

4-1-1991

A Road Map to Achieve Enhanced Cultural Diversity in Legal Education Employment Decisions

Bruce Comly French

Follow this and additional works at: <https://archives.law.nccu.edu/nclcr>

 Part of the [Civil Rights and Discrimination Commons](#), [Law and Gender Commons](#), [Law and Race Commons](#), and the [Legal Education Commons](#)

Recommended Citation

French, Bruce Comly (1991) "A Road Map to Achieve Enhanced Cultural Diversity in Legal Education Employment Decisions," *North Carolina Central Law Review*: Vol. 19 : No. 2 , Article 7.
Available at: <https://archives.law.nccu.edu/nclcr/vol19/iss2/7>

This Note is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact jbeeker@nccu.edu.

A ROAD MAP TO ACHIEVE ENHANCED CULTURAL DIVERSITY IN LEGAL EDUCATION EMPLOYMENT DECISIONS

BY
BRUCE COMLY FRENCH†

INTRODUCTION AND OVERVIEW

The premise of this article is simple: administrators and faculty in law schools should be committed to achieving enhanced cultural diversity on their faculty. This goal is an article of faith within the liberal community of legal education¹ and is even embodied in rules governing the accreditation of law schools by the American Bar Association.² These rules provide, in pertinent part:

The law school shall maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on ground of race, color, religion, national origin, or sex.

- (a) The denial by a law school of admission to a qualified applicant will be treated as made upon the ground of race, color, religion, national origin, or sex if the ground of denial relied upon is:
 - (i) a state constitutional provision or statute that purports to forbid the admission of applicants to a school on the ground of race, color, religion, national origin, or sex; or
 - (ii) an admissions qualification of the school that is intended to prevent the admission of applicants on the ground of race, color, religion, national origin, or sex though not purporting to do so.

† Professor of Law, Claude W. Pettit College of Law, Ohio Northern University, B.A., M.A., The American University, J.D. Antioch School of Law. The research assistance of Mr. William Neville and Milles. Karen Muir, Luci Wellborn, and Ellen Sprobach, students at the Claude W. Pettit College of Law, Ohio Northern University is recognized and appreciated. Special thanks are due for the helpful insights of the participants at the Faculty Development Program, Ohio Northern University College of Law, on April 26, 1990.

1. See *infra* Part E3. “[I]n 1981, 66 of the 94 law schools for which we had information had one or more minority group members on their faculty and 34 had two or more members.” Chambers, *SALT Survey: Minority Group Persons in Law School Teaching*, 20 U.S.F. L. REV. 439, 441 (1986). At the annual meeting of the American Association of Law Schools [AALS] in San Francisco, California, on January 5, 1990, the topic of “[p]romoting and [n]urturing the [a]cademic [v]alues of [f]aculty [d]iversity” was jointly presented by the AALS Executive Committee and the AALS Committee on Recruitment and Retention of Minority Law Teachers. Panelists included Robert Belton (Vanderbilt), Paul A. Brest (Stanford), Robert L. Clayton (Tulane), Carole E. Goldberg-Ambrose (UCLA), Michael A. Olivias (Houston), Donna E. Shalala (Chancellor-Wisconsin at Madison), and Rennard J. Strickland (Wisconsin).

2. Standards for Approval of Law Schools, October, 1984, §§ 211-12.

- (b) The law school shall not use admission policies that preclude a diverse student body in terms of race, color, religion, national origin or sex.
- (c) The denial by a law school of employment to a qualified individual will be treated as made upon the ground of race, color, religion, national origin, or sex if the ground of denial relied upon is an employment policy of the school which is intended to prevent the employment of individuals on the ground of race, color, religion, national origin, or sex though not purporting to do so.

* * * * *

- (e) Equality of opportunity in legal education includes equal opportunity to obtain employment. Each school should communicate to every employer to whom it furnished assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity and will avoid objectionable practices such as
 - (i) refusing to hire or promote members of groups protected by this policy because of the prejudices of clients or of professional or official associates;
 - (ii) applying standards in the hiring and promoting of such individuals that are higher than those applied otherwise;
 - (iii) maintaining a starting or promotional salary scale as to such individuals that is lower than is applied otherwise; and
 - (iv) disregarding personal capabilities by assigning, in a predetermined or mechanical manner, such individuals to certain kinds of work or departments.

Standard 212

Consistent with sound educational policy and the Standards, the law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups (notably racial and ethnic minorities) which have been victims of discrimination in various forms. This commitment would typically include a special concern for determining the potential of such applicants through the admission process, special recruitment efforts, and a program which assists in meeting the unusual financial needs of many such students, provided that no school is obligated to apply standards for the award of financial assistance different from those applied to other students.³

However, recent decisions of the United States Supreme Court⁴ cast doubt upon the constitutional validity of currently employed affirmative action policies.

3. *Id.*

4. *See infra* Part B.

This article will review the legal climate affecting the access of minorities to the legal citadel by first considering the solicitous treatment given by the federal courts to the demands of African American students to be admitted to law and other professional schools.⁵ Building upon this early case law under the Equal Protection Clause of the fourteenth amendment which presaged the coming of *Brown v. Board of Education*,⁶ attention will then be directed to the important cases endorsing affirmative action in higher education admissions schemes,⁷ voluntary affirmative action plans by public⁸ and private employers,⁹ and the Supreme Court's treatment of the societal role model value of preferentially hired minority public school teachers.¹⁰

The analyses which follow will show that these decisions generally established that: access to legal educational opportunities for minorities is of special concern to the federal judiciary; voluntary hiring plans which give preferential treatment to the appointment of African Americans and other minorities to positions in legal education may be protected from attack by members of the cultural majority as reverse discrimination; affirmative action plans which unduly trample upon the rights of specific members of the nondiscriminating majority are likely to be found constitutionally infirm.

Were the conclusions articulated above to represent the end of the Supreme Court's analyses concerning affirmative action hiring, one safely could conclude that most affirmative action hiring proposals would easily pass constitutional muster.

However, recent Supreme Court decisions suggest a new antipathy toward programs which give preference to minorities. This trend is not yet a full-blown retreat from the expansive holdings which sustain voluntary affirmative action plans such as *United Steel Workers of America v. Weber*¹¹ and *Johnson v. Transportation Agency*,¹² because the Court has recently approved race specific remedies in the context of affirmative, in-

5. See *infra* Part A1 and 2. Various definitions of "minority" abound. A relatively sensitive definition can be found in District of Columbia law:

For the purposes of this subchapter:

(1) The term "minority" means Black Americans, Native Americans, Asian Americans, Pacific Islander Americans, and Hispanic Americans, who by virtue of being members of the foregoing groups, are economically and socially disadvantaged because of historical discrimination practiced against these groups by institutions within the United States of America. 1 D.C. CODE ANN. § 1-1142 (1)(1983).

6. 347 U.S. 483 (1954). For an interesting account of the decision, see Kluger, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976).

7. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

8. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

9. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

10. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

11. 443 U.S. 193. See *infra* Part A6.

12. 480 U.S. 616. See *infra* Part A6.

tentional, and continuing employer or local union discrimination only.¹³ Thus, intentional racial discrimination by employers has been found to violate either the Constitution¹⁴ or Title VII of the Civil Rights Act of 1964,¹⁵ or both. These practices will continue to be invalidated by the Court. Additionally, the Supreme Court fashioned a second approach to the finding of liability in employment discrimination cases. This "disparate impact" approach was developed to allow a person alleging discrimination in employment to point to statistical data which suggest a dearth of minorities in the workforce as a starting point for further analysis. Success in establishing a *prima facie* case shifts the intermediate proof burdens to the defendant employer to justify those business practices which have the effect of discriminating against minorities. But the winds of change are sweeping broadly, as disparate impact discrimination models are limited¹⁶ and compensatory and remedial governmental benefit programs are swept aside.¹⁷ Supreme Court Justices have issued shrill dissents to accompany the recent decisions favorable to remedial programs.¹⁸

The American Association of Law Schools (AALS) recommends affirmative action programs which call for either the creation of separate slots for minority candidates or for not filling vacancies occasioned by normal turnover other than with minority candidates. Under the established case law discussed in this article, these programs are doomed.¹⁹ A new approach is needed if cultural diversity is to be enhanced within the law school teaching community.

A new *qualification factors* approach will be presented. This system, modeled upon the concepts of job-related validation studies already known under Title VII case law and federal administrative regulations,²⁰ has an application broader than merely sustaining desirable culturally diverse appointments. Rather, the approach presented will cause a searching inquiry into all faculty appointments decisions. Relegated to a position of historical curiosity is the all-too-often elitist approach which presently calls for careful scrutiny of applicants. Cultural diversity becomes but one, albeit a most important, factor of several designed to

13. See *United States v. Paradise*, 480 U.S. 149 (1987); see also *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986).

14. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

15. See *infra* Part A3-5.

16. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

17. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); but see, *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Metro Broadcasting v. FCC*, 110 S. Ct. 1467 (1990).

18. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. at 657 (Scalia, J., dissenting).

19. See *infra* Part C3.

20. Concerning job-related tests and their validation, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 to 1607.18 (1990); 3 Larson, *EMPLOYMENT DISCRIMINATION* §§ 75.00, 77.00, 78.00.

properly define job needs and to assure the appointment of an appropriate candidate. When faculty appointments committees evaluate cultural diversity in this manner and carefully articulate institutional needs for each specific vacancy, success in sustaining such a system against attack is possible.²¹

This article will conclude with the application of the *qualification factors* approach to the filling of a faculty vacancy at a law school.²²

A. *The Constitutional and Statutory Environment*

1. Equal Protection: Separate is Equal

The Equal Protection Clause of the fourteenth amendment to the United States Constitution provides the basic analytic framework for the protection of different groups of people in our nation. Section 1, in relevant part, provides that “[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”²³

This great constitutional guarantee was part of the revolution in federal - state relations which was reflected in the Reconstruction Amendments to the federal Constitution.²⁴ Ironically in *Plessy v. Ferguson*,²⁵ the equal protection of the laws which the fourteenth amendment was designed to grant was interpreted to allow state-segregated seating on public conveyances. In *Plessy*, the Supreme Court considered a Louisiana statute that required all railway companies to provide “*equal but separate accommodations*” for black and white passengers.²⁶ *Plessy*, who alleged his ancestry was seven-eighths Caucasian and one-eighth African, attempted to use the coach reserved for Whites.²⁷ The Louisiana Supreme Court denied his request for a writ of prohibition against the judge who was to try him for a violation of the statute.²⁸

The Supreme Court affirmed the denial of the writ and held that the statute was not a violation of the fourteenth amendment.²⁹ Further, the Court held that the thirteenth amendment, abolishing slavery and involuntary servitude, was not violated.³⁰ The Court’s majority reasoned that laws such as this one related only to “social” equality, not to political or civil equality. The Court held, social equality was not a goal of the Equal Protection Clause, and could be attained only through voluntary action

21. See *infra* Part C.

22. See *infra* Part E.

23. U.S. CONST. amend. XIV § 1 (emphasis added).

24. U.S. CONST. amends. XIII, XIV, and XV.

25. 163 U.S. 537 (1896).

26. *Id.* at 537-40 (emphasis added).

27. *Id.* at 538.

28. *Id.* at 540.

29. *Id.* at 552.

30. *Id.* at 542.

by individuals, not by statutes.³¹ In dissent, the first Justice John Marshall Harlan offered the hope that equal protection would afford qualitative equal protection at some not too distant point in the future.³²

Plessy placed a judicial imprimatur of legitimacy upon a system of American apartheid. *Plessy* was read broadly to include most realms of public life by subsequent court majorities, rather than being limited to its facts. While the democratic socialization process inherent in public and higher education could easily have justified not extending *Plessy* to education, the judiciary was unwilling to adopt this view. Thus, the narrow reach of federal equal protection neatly dovetailed with restrictive readings of state constitutional provisions during the nineteenth century concerning the rights afforded to African Americans hoping to enter the mainstream of American political, social, and economic life.³³

2. The Fourteenth Amendment and the Coming of Brown: Separate May not be Equal in Legal Education

Schools in many states remained *de jure* segregated through much of the first half of the twentieth century. The Equal Protection Clause gradually became available in legal education when African Americans in southern and border states challenged their exclusion from publicly financed education and from the vastly superior segregated white educational institution. These challenges met with continuing success, although the vindication of rights was a painfully slow process in protecting the individual litigant who was the victim of the discriminatory state law.

In *Missouri ex rel. Gaines v. Canada*,³⁴ decided in 1938, petitioner Gaines, an African American, was refused admission to the School of Law of the University of Missouri.³⁵ Gaines' work and credits at the undergraduate institution he attended qualified him for admission to the School of Law of the University of Missouri.³⁶ However, he was refused admission upon the ground that it was "contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri."³⁷

Gaines brought an action for mandamus to compel the curators of the university to admit him, asserting that the refusal constituted a denial by the state of the equal protection of the laws in violation of the fourteenth

31. *Id.* at 551.

32. *Id.* at 559 (Harlan, J., dissenting).

33. *See, e.g., Roberts v. City of Boston*, 5 Cush. 198 (Mass. 1850).

34. 305 U.S. 337 (1938).

35. *Id.* at 342.

36. *Id.* at 343.

37. *Id.*

amendment.³⁸ Missouri's defense to his suit for admission was that pending the establishment of a Black law school in the state, it would pay Gaines' tuition in an out-of-state school.³⁹

The Court's majority concluded that the state was obligated to furnish "within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity."⁴⁰ Only in the absence of such facilities, was Gaines entitled to be admitted to the existing state law school.⁴¹

In *Sipuel v. Board of Regents*,⁴² decided in 1948, the petitioner, an African American female "concededly qualified to receive the professional legal education offered by the State, applied for admission to the School of Law of the University of Oklahoma."⁴³ That institution was the only school for legal education supported and maintained by the taxpayers of Oklahoma.⁴⁴ After being denied admission, Sipuel applied for a writ of mandamus alleging her application for admission was denied solely because of her color.⁴⁵ The state district court refused to grant the writ; this action was later affirmed by the Supreme Court of Oklahoma.⁴⁶ The United States Supreme Court reversed the state supreme court judgment, citing *Gaines* for the proposition that the state must provide admission of qualified African Americans to the state's only law school when the state has denied admission solely on the basis of race.⁴⁷

In *Sweatt v. Painter*,⁴⁸ decided in 1950, the petitioner, an African American, was refused admission to the University of Texas School of Law on the ground that equivalent facilities were offered by a Texas law school open only to members of his race.⁴⁹ The trial court recognized that this situation was a denial of equal protection, but rather than order the school to admit the petitioner, the trial court continued the case to allow the state to supply substantially equal facilities in the separate law school.⁵⁰ Such a school was established while the appeal was pending and the appellate court remanded the case. The trial court found the new school for Blacks was "substantially equivalent" to the UT School of

38. *Id.* at 342.

39. *Id.* at 342-43.

40. *Id.* at 351.

41. *Id.* at 352.

42. 332 U.S. 631 (1948).

43. *Id.* at 632.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. 339 U.S. 629 (1950).

49. *Id.* at 632.

50. *Id.*

Law.⁵¹ The Supreme Court of the United States reversed this decision. In doing so, the Court expressly reserved the question of the validity of the separate but equal doctrine, holding that the newly established law school was not substantially equal.⁵² The white law school had a better faculty, a better offering of courses, a better library, and a wider range of activities than the law school established for blacks.⁵³

During the same term, in *McLaurin v. Oklahoma State Regents*,⁵⁴ the Supreme Court considered the issue of "whether a state may, after admitting a student to graduate instruction in its state university, afford him different treatment from other students solely because of his race."⁵⁵ McLaurin, an African American male, applied for admission to the University of Oklahoma in order to pursue curriculum leading to a Doctorate in Education.⁵⁶ His application was denied pursuant to a state statute which "made it a misdemeanor to maintain or operate, teach or attend a school in which both white and negroes are enrolled or taught."⁵⁷

Relying upon *Gaines* and *Sipuel*, the district court held that the "State had a constitutional duty to provide [the appellant] with the education he sought as soon as it provided that education for applicants of any other [racial or ethnic] group."⁵⁸ Assuming, however, that the state would follow this mandate, the court refused to grant the mandatory injunction.⁵⁹

The Oklahoma legislature then amended the statutes "to permit the admission of negroes to institutions of higher learning attended by white students, in cases where those institutions offered courses not available in the negro schools."⁶⁰ Yet, the amendments provided "that in such cases the programs of instruction 'shall be given at such colleges or institutions of higher education upon a segregated basis.'"⁶¹

Thereafter, McLaurin was admitted to the graduate school, subject to the rules authorizing segregation mandated by the President of the University. He was required to sit in an assigned seat in the classroom in a row "[r]eserved [f]or [c]olored" students; he was assigned to a table in the library; and he was permitted to eat at the same time in the cafeteria as other students, but was again assigned to a special table.⁶²

The United States Supreme Court stated that although the restrictions

51. *Id.*

52. *Id.* at 633-36.

53. *Id.* at 632-33.

54. 339 U.S. 637 (1950).

55. *Id.* at 638.

56. *Id.*

57. *Id.*

58. *Id.* at 639.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 640.

were imposed in order to comply with the statutory requirements, they signified that the State, in administering the facilities it affords for professional and graduate study, sets colored students apart from the other students.⁶³ This resulted in the student being handicapped in his pursuit of effective graduate instruction. The Court further held, such measures “impair and inhibit the student’s ability to study, engage in discussions and exchange views with other students, and in general, deny him the right to learn his profession.”⁶⁴

The Court relied upon *Sweatt* in concluding that “the conditions under which [McLaurin was] required to receive his education deprive[d] him of his personal and present right to equal protection of the laws.”⁶⁵ “Having been admitted to a state-supported graduate school, McLaurin was entitled to receive the same treatment at the hands of the state as students of other races.”⁶⁶

From 1938 until 1950, with consistent but turtle-like speed, the United States Supreme Court eliminated barriers to access by African Americans to professional education. The Court rendered these decisions within the constraints of the then-existing equivalency doctrine. The role of intangibles, in the thinking of the Court’s majority, can be seen to emerge tentatively in *McLaurin*. This concept would become an important linchpin in the Court’s unanimous *Brown v. Bd. of Education of Topeka*⁶⁷ decision which dismantled segregation in the public school system.⁶⁸

3. *Brown*: The Revolutionary Change in Judicial Perspective and Its Subsequent Retrenchment

In the seminal case of *Brown*, *Brown* and three other cases were each focused on the permissibility of local governments conducting school systems which segregated students by race.⁶⁹ In each case, young African Americans sought admission to public schools on a nonsegregated basis. In three of the cases, the lower federal or state court based its decision upon the separate but equal doctrine as formulated in *Plessy*.⁷⁰ Plaintiffs challenged the validity of the doctrine, arguing that segregated schools

63. *Id.* at 641.

64. *Id.*

65. *Id.* at 642.

66. *Id.*

67. 347 U.S. 483 (1954).

68. *See infra* Part A3.

69. 347 U.S. 483, 486-87 (1954); *Briggs v. Elliott*, 103 F. Supp. 920 (E.D.S.C. 1952); *Davis v. County School Board*, 103 F. Supp. 337 (E.D. Va. 1952); *Gebhart v. Belton*, 1 A.2d 137 (Sup. Ct. Del. 1952).

70. *Id.* at 487-88. In *Gebhart*, the Supreme Court of Delaware followed the “equal but separate” doctrine but ordered the plaintiffs to be sent to the white schools because they were better than the negro schools. *Id.*

were not equal and could never be equal.⁷¹

The Supreme Court did not explicitly overrule *Plessy* or hold the "separate but equal" doctrine unconstitutional, but rather, the Court limited its holding to the conclusion that "in the field of public education the doctrine of 'separate but equal' has no place."⁷² The Court referred to the earlier recognition in *Sweatt* and *McLaurin* that intangibles played a considerable role in the value educational opportunities offered.⁷³

The Court noted that quantifiable tangible equality in matters such as curricula offerings, buildings, books, qualifications and salaries of teachers was occurring in a number of states. However, the Court held that a difference in "intangibles," such as separation, would render a school unequal.⁷⁴ Thus, the Court moved beyond a narrow calculation of raw quantifiable equality: instead, it looked to the effect of segregation on public education. In particular, the Court found that to separate African American children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁷⁵

This revolutionary opinion changed the entire focus of equal protection law: the "separate-but-equal" doctrine was not yet buried, but the end was in sight.⁷⁶ The socializing function of the public schools was recognized, and the American system of apartheid was to lose its legal sanction. *Brown* became the jurisprudential underpinning for the efforts by the federal judiciary to integrate the public educational systems. Subsequent decisions of the Supreme Court continued to reaffirm the commitment of *Brown* to integrated public schools.⁷⁷

While the earlier higher education decisions undergirded *Brown*, so *Brown* became the impetus for federal legislative initiatives which would create the statutory basis for the opening of institutions of higher education to a broader cross-section of the nation's diverse cultures.

71. *Id.*

72. *Id.* at 495.

73. *Brown*, 347 U.S. 483, 495 (1954).

74. *Id.* at 493.

75. *Id.* at 494. *Brown* generated reams of scholarly comment. Several oft-cited articles include: Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For a broader perspective:

Governments and educational institutions should read *Brown* as prescribing a set of affirmative obligations. . . . [T]his process of [affirmative action] should not be limited to the public secondary schools. Indeed, in so far as the idea of progress is concerned, universities are as important if not much more important than the public school[.] . . . [In the area of admissions,] it appears that a lottery would be the best way to achieve the world university that I have been advocating. Parker, *Ideas, Affirmative Action and the Ideal University*, 10 NOVA L.J. 764, 764-66 (1986).

76. *Brown*, 347 U.S. at 495.

77. *Id.* at 483. See also *Green v. County School Bd.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

4. The Civil Rights Act of 1964

The emphasis in this article has been thus far upon student access to public educational opportunities. The Civil Rights Act of 1964⁷⁸ serves the dual purposes of nondiscrimination in university admission policies⁷⁹ and in related faculty employment decisions.⁸⁰ Congress, in enacting this monumental statute, built upon the legacy of *Brown* to ensure a national community where opportunities would not be limited on account of one's race, national origin, color, religion, or sex.⁸¹ Early litigation under the Civil Rights Act of 1964, affecting higher education, attempted to dismantle continuing dual-segregated systems.⁸² While some cases continue to be filed,⁸³ a shift in litigation emphasis has been occasioned by the second generation issue under the Act: that of the proper implementation of race-and gender-conscious affirmative action programs.⁸⁴

Different definitions of affirmative action abound,⁸⁵ but the concept most likely to be perceived by Americans is a system which places the question of one's race, religion, color, national origin, sex, age,⁸⁶ or possible handicap⁸⁷ into the decision making process. Remedial models range from specific hiring quotas or goals⁸⁸ to remedy specific cases of intentional discrimination, to numerical goals of population parity,⁸⁹ to the inclusion of the factors listed above in a laundry list of criteria to be considered.⁹⁰

In *DeFunis v. Odegaard*,⁹¹ the first case to reach the Supreme Court

78. 42 U.S.C. §§ 1981 to 2000h-6 (1988).

79. 42 U.S.C. § 2000d (1988).

80. 42 U.S.C. § 2000e-2(e) (1988).

81. 42 U.S.C. § 2000e-2(a) (1988).

82. *Wright v. City of Emporia*, 407 U.S. 451 (1972); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, cert. denied, 444 U.S. 887 (1979); *Keys v. School Dist. No. 1*, 413 U.S. 189 (1972).

83. See, e.g., *United States v. Louisiana*, 692 F. Supp. 642. (E.D. La. 1988) (suit by the United States to end state dual and segregated system in higher education.); *Ayers v. Allain*, 674 F. Supp 1523 (N.D. Miss. 1987), rev'd, 893 F.2d 732 (1990), reh'g granted, 898 F.2d 1014 (1990).

84. See *supra* Part B5, 6, and 7 and *infra* Part C.

85. Affirmative action may be viewed in several ways: quotas favoring minorities or women; preference systems in which women and minorities are given some preference over white men; self examination plans in which failure to reach goals triggers self study to determine whether discrimination is interfering with decision making; attempts to include more women and minorities in applicant pools; and commitments not to discriminate. D. Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 BERKELEY WOMEN'S L.J. 42 (1988).

86. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988).

87. Rehabilitation Act of 1973, 29 U.S.C. § 701 (1988).

88. See *Washington v. Davis*, 426 U.S. 229 (1976).

89. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

90. See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

91. 416 U.S. 312 (1974). For conflicting analyses of *De Funis*, see Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference In Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Griswold, *Some Observations on the DeFunis Case*, 75 COLUM. L. REV. 512 (1975); Henkin, *De Funis: An Introduction*, 75 COLUM. L. REV. 483 (1975); Larinsky, *DeFunis v. Odegaard: The "Non-Decision" With a Message*, 75 COLUM. L. REV. 520 (1975); Nickel, *Preferential Policies in Hiring and*

230 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 19:219

which squarely pitted preferential race-conscious affirmative action against an excluded white male, the Justices effectively evaded the issue presented, finding that DeFunis' imminent graduation rendered the case moot. While the court was able to duck the thorny issue in *DeFunis v. Odergaard*, the constitutional or statutory justification of a preferential program having the effect of retarding the educational opportunities of white males was ultimately faced.⁹²

5. The Reverse Discrimination Test Case: Bakke

Whatever might be said about other aspects of American social and political life, the role of higher education in a democracy is fundamental. Leaders trained in the great thoughts of antiquity and those trained in the concepts now in vogue, meet one another in the university and create network groups for the future governance of public and private institutions. Denial of access to that entire educational experience to a class of persons cannot be justified in a properly functioning American political democracy.

The case of *Regents of University of California v. Bakke*⁹³ presented the issue of whether an admissions program's utilization of race as a substantial factor in the consideration of an applicant's acceptance, to the point of reserving spaces for minorities, violated the Equal Protection Clause of the fourteenth amendment and section 601 of Title VI of the Civil Rights Act of 1964.⁹⁴ The Supreme Court, in a 5-4 decision, held that such plans did violate the Constitution and Title VI.⁹⁵

The facts creating the controversy were as follows. The admissions program at the University of California at Davis medical school consisted of two procedures - regular and special - with a separate admissions screening committee for each.⁹⁶ Under the regular procedure, candidates with an undergraduate grade point average below 2.5 were automatically rejected.⁹⁷ From those not rejected on this criterion, about one out of six were interviewed and rated.⁹⁸ The full admissions committee then reviewed the applicant's file and made offers accordingly.⁹⁹ The special procedure applied to candidates who "wished to be considered as 'economically and/or educationally disadvantaged' or as members of a

Admissions: A Jurisprudential Approach, 75 COLUM. L. REV. 534 (1975); Pollak, *Defunis Non est Disputandum*, 75 COLUM. L. REV. 495 (1975).

92. See, *Bakke*, 438 U.S. 265 (1978).

93. *Id.*

94. *Id.* at 269-70.

95. *Id.* at 271-72.

96. *Id.* at 272-73.

97. *Id.* at 273.

98. *Id.* at 274.

99. *Id.*

'minority group.'"¹⁰⁰ If selected for the special admissions procedure they were not ranked with those in the regular procedure.¹⁰¹ No White person was ever admitted under the special procedure.¹⁰² The special admissions committee interviewed one-fifth of the applicants and then recommended the top candidates until sixteen special selections had been made.¹⁰³

In 1973, Allan Bakke, a white male, applied for admission to the University.¹⁰⁴ The 1973 application form asked if the applicant wished to be considered under the special program for those from economically and educationally disadvantaged backgrounds.¹⁰⁵ Mr. Bakke was not so considered.¹⁰⁶ Although he scored 468 on a scale of 500 in his interview, he was rejected because he had applied late and only scores of 470 or better were being accepted at that time.¹⁰⁷ In 1974, he reapplied and again was not considered under the regular procedure.¹⁰⁸ He applied early, and although he scored 549 out of 600, he was again rejected.¹⁰⁹ In both 1973 and 1974, special applicants were admitted with lower MCAT scores, grade point averages, and interview scores than Bakke's.¹¹⁰

Bakke filed suit in state court for mandatory, injunctive, and declaratory relief.¹¹¹ He alleged that the special admissions program violated the fourteenth amendment of the Constitution, similar provisions of the California Constitution, and section 601 of Title VI of the Civil Rights Act of 1964. The University cross-claimed for a declaration that its special admission program was lawful.¹¹²

A California superior court found that the program operated as a racial quota and therefore violated the fourteenth amendment, the California Constitution, and Title VI.¹¹³ But the court did not order Bakke's admission.¹¹⁴ Both Bakke and the University appealed.¹¹⁵ The California Supreme Court, without considering the state constitution or Title VI, held that the Equal Protection Clause required that, "no applicant may be rejected because of his race, in favor of another who is less quali-

100. *Id.*

101. *Id.* at 275.

102. *Id.* at 276.

103. *Id.* at 275.

104. *Id.* at 276.

105. *Id.*

106. *Id.*

107. *Id.* at 276.

108. *Id.* at 277.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 278.

113. *Id.* at 279.

114. *Id.* at 279. The court held that Bakke "had failed to carry his burden of proving that he would have been admitted but for the existence of the special program." *Id.*

115. *Id.*

fied, as measured by standards applied without regard to race.”¹¹⁶ The state court held that since Bakke had established that racial discrimination played a significant role in the rejection by the university of his application, the burden shifted to the University to prove that Bakke would not have been admitted even without the special procedure.¹¹⁷ The University conceded its inability to carry its burden of proof and the state supreme court ordered that Bakke be admitted to the University.¹¹⁸ Further review was then sought in the United States Supreme Court.¹¹⁹

Justice Powell announced the judgment of the Supreme Court. He examined the legislative history behind Title VI which revealed “a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution.”¹²⁰ After extensive examination, Justice Powell found that Title VI prohibits racial classifications that violate either the fifth amendment or the Equal Protection Clause of the fourteenth amendment.¹²¹

Justice Powell rejected the University’s argument that the lower courts should not have applied strict scrutiny. He stated that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”¹²² He found that the use of race denied some persons the state-provided benefit of higher education; therefore, the classification was suspect.¹²³ He further stated that to justify the use of such classifications, the state had to show, under the Equal Protection Clause, “that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is ‘necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest.”¹²⁴ Justice Powell found that the classification was impermissible “in the absence of judicial, legislative or administrative findings of constitutional or statutory violations;”¹²⁵ that the University had not carried its burden of proving that “it must prefer members of a particular ethnic group” to improve medical services in deprived areas;¹²⁶ and that the *sole* criterion of ethnic diversity “would hinder rather than further attainment of genuine diversity.”¹²⁷ Therefore, the University failed to carry its burden of “demonstrat[ing] that the challenged classification is

116. *Id.* at 280.

117. *Id.*

118. *Id.*

119. *Id.* at 281.

120. *Id.* at 284.

121. *Id.* at 287.

122. *Id.* at 291.

123. *Id.* at 305.

124. *Id.*

125. *Id.* at 307.

126. *Id.* at 311.

127. *Id.* at 315.

necessary to promote a substantial state interest."¹²⁸

Justice Powell did find, however, that race can be used as a qualification but not *the* qualification.¹²⁹ Justice Powell concluded by (1) affirming that the special admissions program was invalid under the fourteenth amendment, (2) reversing the lower court's judgment enjoining the University from ever using race in the consideration of applicants, and (3) affirming the injunction ordering respondent Bakke's admission.¹³⁰ While a five member majority did vote to invalidate the specific program that was before the Court in *Bakke*,¹³¹ there was no majority opinion regarding the basis for that invalidation. One or more Justices voted for one of three different bases for this ruling.¹³²

Justices Brennan, White, Marshall, and Blackmun, concurred in part and dissented in part. Justice Brennan wrote that the admissions program was constitutional and therefore all aspects of the California court's decision should be reversed.¹³³ He opined that "Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a state or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination. . . ." ¹³⁴ Further, Justice Brennan stated that racial classifications are not per se invalid under the Equal Protection Clause.¹³⁵ Nevertheless, those classifications designed to further remedial purposes "must serve important governmental objectives and must be substantially related to the achievement of those objectives."¹³⁶

He pointed out that race has "too often been inexcusably utilized to stereotype and stigmatize politically powerless segments of society."¹³⁷ "Race, like illegitimacy and gender, is an immutable characteristic."¹³⁸ He found that discrimination based on these characteristics was inconsistent with the concept that "legal burdens should bear some relationship to individual responsibility or wrongdoing."¹³⁹

Brennan summarized his views and pointed out that because the risk exists that racial classifications can be misused, it is "inappropriate to inquire only whether there is any conceivable basis that might sustain

128. *Id.* at 320.

129. *Id.*

130. *Id.*

131. See *infra* text and accompanying notes.

132. *Bakke*, 438 U.S. at 324 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

133. *Id.* at 379.

134. *Id.* at 328.

135. *Id.* at 360.

136. *Id.* at 359 (quoting *Califano v. Webster*, 430 U.S. 313 (1977) and *Craig v. Boren*, 429 U.S. 190 (1976)).

137. *Id.* at 360.

138. *Id.*

139. *Id.* at 360-61.

234 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 19:219]

such a classification."¹⁴⁰ Instead, to justify such a classification, an important and articulated purpose for its use must be shown."¹⁴¹

Justice Brennan found that the University's goal of remedying the effects of past societal discrimination was important to justify the use of sufficiently race-conscious admissions programs."¹⁴² This classification was acceptable where the school could show a sound basis for its conclusion that minority underrepresentation was substantial and chronic, and that the existence of past discrimination was an impediment to minorities seeking access to the professional schools.¹⁴³ Brennan continued by stating that the school did not stigmatize any discrete group or individual by setting aside a reasonable percentage of class positions for only qualified minority applicants.¹⁴⁴ The University program was valid and did not violate the Constitution. Brennan noted that there was no distinction between setting a fixed number of places for disadvantaged minority applicants, which the University did, and adding a set number of points to their admissions rating with the expectation that it would result in the admission of an approximated number of qualified applicants.¹⁴⁵ Thus, Justices Brennan, White, Marshall, and Blackmun would allow race-conscious classifications for the purpose of remedying past societal discrimination.¹⁴⁶

Justice White wrote to consider the question of whether Title VI provided for a private cause of action since "[f]our Justices are apparently of the view that . . . [it] exists, and four Justices assume it for purposes of this case."¹⁴⁷ However, he concluded that a technically private cause of action did not exist,¹⁴⁸ and he voted to sustain the University program.

Justice Marshall, while joining Justice Brennan's opinion, wrote separately to opine that the Court's decision stopped affirmative action programs.¹⁴⁹ Justice Blackmun made some general observations on affirmative action¹⁵⁰ and the Equal Protection Clause.¹⁵¹

Chief Justice Burger and Justices Stewart and Rehnquist joined an opinion by Justice Stevens which asserted that the question of whether race could ever be used as a factor in an admissions decision was not an

140. *Id.* at 361.

141. *Id.* at 361.

142. *Id.* at 362.

143. *Id.*

144. *Id.* at 375-76.

145. *Id.* at 378.

146. *Id.* at 369.

147. *Id.* at 379-80 (White, J., concurring).

148. *Id.* at 386.

149. *Id.* at 387, 402 (Marshall, J., concurring).

150. *Id.* at 402 (Blackmun, J., concurring).

151. *Id.*

issue to be resolved in the case before the Court.¹⁵² Thus, any discussion of that issue was inappropriate.¹⁵³ These four Justices believed that if the state court correctly decided that the University's special admissions program was illegal, the Supreme Court, regardless of its views about the legality of admissions programs, should affirm the California Supreme Court judgment.¹⁵⁴

To further demonstrate that plenary consideration of affirmative action plans was improper, Justice Stevens noted that the judgment as originally entered by the trial court contained four separate paragraphs, two of which he viewed as critical.¹⁵⁵ "Paragraph 3 declared that the University's special admissions program violated the fourteenth amendment, the state constitution, and Title VI."¹⁵⁶ "The trial court did not order the University to admit Bakke because it concluded that Bakke had not shown that he would have been admitted if there had been no special program."¹⁵⁷ Then, Justice Stevens noted that, in paragraph two of its judgment, "[the California Superior Court] ordered the University to consider Bakke's application for admission without regard to his race or the race of any other applicant."¹⁵⁸ The order did not include any broad prohibition against any use of race in the admissions process; its terms were clearly limited to the University's consideration of Bakke's application.¹⁵⁹ Justice Stevens wrote that there was no need to consider constitutional questions either, because the program was invalid when read against section 601 of the Title VI.¹⁶⁰

While the Court's analyses in *Bakke* resolved the dilemma underlying Allen Bakke's admission to the medical school, the plethora of opinions generated left for another day the development of a coherent set of principles concerning this controversial issue.¹⁶¹ The use of race as one of

152. *Id.* at 441 (Stewart, C.J., Stevens, and Rehnquist, J.J., concurring in part and dissenting in part).

153. *Id.*

154. *Id.* at 408-09.

155. *Id.*

156. *Id.* at 409.

157. *Id.*

158. *Id.*

159. *Id.* at 409-10.

160. *Id.* at 412-13.

161. The following are illustrative articles: Smith, *Reflection on a Landmark: Some Preliminary Observations on the Development and Significance of Regents of the University of California v. Allan Bakke*, 21 How. L.J. 72 (1978) ("the Court could find that the use of race is proscribed by [Title VII]"); Days, *Minority Access to Higher Education in the Post-Bakke Era*, 55 U. COLO. L. REV. 491 (1984) ("Yet one is hard-pressed to arrive at any confident conclusions about the impact of that ruling upon minority admission to higher education."); DeRonde and DeRonde, *The Post-Bakke Decisions - Walking the Equal Protection Gangplank*, 10 W. ST. U. L. REV. 143 (1983) ("[T]he simple statement by Justice Powell sanctioning the use of ethnicity as a factor but not the factor in admissions criteria will prove historically to be more than a mere crack in the cornerstone of equal protection."); Williams, *A Critical Analyses of the Bakke case*, 16 S.U.L. REV. 129 (1989).

several factors, rather than as a sole factor, in race or gender conscious decisionmaking as described in Justice Powell's opinion, is the continuing legacy of the Court's opinions.¹⁶²

6. The Voluntary Affirmative Action Cases

United Steelworkers of America v. Weber,¹⁶³ presented the issue of whether Title VII¹⁶⁴ prohibits race-conscious affirmative action plans by employers in the private sector. The Supreme Court, by a 5-2 decision, held that such plans were not in violation of the relevant provisions of the Civil Rights Act of 1964.¹⁶⁵

In 1974, an affirmative action plan was entered into as part of a collective-bargaining agreement between the United Steelworkers of America and Kaiser Aluminum and Chemical Corporation. The plan was designed to eliminate obvious racial imbalances in Kaiser's craft-work forces by implementing on-the-job training. The plan reserved for Black employees fifty percent of the openings in the training programs.¹⁶⁶

In accordance with the plan, Kaiser's Gramery, Louisiana, plant selected thirteen craft trainees on the basis of seniority to fill craft openings. Seven of the trainees were black and six were white with the most senior black having less seniority than several white workers who were rejected.¹⁶⁷ Brian Weber, a worker who fell into the category of rejected white workers, instituted a class action in the district court, alleging that the plan violated sections 703(a) and (d) of Title VII. The district court granted a permanent injunction prohibiting the union and Kaiser from denying access to training programs on the basis of race.¹⁶⁸ The court of appeals affirmed, holding that although the plan was a bona fide affirmative action plan, it still was based on race in violation of Title VII.¹⁶⁹ The Supreme Court granted certiorari.

Justice Brennan wrote the Court's opinion. He emphasized that the court's inquiry was very narrow in that the fourteenth amendment did not apply to the private employer. Further, Title VII requirements were given limited consideration as the Court rejected a literal interpretation of Title VII, choosing to place greater emphasis on the legislative history of Title VII and the historical context from which it arose.¹⁷⁰ Finally, the Court evaluated the plan itself. The Court found "the plan does not

162. See DeRonde and DeRonde, *The Post-Bakke Decisions - Walking the Equal Protection Gangplank*, 10 W. ST. U. L. REV. 143 (1983).

163. 443 U.S. 193 (1979).

164. 42 U.S.C. § 2000(e) (1988).

165. *Weber*, 443 U.S. at 208.

166. *Id.* at 199.

167. *Id.*

168. *Id.* at 200.

169. *Id.*

170. *Id.* at 195.

unnecessarily trammel the interests of the White employees. The plan does not require the discharge of white workers and their replacement with new black hirees."¹⁷¹ "Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."¹⁷² Justice Powell and Justice Stevens took no part in the consideration or decision of the case.

Justice Blackmun concurred with the majority opinion and in the judgment of the Court; however, he wrote a separate opinion to discuss the narrow "arguable violation"¹⁷³ theory. He observed that the Kaiser preferential hiring scheme was a reasonable response for an employer to take regardless of whether a court could order the same step as a remedy.¹⁷⁴ By using such a program, a company is capable of avoiding the task of identifying victims of past discrimination and thus, avoiding claims for backpay. If victims of prior discriminatory practices should be benefited by the scheme, the company can mitigate its liability to those individuals. Further, Justice Blackmun noted, to the extent that Title VII liability is predicated on the "disparate effect" of past hiring practices, the scheme makes it less likely that such an effect could be shown.¹⁷⁵

Justice Blackmun pointed out that the Court declined to consider the narrow "arguable violation" approach and chose instead to use an interpretation of Title VII which permits affirmative action by the employer whenever the job category in question is "traditionally segregated."¹⁷⁶

He suggested the first departure from the "arguable violations" approach to be when the Court measured an individual employer's capacity for affirmative action solely in terms of a statistical disparity.¹⁷⁷ The second departure from that approach was allowing an employer to redress discrimination that "lies wholly outside the bounds of Title VII."¹⁷⁸ To illustrate this second departure, Justice Blackmun referred to the earlier case, *Hazelwood School District v. United States*,¹⁷⁹ where the Court determined that Title VII provided no remedy for pre-Act discrimination, although the purposeful discrimination that creates a "traditionally segregated job category" may have entirely predated the Act.¹⁸⁰ He con-

171. *Id.* at 208.

172. *Id.*

173. *Id.* at 211-14 (Blackmun, J., concurring and concurring in the judgment). The "arguable violation" theory is discussed in Judge Wisdom's dissent from the court of appeals decision. See *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 230 (5th Cir. 1976).

174. *United Steelworkers of America v. Weber*, 443 U.S. 193, 211 (1979).

175. *Id.*

176. *Id.* at 212.

177. *Id.* at 213.

178. *Id.* at 214.

179. 433 U.S. 299 (1977).

180. *Weber*, 443 U.S. at 196.

cluded that although the narrow theory would apply in this case, the Court's broader theory of "traditionally segregated job categories" was the better theory because "[t]o make the arguable violation standard work, it would have to be set low enough to permit the employer to prove it without obligating himself to pay a damage award."¹⁸¹

Justice Rehnquist and Chief Justice Burger dissented.¹⁸² Chief Justice Burger wrote a separate dissent in which he chastised the Court for taking the role of the legislature. "If 'affirmative action' programs such as the one presented in this case are to be permitted, it is for Congress, not this Court, to so direct."¹⁸³ The Chief Justice pointed out that Congress had only enacted a statute of such "extraordinary clarity" after conducting "long study and searching debate."¹⁸⁴ Yet, the Court operated under the guise of "statutory construction" to rewrite Title VII to achieve what the Court considers a desirable result. "[The Court] 'amends' the statute to do precisely what both its sponsors and its opponents agreed the statute was *not* intended to do."¹⁸⁵ Justice Rehnquist argued that the Court's opinion was ahead of its time. To emphasize how the decision dramatically and unremarkably illustrated a switch in the Court's interpretation of Title VII, he quoted an excerpt from George Orwell's 1984.¹⁸⁶ The passage spoke of how an official delivering a speech had

unrolled and read it without pausing in his speech. Nothing altered in his voice or manner, or in the content of what he was saying, but suddenly the names were different . . . The speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax.¹⁸⁷

Justice Rehnquist found the Court's behavior as being much like the Orwellian speaker, as if the Court had been handed a note that indicated Title VII would lead to an unacceptable result if interpreted as it had been in prior decisions. Thus, he argued without even a break in syntax, the Court rejected "a literal construction of section 703(a) in favor of newly discovered 'legislative history,' which leads to a conclusion directly contrary to that compelled by the 'uncontradicted legislative history' unearthed in *McDonald* and our other prior decisions."¹⁸⁸

Justice Rehnquist strongly argued that the statute should be literally construed; and *then* if the statute is unclear, the legislative history should be considered. He argued that Title VII prohibits race considerations in

181. *Id.* at 213.

182. *Id.* at 216 (Rehnquist, J., and Burger, C.J., dissenting).

183. *Id.* at 218.

184. *Id.* at 216.

185. *Id.*

186. *Id.* at 219-20.

187. *Id.* at 219 (citing G. Orwell, *Nineteen Eighty-Four*, 181-82 (1949)).

188. *Id.* at 221.

employment decisions "whether the race be black or white."¹⁸⁹ He concluded by pointing out that the majority, "[b]y going not merely beyond, but directly against Title VII's language and legislative history . . . has sown the wind. Later courts will face the impossible task of reaping the whirlwind."¹⁹⁰

The outcome in *Weber* was surprising. Time honored rules of statutory construction were ignored as the Court adopted a congressional purpose at significant variance with the historical record. A far preferable underpinning would have been a statute authorizing such remedial provisions. While private voluntary solutions to questions of workplace discrimination are desirable, here the color-blind principles of Title VII are specifically repudiated.

The *Weber* fact pattern soon was replicated in the workplace of a public employer. *Johnson v. Transportation Agency*,¹⁹¹ presented the issue of whether a voluntary affirmative action plan by a public employer which took into account the applicant's sex as a factor in promotions violated Title VII. The Supreme Court, this time with a decisive 6-3 decision, held that such a plan did not violate Title VII.

The confrontation stemmed from a county affirmative action plan adopted in 1978 for the county transportation agency. The plan provided "that, in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant."¹⁹² Supervisors implemented the plan to address the problem of underrepresentation of women in five job categories based on a comparison to the county labor force. The plan's short-term goal was to achieve "a statistically measurable yearly improvement in hiring, training, and promotion"¹⁹³ of women in the five categories; the long-term goal being to match the work force in the Agency with the area labor force.

In 1979, a promotional position opened for a road dispatcher. The Agency classified this position as a Skilled Craft Worker; the Agency at that time did not have any women in the designated classification. Diane Joyce and Paul Johnson applied for the position along with ten other county employees. Joyce had worked for the County since 1970; Johnson, since 1967. After the first interview, Johnson had tied for second and Joyce was ranked third. Prior to the second interview, the Affirmative Action Coordinator recommended to the Agency Director that

189. *Id.* at 220.

190. *Id.* at 255.

191. 480 U. S. 616 (1987).

192. *Id.* at 620-21.

193. *Id.* at 621.

Joyce be promoted in accordance with the plan. The panel conducting the second interview recommended Johnson. The Agency Director, considering a combination of factors including the affirmative action plan, promoted Joyce to the position.¹⁹⁴

Johnson filed a complaint with the E.E.O.C. alleging denial of promotion on the basis of sex. After receiving his right-to-sue letter, he filed suit in the district court. The district court found that Joyce's sex was a determining factor in promotion; and that since the plan was permanent, the court held the plan invalid under *Weber*.¹⁹⁵ The court of appeals reversed, finding the consideration of sex lawful by the Agency.¹⁹⁶

Upon plenary consideration, Justice Brennan wrote for the Supreme Court. He evaluated two issues: (1) whether consideration of sex was justified in light of the under-representation of women in "traditionally segregated jobs"; and (2) whether the rights of male employees were unnecessarily trammled.

The Court found that the plan was designed to eliminate work force imbalances within the Agency in traditionally segregated job categories; and that the plan did not require the hiring of a woman over a man, but rather, permitted sex as a factor to be considered in the selection process. The Court also found that since no quotas had to be met, women still had to compete with men for a job and therefore the plan did not "unnecessarily tramm[e] the rights of other employees, [nor] creat[e] an absolute bar to their advancement."¹⁹⁷ Finally, the Court noted the importance of the plan being a voluntary effort to eliminate discrimination in the workplace.

Justice Stevens wrote a concurring opinion to emphasize that the majority opinion in no way established "the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups."¹⁹⁸ He began his opinion by noting that protected groups may be benefitted by antidiscrimination measures in two distinct ways. First, as a sword, antidiscrimination measures "may confer benefits by specifying that a person's membership in a disadvantaged group must be a neutral, irrelevant factor in governmental or private decisionmaking or, alternatively, by compelling decisionmakers to give favorable consideration to disadvantaged group status."¹⁹⁹

Second, as a shield, such a statute could also shield a member of a protected class by assuring decisionmakers that, in some instances, "when they elect for good reasons of their own to grant a preference of

194. *Id.*

195. *Id.* at 625.

196. 770 F.2d 752 (9th Cir. 1985).

197. *Johnson*, 480 U.S. at 626.

198. *Id.* at 642 (Stevens, J., concurring).

199. *Id.*

some sort to a minority citizen, they will not violate the law.”²⁰⁰ Justice Stevens further emphasized his conviction that employers should not be forced to have had past discrimination in the workplace to ensure that group preferences would not violate Title VII.

Justice O'Connor concurred in judgment, but disagreed with the “expansive and ill-defined approach to voluntary affirmative action”²⁰¹ taken by the majority. In her view, the proper initial inquiry to make in evaluating the legality of a public employer's affirmative action plan under Title VII was no different from the inquiry required by the Equal Protection Clause. In either scenario, the employer must have possessed “a firm basis for believing that remedial action was required.”²⁰² She continued by arguing that an employer would possess such a firm basis if it could point “to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination.”²⁰³ However, she disagreed with the dissenters that *Weber* should be overruled. She noted that in *Weber*, the Court balanced the two conflicting concerns that arise in construing section 703(d): “Congress' intent to route out invidious discrimination against any person on the basis of race or gender, (citation omitted) and its goal of eliminating the lasting effects of discrimination against minorities.”²⁰⁴ As she read *Weber*, the Court also determined that Congress had balanced the competing concerns by allowing affirmative action only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination. It would be inconsistent with the background and purpose of Title VII to prohibit affirmative action in every case.²⁰⁵

Justice White, dissenting, agreed with Justices Scalia and Chief Justice Rehnquist that *Weber* should be overruled. However, Justice White understood “traditionally segregated jobs” to be those dealing with blacks and not the expansive view of any societal imbalance as used by the majority. He asserted that the Court interpreted Title VII to mean “nothing more than a manifest imbalance between one identifiable group and another in an employer's labor force.”²⁰⁶ This he argued was, as Justice Scalia put it, a perversion of Title VII.

Justice Scalia, joined by Chief Justice Rehnquist, dissented. “The Court today completes the process of converting [Title VII] from a guarantee that race or sex will *not* be the basis for employment determina-

200. *Id.*

201. *Id.* at 648 (O'Connor, J., concurring in the judgment).

202. *Id.* at 649.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 657 (White, J., dissenting).

tions, to a guarantee that it often *will*.” Justice Scalia added that “the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted.”²⁰⁷ Scalia concluded that because of this holding, personnel decisions will be made on sex and not personal merit. Finally, Justice Scalia argued that the decision did more than just reaffirm *Weber*, and extend it to public actors. The decision provided a threshold defense against Title VII liability based on numerical disparities; in his opinion, this approach endorses an illegal quota system.

Johnson strengthened the voluntary affirmative action model. In that it affects public employers, the statutory analyses confirm that such a plan is not sufficiently adverse to the male employee so as to offend the outer constraints of the fourteenth amendment. Notwithstanding the strident dissents, the workforce statistical imbalance aspect of the prevailing opinions in the case provides the strongest justification to sustain preferential hiring programs in law schools and other institutions of higher education.²⁰⁸ Demographics of the workplace, showing fewer women or African Americans than in the available work force, allows an employer to voluntarily engage in affirmative action to the detriment of members of the majority. Thus, with no showing of particularized discrimination, an employer may favor underrepresented classes of persons in the selection process.

7. Principles Affecting Layoffs are Different: Individual Whites are Identified

*Wygant v. Jackson Board of Education*²⁰⁹ presented the issue of whether “a school board, consistent with the Equal Protection Clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin.”²¹⁰ The Supreme Court, by a 5-4 vote, held that the policy violated the Equal Protection Clause.²¹¹

In 1972, a collective bargaining agreement (CBA) was entered into between the Jackson, Michigan, Board of Education (Board) and the Jack-

207. *Id.* at 677 (Scalia, J., dissenting).

208. Buchanan, *Johnson v. Transportation Agency, Santa Clara County: A Paradigm of Affirmative Action*, 26 HOUS. L. REV. 229 (1989) (strongly defending the constitutional and policy wisdom of the *Johnson* holding); Kandel, *Johnson v. Transportation Agency: A Revival for Affirmative Action*, 13 EMP. REL. L.J. 122 (1987) (*Johnson* protects women and minorities in competition for jobs in employment systems which hire on individual merit); Note, *Johnson v. Transportation Agency*, 65 U. DET. L. REV. 861 (1988) (authored by Sherrill D. Wolford) (affirms approval of the principle of affirmative action).

209. 476 U.S. 267 (1986). See also *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984) (race conscious layoffs are not appropriate).

210. 476 U.S. at 269-70.

211. *Id.* at 269.

son Education Association (union).²¹² The agreement contained a layoff provision which stated "teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."²¹³

During the 1976-77 and 1981-82 academic years, the Board, adhering strictly to the CBA, laid off non-minority teachers while retaining minority teachers with less seniority.²¹⁴ Wendy Wygant, a non-minority teacher who was laid off, instituted an action alleging that the layoffs were in violation of the Equal Protection Clause and Title VII. The district court dismissed all claims, holding that prior discrimination need not be found to grant racial preferences. The district court held that such preferences were permissible "as an attempt to remedy societal discrimination by providing 'role models' for minority school children."²¹⁵ The court of appeals affirmed.²¹⁶ In the Supreme Court, petitioner Wygant only sought review of the Equal Protection Clause claim.²¹⁷

Justice Powell announced the judgment for the Court and opined that an examination of classifications based on race consisted of two prongs: (1) whether a compelling state interest existed, and (2) whether the means of achieving the goal were narrowly tailored.²¹⁸ The district court had held that the role model theory, based on societal discrimination, was a compelling state interest to justify the racial preferences.²¹⁹ Justice Powell stated that in addition to societal discrimination, some prior actual discrimination must be shown before the state may use racial classifications to remedy the broader, more amorphous societal discrimination.²²⁰ Justice Powell denounced the role model theory mainly because it had no logical stopping point: "[t]he role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose."²²¹ He further stated that such a plan would require year-to-year calibrations which the Court earlier announced were unnecessary.²²²

Justice Powell maintained that the correct analysis was not a student to teacher ratio, but rather a comparison of the "'racial composition of [the school's] teaching staff and the racial composition of the qualified

212. *Id.* at 270.

213. *Id.* at 270.

214. *Id.* at 272.

215. *Id.* at 272.

216. 746 F.2d 1152 (6th Cir. 1984).

217. *Wygant v. Jackson v. Board of Educ.*, 476 U.S. 267, 273 (1986).

218. *Id.* at 273.

219. *See, Wygant*, 746 F.2d 1152 (6th Cir. 1984).

220. 476 U.S. at 275.

221. *Id.*

222. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 32 (1971).

244 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 19:219

public school teacher population in the relevant labor market.’²²³ He stated that using a student-teacher ratio would be a step in the wrong direction because a school system could justify a small number of African American teachers by comparing the percentage to a small population of African American students.²²⁴

Justice Powell announced that the reasonableness standard used by the court of appeals was incorrect and that the Supreme Court had always used more stringent standards. “[T]he means chosen to accomplish the State’s asserted purpose must be specifically and narrowly framed to accomplish that purpose.”²²⁵ He found that the layoffs were more disruptive than hiring goals; and that since a less intrusive means of achieving the same goal existed, the Board’s layoff plan was not narrowly tailored.²²⁶ Therefore, the layoff plan was violative of the Equal Protection Clause.

Justice O’Connor, concurring in part and concurring in the judgment, agreed with the strict standard announced by Justice Powell, but disagreed with the need to have proven past discrimination: “The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers’ incentive to meet voluntarily their civil rights obligations.”²²⁷ She argued that the Court’s result would be clearly at odds with the Court’s and Congress’s emphasis on “the value of voluntary efforts to further the objectives of the law.”²²⁸ She contended that remedying past or present racial discrimination is a sufficiently strong state interest to justify a carefully crafted affirmative action plan. Additionally, Justice O’Connor maintained that such results cannot be justified by a mere reference to the incremental value a contemporaneous findings requirement would have as an evidentiary safeguard. As depicted by the instant case, “public employers are trapped between the competing hazards [of being liable] to minorities if affirmative action *is not* taken to cure apparent employment discrimination and [being liable] to nonminorities if affirmative action *is* taken.”²²⁹

Justice White concurred in the judgment.²³⁰ He argued that the Board did not assert any interests, either singly or together, that justified the racially discriminatory layoff policy and that would save it from the stric-

223. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977)).

224. *Id.* at 276.

225. *Id.* at 280.

226. *Id.*

227. *Id.* at 290 (O’Connor, J., concurring in part and concurring in the judgment).

228. *Id.* (citing *University of Calif. Regents v. Bakke*, 438 U.S. 265, 364 (1978)).

229. *Id.* at 291 (emphasis in original).

230. *Id.*

tures of the Equal Protection Clause.²³¹ He could not believe that “in order to integrate a work force, it would be permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force.”²³² He noted that none of the Court’s prior cases suggest that this would be permitted under the Equal Protection Clause.²³³ Thus, he agreed with the plurality that the Board’s policy was unconstitutional.

Justice Marshall, joined by Justice Brennan and Justice Blackmun, dissented.²³⁴ Justice Marshall believed that the layoffs were unfair, but, he argued, unfairness should not be confused with constitutional injury. “Paying no heed to the true circumstances of petitioner’s plight, the plurality would nullify years of negotiation and compromise designed to solve serious educational problems in the public schools.”²³⁵ “A public employer, with the full agreement of its employees, should be permitted to preserve the benefits of a legitimate and constitutional affirmative-action hiring plan even while reducing its work force.”²³⁶ The Board had an important and legitimate purpose in agreeing with these lay-off provisions. He did state, however, that further fact-finding was needed. In his view, an attempt to resolve the constitutional issue either, as the plurality had done, without any historical context whatsoever, or on the basis of a record so devoid of established facts, was to do a grave injustice to not only the Board and teachers involved, but also to the individuals and governments [who are] committed to the goal of eliminating all traces of segregation throughout the country.²³⁷

Justice Stevens wrote a separate dissent.²³⁸ In his opinion, it was not necessary for the Court to find that the Board had been guilty of past racial discrimination to support the conclusion that it had a legitimate interest in employing in the future more African American teachers.²³⁹ He argued that instead of analyzing this type of case by inquiring as to whether minority teachers “had some sort of special entitlement to jobs as a remedy for sins [of] the past,” the Court should first “ask whether the Board’s action advances the public interest in educating children for the future.”²⁴⁰ If so, Justice Stevens believed the Court should consider “whether that public interest, and the manner in which it is pursued,

231. *Id.* at 295 (White, J., concurring in the judgment).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 296 (Marshall, Brennan, and Blackmun, JJ., dissenting).

236. *Id.*

237. *Id.* at 312.

238. *Id.* (Stevens, J. dissenting).

239. *Id.*

240. *Id.* at 313.

justifies any adverse effects on the disadvantaged group."²⁴¹

Justice Stevens concluded by stating that the Court should not lightly approve governmental use of a race-based distinction.²⁴² Although the ultimate goal is to eliminate such irrelevant factors as a person's race from decisionmaking, in the instant case, he was persuaded that the Board's decision to include more black teachers served a valid purpose; it was adopted with fair procedures; it was given a narrow breath.²⁴³ It was "a step toward that ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race."²⁴⁴ "The goal of providing 'role-models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty."²⁴⁵ "[V]alid hiring goals, the burden [of which] to be borne by innocent individuals is diffused to a considerable extent among society generally. . . . Denial of a future employment opportunity is not as intensive as loss of an existing job."²⁴⁶

8. Summary

Preferential affirmative action hiring has, as the cases which have been studied reflect, the support of a majority of the Supreme Court. The *Bakke* Court recognized, in Justice Powell's opinion, that race could be a factor in medical school admissions policies. This analysis supports the special consideration being given to gender and other immutable characteristics as well. Strict numerical quotas are unacceptable because they posit the non-merit immutable characteristic as the controlling factor in decisionmaking. Four members of the Court in *Bakke* set forth a strident approach to affirmative action that would seem to leave remedies available only to specific victims of intentional discrimination. But *Bakke* provides the legal justification for affirmative action admissions and employment programs in higher education.

Weber and *Johnson* both encourage voluntary affirmative action plans.

241. *Id.*

242. *Id.*

243. *Id.* at 320.

244. *Id.*

245. *Id.* at 288 n.1 (O'Connor, J., concurring in part and concurring in the judgment).

246. *Id.* at 282-83. (Marshall, J., dissenting). For scholarly commentary, see Kandel, *The Limits of Wygant v. Jackson Board of Education*, 12 EMPL. REL. L.J. 289, 305 (1986) ("Wygant is unsatisfying for EEO practitioners because it clouds rather than advances understanding of affirmative action."); Pray, *Wygant: Affirmative Action under the Equal Protection Clause*, 16 STETSON L. REV. 915, 937 (1987) ("The Supreme Court clarified their analytic approach to affirmative action [plans] under the Equal Protection Clause."); Note, *Wygant v. Jackson Board of Education: Affirmative Action and the Innocent Party*, 18 U. TOL. L. REV. 519, 520 (1987) ("Wygant will not have a major effect on affirmative action plans in general"); Note, *Wygant v. Jackson Board of Education: Are Layoffs Appropriate in Affirmative Action? The Question Remains*, 16 CAP. U.L. REV. 105, 118 (1986) ("[h]opefully, the Wygant decision will not deter public employers from implementing voluntary, appropriately tailored, remedial efforts to correct discriminatory abuses").

Weber is a curious decision, endorsing race-conscious voluntary remedies which adversely affect members of the majority. *Johnson* is closer kin to *Bakke* by endorsing sex as a factor. As noted in several opinions of the court, these voluntary programs include remedies which would be beyond the federal judicial power in that no specific victims of discrimination are identified. *Wygant* limits the federal judicial power when identifiable whites are injured: in this case, by lay-off as a result of a plan designed to increase racial diversity in the public school classroom.

The flip side of *Wygant* is more important in hiring decisions. Here the court allows these broader objectives of ridding society of the remnants of historical discrimination. These decisions support, at least through the 1986 *Wygant* decision, current models of affirmative action hiring policies in academia.

B. *The New Models for Assessment of Affirmative Action*

1. Overview

While the decisions discussed in the previous part of this article give support to attempts to increase dramatically culturally diverse appointments to law faculties, four recent decisions of the Supreme Court cast an ominous cloud over the continuing efficacy of such initiatives. It is important to note that none of these decisions *specifically* address the question of appointments in higher education. But the tone is unmistakable.

The cases to be assessed are *Martin v. Wilks*,²⁴⁷ *Wards Cove Packing Company, Inc. v. Atonia*,²⁴⁸ *Price Waterhouse v. Hopkins*,²⁴⁹ and *City of Richmond v. J.A. Croson Company*.²⁵⁰ These cases addressed, respectively, challenges to consent decrees to closed Title VII litigation by the adversely-affected white employees not party to the original litigation; burdens of proof in Title VII cases in two instances; and finally, local government minority set-aside programs.

To appreciate the far-reaching significance of these decisions, attention must be given to the actions of proponents of race- and gender-conscious affirmative action following the court decisions. They have sought an immediate response by the Congress to undercut the girdings of these four decisions by amending the Civil Rights Act of 1964.²⁵¹

247. 490 U.S. 755 (1989).

248. 490 U.S. 642 (1989).

249. 490 U.S. 228 (1989).

250. 488 U.S. 469 (1989).

251. H. Bill No. 4000 and S. Bill No. 2104. The Civil Rights Act of 1990 is designed to overturn the decisions which are discussed in this part. In the first session of the 101st Congress, Senate bill 1235 was introduced by Paul Simon (D. Ill.) to overturn *Croson* and House bills 3035, 3455 and Senate bill 1261 were introduced by Floyd Flake (D. N.Y.), Tom Campbell (R. Ca.), and Howard Metzenbaum (D. Ohio), respectively, to overturn *Wards Cove*.

2. *Martin v. Wilks*: A New Approach to Upset Consent Decrees

*Martin*²⁵² set forth the question whether "white firefighters who had failed to intervene in earlier employment discrimination proceedings in which consent decrees were entered, could challenge employment decisions taken pursuant to those decrees."²⁵³ The Supreme Court, in a 5-4 decision, held that individuals not parties to the consent decrees could challenge it on the grounds that the decree interfered with their rights under both the Constitution and Title VII.²⁵⁴

In 1974, seven black individuals and a local branch of the NAACP filed separate class-action suits against the city of Birmingham, Alabama, and the Jefferson County Personnel Board, alleging that both had engaged in racially discriminating hiring and promotional practices in various public service jobs in violation of Title VII and other federal laws.²⁵⁵ Consent decrees were eventually entered that included goals for hiring blacks as firefighters and promoting them within the department.²⁵⁶

The Birmingham Firefighters Association (BFA) appeared at the fairness hearing held concerning the consent decree and filed objections *amicus curiae*.²⁵⁷ The BFA also moved to intervene on the ground that the decrees would adversely affect their rights.²⁵⁸ The district court denied the motions as untimely and approved the decrees.²⁵⁹ A group of white firefighters, the *Wilks* respondents, then filed a complaint against the city and the board seeking injunctive relief against enforcement of the decrees.²⁶⁰ The complaint alleged that, because of their race they were being turned down for promotions in favor of less qualified blacks, which was a violation of federal law.²⁶¹

The board and the city admitted to making race conscious employ-

252. *Martin v. Wilks*, 490 U.S. 755 (1989). The history of the underlying *Martin* litigation follows:

This case originated as *Ensley Branch, NAACP v. Serbels*, 13 EMPL. PRAC. DEC. (CCH) ,504 (N.D. Ala. 1977), *aff'd in part and rev'd in part*, 616 F.2d 812 (5th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980). This was ultimately consolidated for trial with the *Martin* and *Jefferson County* cases. The same counsel represented the Birmingham Firefighters Association (BFA) at the fairness hearing and then represented the individual *Martin* litigants. All of the individual litigants in *Martin* were members of the BFA at the time of the fairness hearing, allowing the argument to be asserted by the city that the litigants in the reverse discrimination suit already had their day in court. For support of the proposition, see *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

253. *Martin*, 490 U.S. at 758.

254. *Id.* at 762-63.

255. *Id.* at 755.

256. *Id.*

257. *Id.* at 759.

258. *Id.*

259. *Id.* (citing *United States v. Jefferson County*, 28 FED. EMPL. PRAC. CASES 1834 (N.D. Ala. 1981)).

260. *Id.* at 760.

261. *Id.*

ment decisions.²⁶² A group of African American individuals, the *Martin* petitioners, were allowed to intervene in their class representative capacity to defend the decrees.²⁶³ The district court again denied relief and both of these decisions were reversed on appeal.²⁶⁴

Chief Justice Rehnquist delivered the opinion of the Court. He relied primarily on interpretations of the Federal Rules of Civil Procedure in holding that the white firefighters could not be precluded from challenging a consent decree to which they were not parties.²⁶⁵ The Court relied upon the principle set forth in *Hansberry v. Lee*²⁶⁶ that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."²⁶⁷ The Chief Justice maintained that one not privy to litigation should be able to rest assured that his rights are protected and not shoulder the burden of "voluntary intervention"²⁶⁸ in a suit in which he is not directly involved.²⁶⁹ The majority of the Court agreed that the burden of joining parties lies with the one bringing the suit. Who better than they to know who is necessary to properly litigate their case?²⁷⁰ Rule 19 of the Federal Rules of Civil Procedure provides for joining affected parties in complex litigation affecting so many conflicting interests.²⁷¹

The majority opinion would be unremarkable if rendered in any context other than a civil rights or employment discrimination suit.²⁷² But here the consequences of consent decrees may subsequently preclude such a method of resolving complex and sensitive matters of racial and gender discrimination. How is one to resolve these matters? The Court points to the provisions of the existing federal procedural rules. Perhaps some specifics of class actions under Rule 23 could be used to bind parties who are not personally appearing before the Court, but who appear in some type of representative fashion.²⁷³ However, class actions,

262. *Id.*

263. *Id.*

264. *Id.* at 760-61.

265. *Id.* at 763.

266. *Id.* at 761 (citing 311 U.S. 32 (1940)).

267. *Id.* (quoting 311 U.S. 32, 40).

268. *Id.* (citing *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 441 (1934)).

269. *Id.*

270. *Id.* at 765.

271. *Id.* at 764-65.

272. Many commentators, before *Martin*, encouraged greater notice, involvement, and fairness hearings to bind nonparties to affirmative action consent decrees: P. Glaser, *MANAGEMENT OF MASS TORT LITIGATION* (1986); Kramer, *Consent Decrees and the Right of Third Parties*, 87 MICH. L. REV. 321 (1988); Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL FOUND. 103 (1987); H. Newberg, *NEWBERG ON CLASS ACTIONS* (1977); Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887 (1984); B. Vanyo, *SECURITIES LITIGATION* (1988).

273. *FED. R. CIV. P.* 23(c)(2). See *Eisen v. Carlisle*, 417 U.S. 156, 177 (1974).

though, may have some of the same problems of the existing litigation condemned in *Martin*. Recent decisions of the Supreme Court have curtailed the use of class actions by requiring use of sub-classes and providing detailed notice and an opportunity to "opt-out."²⁷⁴

The dissenters took the majority to task for failing to consider the procedural difficulty which may be encountered by civil rights activists.²⁷⁵ In addition, Justice Stevens's opinion distinguished between rights extinguished by the initial court decree and those rights which are burdened by the decree; one's failure to join the suit limits one's action and the right to appeal from a consent decree possibly adverse to one's interest.²⁷⁶ Further, applying a balancing test, the dissenters suggested that in any consent decree, some rights would be abridged in favor of another's. Then, only a small number of white males would be adversely affected.²⁷⁷

The difference of opinion in the Court starts with differing philosophical orientations, with the dissenters seeking to ease the litigation burden upon the minority members of society. These Justices are willing to impose some of the burden of ending longer term societal discrimination upon the members of the "innocent" majority who have been the beneficiary of the discrimination.

Martin will no doubt limit the efficacy of consent decrees, a policy which was supported by Congress in its enactment of the Civil Rights Act of 1964; the establishment of the Equal Employment Opportunity Commission,²⁷⁸ and in the Supreme Court's support of voluntary affirmative action plans discussed in an earlier part of this article.²⁷⁹ Contested cases with an eventual judicial order will have to be more frequent: this would not be such an insurmountable burden were it not for several other decisions affecting burdens of proof which will be discussed below.²⁸⁰

Creative use by plaintiffs of Rule 23 and the creation of defendant classes will solve some of the problems inherent in affirmative action-reverse discrimination litigation. Named groups of affected parties may be identified by a class representative device, perhaps a union, or individually sued. In the specific context of the *Martin* litigation, it would not be difficult to name and serve all current employees of the fire department. Class representatives could then represent the interests of members yet to be hired. Broad notice could be given under Rule 23. Careful trial court management of parties required under Rule 19 or interests

274. *Wilks*, 490 U.S. at 769. (Stevens, Brennan, Marshall, and Blackmun, J.J., dissenting).

275. *Id.*

276. *Id.* at 788.

277. *Id.*

278. See *supra* Part A6.

279. See *infra* Parts B3 and 4.

280. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

entitled to consideration under Rule 24 could avoid subsequent appellate renewal.

These devices, which are apparently now compelled by the *Martin* decision, will slow the likelihood of consent decrees. Adversarial proceedings will predominate with the myriad conflicting interests represented. However, creative use of Rules 19, 23, and 24 of the Federal Rules of Civil Procedure will allow the principle of *Martin* to be overcome so that the initial relief — probably less under the new burdens of proof discussed below — binds *all* of the potentially affected parties.

3. Burdens of Proof: The Twins of Change

Wards Cove and *Hopkins* likely will have a greater impact upon Title VII law than *Martin*. The dilemma of *Martin* makes litigation more complex, but it can be remedied. *Wards Cove* seems to overturn a score of years of case law in a single deft blow: case law which can be only recaptured through congressional action.

The facts of *Wards Cove* are unique, but the impact of the majority's opinion will be general and far-reaching. The employment practices of two employers operating salmon canneries in remote Alaska were presented.²⁸¹ At issue were jobs of two general types: unskilled "cannery jobs" and mostly skilled "noncannery jobs."²⁸² Cannery jobs were filled with Filipinos and Native Alaskans. The Filipinos were hired through a union hiring hall agreement while native Alaskans were hired from villages near the canneries.²⁸³ By contrast, noncannery jobs were filled primarily with Caucasians from company offices in Oregon and Washington.²⁸⁴ While at the same job site, noncannery workers were paid better than cannery workers and the White noncannery workers lived in separate residence halls and ate in separate mess halls from the non-White cannery workers.

Claims of disparate treatment and disparate impact²⁸⁵ were advanced. The federal district court rejected all claims based upon disparate treatment²⁸⁶ and found that while the disparate impact claims were colorable, they too failed for want of proof.²⁸⁷ Upon appeal to the Court of Appeals for the Ninth Circuit, an appellate panel initially affirmed, but the *en banc* court held that subjective hiring practices such as alleged in *Wards Cove* could be analyzed under a disparate impact analysis.²⁸⁸ This

281. *Id.* at 646.

282. *Id.* at 647.

283. *Id.*

284. *Id.* at 648.

285. *Id.* at 648.

286. 703 F.2d 329 (9th Cir. 1983).

287. *Antonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1482 (9th Cir. 1987).

288. 703 F.2d 329 (9th Cir. 1988).

circuit opinion preceded the Supreme Court's opinion in *Watson v. Fort Worth Bank and Trust Co.*,²⁸⁹ which merged some of the proof procedures involving evidence of subjective behavior.

The Ninth Circuit concluded that once the *prima facie* claim of disparate impact had been shown by the plaintiffs, the burden then shifted to the employer to prove the business necessity of its practice.²⁹⁰ No appellate panel or *en banc* opinion challenged the district court's conclusions concerning the disparate treatment claims initially plead. Thus, the specific intent to discriminate claims were not further pursued.

The Supreme Court noted that the appellate court had analyzed the legitimacy of the disparate impact claim by comparing the respective number of whites and minorities in the cannery and noncannery positions.²⁹¹ This was an attractive approach and emotionally compelling, but no records were available which compared the pool of job applicants or the population of minorities in the labor force qualified for the cannery positions.²⁹² The emotionally satisfying comparison which had been made by the appellate court did not reflect any information as to the possible available workforce: there was no information showing whether the employers discriminated in the context of the qualified pool. The lower court approach was criticized as both being overly-broad and overly-narrow at the same time, depending upon how one posed the question of the appropriate measuring rod.²⁹³

The parts of the Court's opinion excerpted above created significant problems for persons litigating questions of employment discrimination as shown, but the *coup de grace* came as the Court opined in dicta the procedures the lower courts were to employ upon remand.²⁹⁴ "[T]he plaintiff's burden in establishing a *prima facie* case goes beyond the need to show that there are statistical disparities in the employer's workforce. The plaintiff must begin by identifying the *specific* employment practice that is challenged [as having the allegedly discriminatory effect]."²⁹⁵ The Court continued: "[e]ven if on remand respondents can show that non-whites are underrepresented in the at-issue jobs in a manner that is acceptable under the standards set forth in Part II . . . this alone will *not* suffice to make out a *prima facie* case of disparate impact."²⁹⁶

While this procedure may be burdensome, liberal tools of discovery will aid prospective plaintiffs in isolating the employment practice which

289. 863 F.2d 461 (6th Cir. 1988).

290. *Antonio v. Wards Cove Packing Co., Inc.*, 703 F.2d 329 (9th Cir. 1982).

291. *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642, 650 (1988).

292. *Id.* at 658.

293. *Id.* at 654.

294. *Id.* at 656 (citing *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977 (1988)).

295. *Id.*

296. *Id.* at 657.

allegedly causes the discriminatory practice. Once the plaintiffs identify the specific employment practice which has the discriminatory effect and present the statistical data from the relevant work forces, then, and only then, is the employer required to present its business necessity defense.²⁹⁷

In considering the employer's asserted business necessity justification, there is no requirement that the practice be "essential" or "indispensable."²⁹⁸ The employer merely is required to carry the burden of production, not the burden of persuasion, which always remains with the plaintiff.²⁹⁹ If the employer meets its burden of production, then the plaintiff may still prevail by persuading "the fact finder that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s]; by so demonstrating, [the plaintiffs] would prove that [petitioners were] using [their] tests merely as a 'pretext' for discrimination."³⁰⁰ Alternative business practices with less disparate impact presented by plaintiffs should be adopted gingerly by the federal judiciary. As a practical matter, the employer's selection processes which are not designed to intentionally discriminate will be sustained if not violative of the disparate impact theory.

The four Justices who dissented from the majority's holding believed that the majority's approach to the appropriate work force/pool statistics was unduly narrow. Given the narrow and unique nature of the employer's work in remote Alaska, the dissenters believed that the racial classification between the two job categories should be "treated as a significant element of the [plaintiff's] prima facie case."³⁰¹ The dissenters then recounted the history of disparate impact litigation for a score of years, sadly noting that the fair rules of the shifting burdens of proof—adopted over years of litigation—were changed in a fashion which made a plaintiff's task nearly impossible.³⁰² The "plantation" setting of the salmon canning industry may be likened to the slave days.³⁰³ "[O]ne wonders whether the majority still believes that race discrimination — or, more accurately, race discrimination against nonwhites — is a problem in our society, or even remembers that it ever was."³⁰⁴

Wards Cove is a wholesale retreat from basic principles of Title VII disparate impact law. Its shifting rules regarding the employer's burdens during litigation undercut basic rules of evidence which place the burden

297. *Id.* at 658.

298. *Id.* at 659.

299. *Id.*

300. *Id.* at 660 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

301. *Id.*

302. *Id.* at 662.

303. *Id.* (Blackmun, Brennan, and Marshall JJ., dissenting).

304. *Id.* (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

254 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 19:219]

of producing evidence in a trial in the hands of the party having superior access.

A less damaging procedural and evidentiary case is next considered.³⁰⁵ *Hopkins* presented an interesting alignment of Supreme Court justices. Justice Brennan, usually relegated to strident dissent in this year's employment discrimination marathon, announced the judgment of the Court in which Justices Marshall, Blackmun, and Stevens joined.³⁰⁶ Justices White and O'Connor concurred in the judgment,³⁰⁷ and Justices Kennedy and Scalia and the Chief Justice dissented.³⁰⁸

Hopkins had been denied her partnership with the Price Waterhouse accounting firm. She alleged the denial was premised upon sex discrimination, resulting from male partners' sexual stereotyping of appropriate characteristics of women partners,³⁰⁹ the employer argued that its decision to deny partnership would have been made regardless of any possible sex discrimination, thus, it had a legitimate basis for the personnel action.³¹⁰ This mixed motive case was accepted by the Supreme Court to consider the appropriate standard of proof by which the employer had to prove that it would have made the same decision without the illegal sex-based factor.³¹¹ The district court in *Hopkins* required a clear and convincing evidence standard; the court of appeals reversed with instructions to consider the matter under a preponderance of evidence standard.³¹² The majority and separate concurring opinions of the Supreme Court Justices differ upon the nature of the evidence which the employer must submit. The majority seemed to require some objective evidence; Justice White stated that "[if] the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof."³¹³ Justice O'Connor opined that the plaintiff must show that the unlawful basis was a substantial part of the employer's decision-making processes.³¹⁴ The dissenters reviewed the plurality's pronouncements and concluded that *Hopkins* could not prevail in this litigation

305. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

306. *Id.*

307. *Id.* at 258 (White, O'Connor, JJ. concurring).

308. *Id.* at 279 (Kennedy and Scalia, JJ. and Rehnquist, C.J., dissenting).

309. *Id.* at 232-34.

310. *Id.*

311. *Hopkins*, 490 U.S. at 236-37. The Supreme Court has considered similar mixed motive cases in the union setting, *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393 (1983) (the so-called *Wright Line* cases) and in a constitutional setting in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, the Supreme Court opined that if the constitutionally or statutorily protected behavior had played a "substantive part" in the making of the employment decision, that the decision would be unlawful. *Mt. Healthy*, 429 U.S. at 284.

312. 263 U.S. App. D.C. 321, 825 F.2d 458 (1987).

313. 490 U.S. at 261-62 (White, J., concurring in the judgment).

314. *Id.* at 265 (O'Connor, J., concurring in the judgment).

based on the district court's factfinding.³¹⁵

The agreement in the Supreme Court upon the preponderance of evidence standard is not the most troublesome part of this opinion. Rather it is the consensus which emerges from the combined opinions of all Justices other than the plurality which indicates how easy it is for the employer to prevail when several motives may be articulated. Earlier decisions of the Supreme Court and of the appellate courts had given hope that decisions which smacked of racial or gender discrimination would be rejected; here, such decisions may be rectified if the employer is able to articulate arguably legitimate grounds, however flimsy.

4. Local Minority Set-Aside Programs: No Dice

Programs providing for special minority set-asides in public works procurement programs came before the Supreme Court in a case which involved such a preferential program adopted by the City of Richmond, Virginia. The local ordinance provided that a certain percentage of governmental contracts had to be awarded to minority entrepreneurs. In *City of Richmond v. J.A. Croson Co.*,³¹⁶ a losing bidder challenged the city ordinance as violative of the Equal Protection Clause of the fourteenth amendment. The trial court determined that the remedial nature of the city program was constitutional in light of the factual record which established that a city with one-half African American population gave less than one percent of its prime contracts to minority entrepreneurs. The Court of Appeals for the Fourth Circuit reversed³¹⁷ the district court under the authority of *Wygant*.³¹⁸

When argued to the Supreme Court, consideration of the Court's prior approval of a congressionally-authorized race-conscious set-aside program had to be considered. In *Fullilove v. Klutznick*,³¹⁹ the Court had sustained the federal program against fifth and fourteenth amendment challenges. The Court found that Congress had the right to try temporary, experimental programs to remedy what Congress perceived to be a social and economic problem directly attributable to violations of the Constitution. In contrast, the Richmond program was invalidated because the city had no documented and specific evidence of invidious discrimination; the program was not sufficiently narrow in its scope to avoid strict scrutiny; and a number of the benefitted groups (such as Orientals, Indians, Eskimos, and Aleuts) did not have a history of discrimination at the hands of the City of Richmond.³²⁰ Local or state government set-

315. *Id.* at 294-95 (Kennedy and Scalia, JJ., and Rehnquist, C.J., dissenting).

316. 488 U.S. 469 (1989).

317. 882 F.2d 1355 (4th Cir. 1987).

318. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

319. 448 U.S. 448 (1980).

320. *Croson*, 488 U.S. at 506. Several recent law review articles and comments may shed light

aside programs appear to be doomed by the decision. The evidentiary burden upon a local or state legislature in enacting such remedial programs is so high as to make it unlikely that a legislature assembly will adopt such a measure.

In contrast to the more ambiguous impact of generalized hiring goals, the Court analyzed the *Croson* case under the rubric of *Wygant* which focused upon identified victims: in *Wygant*, whites were discharged rather than more recently hired minorities; in *Croson*, a specifically identified majority public works bidder lost to a less competitive minority vendor.³²¹ *Croson* is in harmony with the *Martin* decision by allowing for the *post hoc* protection of the majority from whatever limited preferential treatment is made available to minorities. But the *Croson* decision cannot be mended without congressional action, while *Martin* can be overcome as outlined above.

5. The Impact of These Decisions

The impact of these decisions and others, such as *Patterson v. McLean Credit Union*,³²² a case involving an interpretation of a related employment discrimination statute,³²³ has yet to be realized. In the wake of these opinions, the Supreme Court promptly vacated judgments and remanded cases in which certiorari had been granted: *Swint et al. v. Pullman-Standard*,³²⁴ *H.K. Porter Co. v. Dade County, Florida*,³²⁵ *USX Corp. v. Green*,³²⁶ and *Consolidated City of Jacksonville v. Nash*.³²⁷ In

on *Croson*. For an article generally critical of the *Croson* decision, see Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989) (the Supreme Court's adoption of the strict scrutiny test for weighing the constitutionality of race-conscious remedial measures in state and local legislation). For an interesting account, see Russ, *The Richmond Narrative*, 68 TEX. L. REV. 31 (1989). ("[T]he Court has erected an impediment that will save only to hinder our striving to 'get beyond racism'"). Note, *An Analysis of the New Legal Model for Establishing Set-Aside Programs for Minority Business Enterprise: The Case of City of Richmond v. J. A. Croson Co.*, 25 GONZ. L. REV. 141, 155 (1989) (while commending the Supreme Court for its decision, this student author notes "[A]n institution lacking federal competence, which desires to address a racial imbalance within its own 'bailiwick,' but is unable to point to specific acts of past discrimination, must resort to alternative nonpreferential affirmative action efforts"). See also, Note, *Constitutional Law - Equal Protection Benign Classifications Based on Race Must be Narrowly Tailored to Achieve a Compelling Governmental Interest*, 21 ST. MARY'S L.J. 493 (1989). Comment, *Affirmative Action Minority Set-Asides: Future Justification for Implementation at the State and/or Local Government Level*, 59 MISS. L.J. 189, 205 (1989). Comment, *Race-Based Remedial Legislation and the Appropriate Standard of Review*, 14 S. ILL. U. L.J. 63 (1989).

321. 491 U.S. 164 (1989). See also *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989), holding that the recovery of attorneys fees by women and minorities against "reverse discrimination" plaintiffs was not available.

322. 485 U.S. 617 (1988).

323. 42 U.S.C. § 1981 (1988).

324. 490 U.S. 1103 (1989) (vacated and remanded in light of *Wards Cove*).

325. 489 U.S. 1062 (1989) (vacated and remanded in light of *J.A. Croson Co.*).

326. 490 U.S. 1103 (1989) (vacated and remanded in light of *Wards Cove*).

327. *Id.*

one case, the Supreme Court summarily affirmed a lower court decision which had invalidated a state set-aside program which had failed to make specific findings of intentional discrimination by the governmental unit.³²⁸

Lower courts have interpreted these decisions in a variety of circumstances, including: *Wards Cove* does not apply to voluntary contracts;³²⁹ *Croson* proposes that laws applicable to the preservation of African American rights apply equally to whites;³³⁰ local set-aside program are enjoined under the authority of *Croson*;³³¹ *Wards Cove* does not permit the introduction of new proof to invalidate a fourteen year old finding of discrimination;³³² word of mouth referral system which was found by the Court to be unlawful was not being revisited as a result of *Wards Cove*;³³³ a DEA case fails because statistical proof of one subgroup did not satisfy *Wards Cove* analysis;³³⁴ *Wards Cove* results in employer victory in challenge to fetal protection policy;³³⁵ *Martin* does not require the opening of a consent decree where no African Americans were working for employer when decree entered;³³⁶ *Martin* compels conclusion that White officers may challenge implementation of a consent decree where 1:1 African American and white hiring ratio was mandated;³³⁷ and subjective interviewing practice which resulted in a statistical disparity of hiring African American and white is a sufficiently identified employment practice to survive a *Wards Cove* analyses.³³⁸

In a word, these decisions call into question the basic principles that have informed affirmative action practices in the United States for a score of years. They compel a sobering reassessment of new approaches one might utilize to employ more (or continue to employ more) culturally diverse faculty in an institution of higher education. A bias in favor of the employer is present in these cases; a tilt in favor of the view that racial and gender discrimination is a thing of the past permeates; and a tilt in favor of challenges to programs which hurt identifiable whites is presented. Thus, the clarion call is for a new approach which will con-

328. Michigan Road Builders Ass'n., v. Milliken, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1981).

329. United States v. City of Miami, 52 EMPL. PRAC. DEC. (CCH) ,625 (S.D. Fla. 1990).

330. Triad Assocs. v. Chicago Housing Authority, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 129 (1990).

331. Cone Corp. v. Hillsborough County, Florida, 723 F. Supp. 669 (M.D. Fla. 1989).

332. Sledge v. J. P. Stevens & Co., Inc., 52 EMPL. PRAC. DEC. (CCH) ,537 (E.D.N.C. 1990).

333. E.E.O.C. v. Andrew Corp., 51 EMPL. PRAC. DEC. (CCH) ,364 (N.D. Ill. 1989).

334. Lowe v. Commack Union Free School Dist., 886 F.2d. 1364 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1470 (1990).

335. UAW v. Johnson Controls Inc., 886 F.2d 871 (7th Cir. 1989).

336. Henry v. Gadsen, 40 FED. EMPL. PRAC. CASES 292 (N.D. Ala. 1989).

337. Mann v. City of Albany, 883 F.2d 999 (11th Cir. 1989).

338. Green v. USX Corp., 896 F.2d 801 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 53 (1990).

tinue to encourage cultural diversity while withstanding constitutional and statutory invalidation.

C. *The Hiring Practices: The Chase*

1. The Current Practices

Few accounts exist of the hiring practices of law schools. As two authors have noted, this is curious, in light of the fundamental and critical role one's colleagues play in the activities of a law school and in its ability to carry out its training mission.³³⁹

Bruce and Swygert outline institutional processes which can identify some positions early in a school year for the future—through anticipated resignations, new positions, colleagues on visitorships, and the like — but concludes that many needed slots are unknown until much later in the year.³⁴⁰ The authors discuss the role of the recruitment processes of the American Association of Law Schools,³⁴¹ the rituals of “good ‘ole boy” referrals, the campus interview, and the varying levels of decisionmaking within the law school itself.³⁴² But especially important for our consideration are the criteria which are used to select candidates.³⁴³

The consensus among law schools supports the view that the prestige of the law school attended and one's rank at that school are the two most salient features considered in the selections process.³⁴⁴ A surprisingly small number of law schools are the feeder schools within this system.³⁴⁵ Advanced graduate degrees in the law are considered as a means to improve the pedigree of a less desirable law school where a potential teacher has obtained his or her Juris Doctor degree.³⁴⁶ Law review and publication experience is highly valued.³⁴⁷ Law teaching experience at an *appropriate* law school will be considered.³⁴⁸ A judicial clerkship will be rewarded.³⁴⁹ Of course, on occasion, specialized course needs may dic-

339. See Bruce & Swygert, *The Law Faculty Hiring Process*, 18 HOUS. L. REV. 215 (1981) (quoting Editorial, *A Reflection on the Lighthouse*, 27 J. LEGAL EDUC. 377 (1975)). See also Prosser, *Advice to the Lovelorn*, 3 J. LEGAL EDUC. 505 (1951).

340. Bruce and Swygert, *supra* note 338.

341. *Id.* at 230-35.

342. *Id.* at 235-42.

343. *Id.* at 243-59.

344. *Id.* at 243-44. See also Lee, *Ten Faculty Candidates: Which Two Would You Choose for Your School?* — LEARNING & L. 22 (Spring 1974); Prosser, *Lighthouse No Good*, 1 J. LEGAL EDUC. 257 (1948).

345. Bruce & Swygert, *supra* note 338, at 243 n.150. The top five schools include: Harvard, Yale, Columbia, Michigan, and Chicago; the next 15 include N.Y.U., Georgetown, Texas, Virginia, Berkeley, Pennsylvania, Wisconsin, Northwestern, Stanford, Iowa, Illinois, Minnesota, Cornell, Duke, and George Washington.

346. *Id.* at 244-46.

347. *Id.* at 248.

348. *Id.* at 248-50.

349. *Id.* at 251.

tate that someone with specific experience and knowledge about a discrete area of the law — such as tax — may be hired outside of the traditional settings.³⁵⁰ Some clinical appointments will give greater weight to practice experiences.³⁵¹

The irony of this system of selection is that it is unlikely to pass any kind of job validation study which Title VII requires of employers — with the caveat that the impact of the Court's decisions noted above cannot be fathomed with any certainty.³⁵² Using the outline developed above, the ideal law school faculty applicant would:

- Attend one of 20 schools of law and perform in the top of his or her class;
- Be an editor of the law review; and
- Serve a judicial clerkship - preferably on a federal court of appeals or the Supreme Court.

2. An Assessment of the Current Practices

This pool of attractive candidates is relatively small and certainly does not meet the needs for faculty hiring. Thus far, we have dared not inquire as to whether any of these characteristics make the slightest difference when hiring law faculty. Do we ask whether the prospective teacher can teach? Do we require any knowledge about teaching? Do we require any understanding of ethics? Do we require any information about one's ability to be a lawyer - or to understand the demands of daily legal practice? Do we have any information concerning one's willingness to work with colleagues or students? To do counseling? A myriad of questions are posed which suggest that the hiring rules for law schools are only vaguely related to the actual activity of law school teaching.

On the plus side, the currently favored criteria give good indication that one might be a clone of an existing law school faculty member; or that one might be a good editor of another's work or perhaps, (but not certainly) a good writer in one's own right; or have good contacts with a small cadre of other legal educators and a particular judge and his or her colleagues.

It is surprising that so little thought has been given to what legal educators actually do - and then to pose questions to applicants about those matters.³⁵³ Law schools tend to emulate the so-called leaders in legal

350. *Id.* at 250-53.

351. *Id.* at 250 n.194.

352. *See supra* Part B. "And there is little, if any, evidence available to determine whether we would do as well or better if alternative criteria were used in selecting law teachers." Laurence, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429, 434 n.13 (1986).

353. *See supra* Part D. Notwithstanding the practices of law schools in the recruitment process,

260 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 19:219

education. And notwithstanding the relatively fungible elitist credentials of law school faculty, today's vogue is to identify *ad hoc*, cultural diversity *per se* as a desirable goal. With this goal the author concurs, but the methodology of imposing such a quasi-quota system demeans all applicants: applicants are hired because of their cultural diversity and then, when a desirable number is reached, the job of cultural diversity is completed. The randomness of the appointments process does not begin to qualify as a job-validated approach required by federal regulations.³⁵⁴

Ironically, law school faculties commend themselves upon their diversity - or at least diversity as they define it. Southerners and Northerners are on a single faculty (occasionally); Jews and Gentiles; Democrats and Republicans;³⁵⁵ but only occasionally do we have women, Blacks, Hispanics, Native Americans;³⁵⁶ and even less occasionally do we have avowed gays and Lesbians.³⁵⁷ But the intellectual diversity which is alleged to exist is only diversity at a very limited level. The broader American populace believes that law faculty belief systems generally are at variance with the general population. The academy has set itself upon a course which seems to members of the academy to be just and "correct": the vogue of the then existing, "politically correct" position. Missing, of course, is the economic class integration which might make a faculty truly diverse.

3. The Activities of the Law Schools' Constables: The American Association of Law Schools and the American Bar Association

The American Association of Law Schools (AALS) has for some time

the aspirational goals of one midwestern law school show the following policies as its hiring qualification standards:

- a. Demonstrated achievement in or potential to achieve quality teaching.
- b. Meaningful work experience.
- c. Completion of advanced degrees in Law or other disciplines in addition to the required degree.
- d. Distinguished record in academic programs related to the position to be filled.
- e. Compatibility with small town environment.
- f. Diversity of gender, race and ethnic background represented on the faculty.
- g. Personality and demeanor which suggest that the candidate will be accessible to and approachable by our students.
- h. Diversity of educational institutions represented on the faculty.
- i. Publications, editorships, membership on committees, commissions or boards.
- j. Recognition of the moral, ethical and religious values embodied in the purposes and goals of the University.

OHIO NORTHERN UNIVERSITY FACULTY BYLAWS - PERSONNEL STANDARDS § IIA (1988).

354. See Bryden, *On Race and Diversity*, 6 CONST. COMMENT. 383 (1987).

355. *Id.*

356. See *infra* text accompanying notes 365-66.

357. See Scalia, *The Disease as Cure*: "In order to get beyond racism, we must first take account of race," 1979 WASH. U.L.Q. 147 (1979).

championed the employment of a more diverse faculty.³⁵⁸ The Special Committee on Recruitment and Retention of Minority Law Teachers (Special Committee), in its March 24, 1988, report³⁵⁹ defined the affected class of minorities as "Blacks, Hispanics (including Mexican-Americans, Puerto Ricans, Cuban-Americans, and others of Spanish origins), Asians and Pacific Islanders, and Native-Americans."³⁶⁰ "The working definition of 'minorities' is not necessarily intended to be close-ended."³⁶¹

The Special Committee considered a number of special approaches to enhance minority hiring:

- A study to identify the pool of potential minority applicants³⁶²
- Expanding the stream of candidates: more focused advertising of vacancies, use of minority alumni to recruit, scheduling of CLE programs involving minority graduates; adjunct responsibilities; hiring of promising minority students as research assistants, use of minority legal organizations, reservation of slots for minority applicants; faculty and practitioner exchanges; loan forgiveness programs, and several other programs.³⁶³

The Special Committee then considered problems of retention,³⁶⁴ and quality of life issues for minorities in legal education.³⁶⁵ The recommendations of the AALS, however well intended, run afoul in many respects of the recent pronouncements concerning affirmative action of the Supreme Court. The Association's reliance upon the protection afforded to "voluntary" plans which adversely affect the cultural majority is increasingly suspect when set against the principles enunciated by the emerging staple majority of the Supreme Court. The inevitable demise of traditional voluntary affirmative action plans should not be viewed with gloom. This circumstance should compel the academy to rethink and rearticulate more clearly standards for appointment. The new standards will appropriately take into account the cultural diversity of our nation and will develop criteria which will as accurately as possible tailor both curricular needs and predict success on a law school faculty. Rather than lament such a mission, law faculties should welcome it.

358. For example, the AALS filed an *amicus* brief in *Sweatt v. Painter*, 339 U.S. 629 (1950). For a discussion of *Sweatt v. Painter*, see *supra* text accompanying notes 48-53.

359. Association of American Law Schools, Report of the AALS Special Committee on Recruitment and Retention of Minority Law Teachers (1988), redistributed to Deans of Member Schools and Associate Deans for Academic Affairs, Memorandum Deans 89-201 from Betsy Levine, Executive Director (March 31, 1989).

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

4. The Current Data Suggest that Culturally Diverse Hiring is Floundering

The Association's concern for special efforts to recruit a culturally diverse faculty is further strengthened by an assessment of the numbers of such persons in legal education. A recent AALS annual meeting presentation included the following detailed demographic information:

- Blacks in the legal profession

1890	431	.48%
1970	3,406	1.29%
1989	24,038	3.4%

- Minority Law Student Enrollment in Law Schools

	BLACK	MEXICAN	ASIAN
1977-78	5,304 (4.9%)	1,564 (1.5%)	1,382 (1.2%)
1988-89	6,321 (5.2%)	1,657 (1.3%)	3,133 (2.5%)

[Essentially stable in all categories except for an increase in Asian Americans]

- Minorities Accepting Academic Positions

1977	4.1%
1986	2.5%

Present Overall Minority Faculty .7%³⁶⁶

In the 1989-90 AALS Faculty Appointments Register, 698 registrants were noted. Of these, 201 or 28% were female, 1 was a Native American male; 28 were Black (11 male; 17 female) and 11 were Hispanic (7 male; 4 female).³⁶⁷ These numbers suggest that even extraordinary efforts to recruit persons of cultural diversity from traditional sources will be inadequate.

As the Association's Special Committee has noted, new doors must be opened. The University of California at Los Angeles (UCLA), the University of Wisconsin at Madison, and Stanford University law schools have all undertaken dramatic initiatives to increase their number of cultural diverse faculty with success. These "successes" have used some variations from the traditional "ideal" candidate profile outline above, but this author contends that the traditional qualifications does little to mirror the reality of the job requirements for successful law school teaching.

366. R. Clayton, *Promoting and Nurturing Academic Values of Faculty Diversity*, AALS Program, San Francisco, California (January 5, 1990) (Hand-out).

367. Data collected by D. Benson, Ohio Northern University College of Law from Register, presented at Faculty Discussion Group on April 23, 1990.

D. *The Qualification Factors Approach*

1. The General View

The description of a more comprehensive set of criteria for appointment as a member of the law faculty is occasioned by several principles and by the author's experiences on a university-wide committee at a small midwestern school. First, decisions which purposefully discriminate, for whatever commendable motivation should be suspect in the academy. Thus, the determination to create a minority or women's slot for a particular appointment seems remiss in principle. The fact that several accrediting law school bodies might endorse such an approach is of interest, but does little to save the practice if it is arguably defective in fact. If cultural diversity is desirable, which I believe strongly it is, then principled approaches should be developed to justify, support, and implement such a course of action.

Any type of affirmative action program that looks like a numbers-crunching exercise is viewed as suspect by all affected constituencies: the applicant, one's colleagues, and the students. The applicant resents his or her special treatment as a "minority"; colleagues grumble about a slot being a "women's slot" or a "Black slot"; and students may perceive employing a Black or female faculty member with less outstanding credentials than a mythical "White male" faculty applicant as affirmative action.

Here, is an opportunity to weave objectives of cultural diversity into the basic job description, and to make cultural diversity a desirable end in and of itself as a matter of basic qualification for a position. This approach, would enable a college of law to state with confidence that the *most* qualified applicant under the personnel guidelines has been hired to fill a particular position. By making cultural diversity an official ingredient of job qualifications, we test the limits of our academic commitment to diversity in higher education in the late Twentieth Century.

How important it is to have the perspective of culturally diverse persons in a particular position would guide our recruitment efforts - and might aid our recruitment efforts when applicants of diverse backgrounds considered the genuine commitment evidenced by a law school to attract such diversity.

Job validation tests have long been considered as one acceptable way to achieve the desired blend of cultural diversity in the appointments; criteria have tended to create a nondiverse workforce.³⁶⁸ Here the stan-

368. "We have not imposed upon law schools the same obligations we place upon police departments, fire departments, or even elementary and high school systems to demonstrate that the qualifications they have established are job-related." H. Glickstein, *Law Schools: Where the Elite Meet to Teach*, 10 NOVA L.J. 541, 541-42 (1986).

264 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 19:219

dards which have been employed to hire members of law school faculties have tended to produce a predominately White work force; this fact should shift the burden to the employer to justify the employment practices necessitating that cultural composition. As has been suggested previously in this article, law school hiring standards seem so muddy as to be unable to withstand scrutiny of any serious sort.³⁶⁹

Thus, vacant faculty positions should be carefully assessed by a committee of the faculty, with the active participation of the dean or the dean's designee, to create a job description that mirrors the school's needs at the time the position is being advertised. This would, of course, allow a different job description for a subsequent hiring should institutional needs change.

This approach builds upon *Bakke* and *Johnson* which allow cultural diversity to be considered in the employment decision-making process. Its novelty is to take the next step of truly writing a job description which mirrors actual need.

2. An Illustrative Job Vacancy Announcement

VACANCY - JOB DESCRIPTION - QUALIFICATIONS

1. In filling each vacancy within the law school, the appointments committee shall, with the cooperation and assistance of the dean, prepare a job description for the vacant position. Recruitment for a specific position shall not be undertaken until the dean approves the job description and it is subsequently approved by the University Personnel Standards Committee.
2. Job descriptions shall completely assess the qualifications required for a particular appointment. Factors to be considered, with each factor evaluated as shown below, should include:
 - A. Demonstrate substantive knowledge in the field to be taught. (20 points)
[Factors to be considered: actual degrees earned; specific training in field; actual academic performance in major field.]
 - B. Actual or Potential for Scholarly Research. (10 points)
[Factors to be considered: review of published works (including student works), areas of research interest.]
 - C. Cultural Diversity. (20 points)
[Representation in group defined as a "need group" (reflecting underrepresentation in terms of relative racial/gender distribution in workforce).]
 - D. Demonstrate experience and interest in collegial activities and community/civic affairs. (10 points)

369. See *supra* Part D2.

[Factors to be considered: Prior associational activities, work on committees and group activities in the community.]

- E. Demeanor and Personality for Effective Student Counseling and Interaction. (20 points)
 - F. Work Load Production. (10 points)
[Factors to be considered: teaching assistantships, previous full or part-time employment and responsibilities associated therewith.]
 - G. Compatibility with the Institution. (10 points)
[Factors to be Considered: Environmental background indicating temporary or permanent, interest in living in small town; compatibility with moral, ethical and religious values of the institution; tolerance of divergent value systems.]
3. The University Personnel Standards Committee is established to assist in the development of job description and appropriate and valid job qualifications.

E. *The Implementation of the Program and Other Recommendations*

Cultural diversity is more imperative than it has ever been. New approaches are needed to ensure that the institutions of higher education, and particularly the schools of law from which come the leaders of our society — are truly populated by faculty which represents the diverse cultural heritages of our Nation. The proposals which are contained in this article which of course are of general application might be implemented by a college of law along the following lines:

Assume a vacancy in teaching property, land use planning, civil rights, and municipal corporations. Here identified, for illustrative purposes only, are two fields: property and perhaps municipal corporations/constitutional law.

In evaluating factor 1, one would look at the existence of the J.D. degree, performance in law school in the subject courses; and any additional specific training in these fields. Assuming grades of A in all affected classes, a J.D. from a creditable institution, and work with a law firm involved in land use/zoning litigation, such an applicant might be evaluated in the 8-10 range.

Under factor 2, student papers, law journal articles, law subject matter newsletters and the like would be assessed. Also, in this applicant's case, appellate briefs or other pleadings, might be appropriate. A student note and three appellate briefs of exceptionally good quality might result in a 6-8 rating.

Under factor 3, cultural diversity would be assessed. In law, representation by Blacks, Hispanics, and to a lesser extent, women, is inadequate. Thus, a Black woman applicant might be evaluated from 9-10 on this scale. Some persons who have commented upon this hiring system rec-

commend that this factor be given greater weight than 10. The relative ranking of these factors is tricky: it is easily susceptible to abuse in favoring or discouraging such appointments.

Under factor 4, experience of the applicant in working with community or professional group and the like would be assessed. This would give an indication of committee work. Our applicant was with one bar committee on a *pro bono* basis, and serves as the treasurer of her neighborhood civic association. She might be evaluated 5-7 on this factor.

Factor 5 would be subjective in many ways, but comments from employers or previous supervisors might be helpful. Here, the applicant was viewed as a nurturing personality. She might receive an 8-9 on this factor. Work load productivity would be easily assessed in the context of a law firm associate, with a high number (9-10) likely being assigned. To be pursued would be the question of subtracting from that number because the applicant wanted a more "laid back" lifestyle.

Finally, the environmental and ethical compatibility factor would be pondered. Prior specific experiences of attending a college in a small community with a church affiliation might give some evidence of compatibility. However, as cultural diversity is sought above, diversity in background experiences may also be appropriate here. Our applicant attended a small church-affiliated institution in Indiana and a large urban law school. She is active in church social affairs. She might receive an evaluation of 8-9 on this category.

This is but a possible scenario to unfold. Others are certain to exist. This recruitment plan would likely withstand constitutional attack in that the factors of cultural diversity are integrated and woven into a broad plan of appointments; the numbers are tentative and subject to rethinking; and the plan represents a proposal which considers in a broad context, the institutional employer needs.

But this is but the first step. Once a diverse faculty is engaged, efforts at retention begin. Persons of cultural background of other than the majority cannot be tokens, subject to serving all students of a similar culture, or explaining the culture's view of the world to the majority community. Efforts for changes in emphasis must be provided: the faculty member engaged for specific needs should be able to "spread his or her wings" in the face of an impending vacancy, such that the new applicant may be one who takes over some of the more senior colleague's responsibilities in a certain field. This is a dynamic process. It will ensure an exciting, culturally diverse and rich academic community - and that will allow the academy to serve most effectively the broader community as the new century dawns.

F. Conclusion

This Article has traced the rise and likely fall of race- and gender-conscious preferential programs affecting minorities. Whether the more restrictive decisions of the Supreme Court of recent vintage were upon us or not, the qualification factors approach as a proposal for hiring practices seems far more fair than the existing systems. In this scenario, a faculty and administration must figure out what they want a new employee to do. They need to define, assess needs, seek comments from other members of the faculty as to their potential new needs, before they advertise a job vacancy. Once such a position is identified, then hiring can occur in a rational fashion. Gone will be the preoccupation with certain pedigrees. What will emerge will be a truly diverse faculty, appointed with specific tasks in mind — tasks that, of course, may change, but tasks which have been thought out. This new system will require time and commitment - experimentation and change — but the enhanced quality of legal education which may result seems to be a goal worthy of pursuit.

APPENDIX A

The value of racial, gender, political, pedagogical and cultural diversity is assumed and will not be debated in this article. The literature abounds with sensitive and thoughtful essays on these topics. (I also have included some divergent views.) See, with regard to women in legal education and feminism: Angel, *Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMPLE L. REV. 799 (1988) (discussing the absence of women in legal education, the "system," and the sexually degrading remarks often uttered by Angel's male colleague - an excellent bibliography of sources used by Angel is included, *id.* at 800 n.2).

Information for this article was also obtained from the following sources: C. EPSTEIN, *WOMEN IN LAW* (1981); K. MORELLO, *The INVISIBLE BAR* (1986); Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988); Barnes, *Women and Entrance to the Legal Profession*, 23 J. LEGAL EDUC. 276 (1970); Bysiewicz, 1972 AALS Questionnaire on Women in Legal Education, 25 J. LEGAL EDUC. 503 (1973); Epstein, *Women Lawyers and Their Profession: Inconsistency of Social Controls and Their Consequences for Professional Performance*, in THE PROFESSIONAL WOMEN 669 (1971); Erickson, *Legal Education: The Last Academic Bastion of Sex Bias?*, 10 NOVA L.J. 457 (1986); Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101 (1988); Faught, *Update: The Status of Women Faculty in Illinois Law Schools*, 74 ILL. B.J. 452 (1986); Fossum, *Women in the Legal Profession: A Progress Report*, 67 A.B.A. J. 578 (1981); Fossum, *Women Law Professors*, 1980 AM. B. FOUND. RES. J. 903; Jacobs, *Women in Law School: Structural Constraint and Personal Choice in the Formation of Professional Identity*, 24 J. LEGAL EDUC. 462 (1972); Jason, Moody, & Schuerger, *The Woman Law Student: The View From the Front of the Classroom*, 24 CLEV. ST. L. REV. 223 (1975); Robert & Winter, *Sex-Role and Success in Law School*, 29 J. LEGAL EDUC. 449 (1978); Wald, *Women in the Law: Stage Two*, 52 UMKC L. REV. 645 (1983); Weisberg, *Women in Law School Teaching: Problems and Progress*, 30 J. LEGAL EDUC. 226 (1979); White, *Women in the Law*, 65 MICH. L. REV. 1051 (1967); Winter, *Survey: Women Lawyers Work Harder, Are Paid Less, But They're Happy*, 69 A.B.A. J. 1384 (1983); and Zenoff & Lorio, *What We Know, What We Think We Know, and What We Don't Know About Women Law Professors*, 25 ARIZ. L. REV. 6869 (1983).

A comprehensive issue of volume 39 JOURNAL OF LEGAL EDUCATION entitled *Women in Legal Education - Pedagogy, Law, Theory, and Practice* includes thoughtful comments.

Additional sources which are of interest include: Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989) (commenting upon the workplace, sexual harassment, "neutral" policies which undervalue women, new models for parenting,

and the role of the workplace in one's life); Dalton, *The Faithful Liberal and the Question of Diversity*, 12 HARV. WOMEN'S L.J. 1 (1989); Markoff, *Wisconsin Does the Impossible; Boosts Minority Ranks By Four*, NAT'L L.J. March 6, 1989, at 4, col. 1 (discussing the one-shot hiring of four minorities by one law school); and Tobias, *Respect for Diversity: The Case of Feminist Legal Thought*, 58 U. CIN. L. REV. 175 (1989); Concerning African-Americans: Alexander & Alexander, *The New Racism: An Analysis of the Use of Racial and Ethnic Criteria in Decision-Making*, 9 SAN DIEGO L. REV. 190 (1972) (discusses definitional problems and generally argues against group identification as a lawful basis for decisionmaking); Amaker, *DeFacto Leadership and the Civil Rights Movement: Perspective on the Problems and Role of Activists and Lawyers in Legal and Social Change*, 19 SO. U. L. REV. 1, 17 n. 18 (1989) (discussing small number of Black faculty members); Bell, *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319 (1986) (discusses "problems" of too many minority faculty); Bell, *Stranger in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U.S.F. L. REV. 385 (1986); Brooks, *Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets*, 5 LAW & INEQUALITY 1 (1987) (comments upon a predisposition to evaluate minority faculty more harshly); Bunzel, *Minority Faculty Hiring*, THE AMERICAN SCHOLAR 39 (19—) (commenting upon federal government's early initiative to increase minority faculty hiring at the expense of all standards); and Crenshaw, *Foreword: Toward a Race Conscious Pedagogy in Legal Education*, — NAT'L BLACK L.J. 1.

For an article commenting upon the hiring of White males writing about civil rights and social injustice, quoting each other, and ignoring mention of nonwhite authors having personal experience concerning the issue, see Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984), especially *id.* at 562 n.3. The exclusion of such nonwhites means that affirmative action is approached from a social utility or distributive justice model rather than premised on reparations:

Many of the minority scholars emphasize the reparations argument and stress the inherent cost to whites; the [white male] author of the inner circle generally make the case on the ground of utility or distributive justice.

Id. at 569 & n. 45; Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L.J. 443 (1983) (comprehensive study), see especially nn. 235-66 and accompanying text which present minorities in teaching and the special insights they bring in certain specialized cases; Littlejohn, *Black Law Professors: A Past. . . A Future?* 64 MICH. BAR J. 539 (1985); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 53 (1975); and Wonnell,

270 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 19:219

Circumventing Racism: Confronting the Problem of Affirmative Action Ideology, 1989 B.Y.U. L. REV. 95 (discussing strategies to circumvent racism: "affirmative action ideology as a tragic obstacle to needed changes").

And for a melange of materials discussing affirmative action and the relationship between African-Americans and women see: Austin, *Sapphire Bound!*, 1989 WISC. L. REV. 539 (importance of African-American role models); Bergmann, *Is There a Conflict between Racial Justice and Women's Liberation?*, 37 RUTGERS L. REV. 805 (1985); Kay, *Beyond Diversity: Accepting Difference*, AALS NEWSLETTER, April 1989, at 1-3; Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 BERKELEY WOMEN'S L.J. 42 (1988) (discussing variable passive-aggressive models of affirmative action); and Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculty*, 137 U. PA. L. REV. 537 (1988). Chused states:

Racial tokenism is alive and well at American law schools. . . [B]lack professors in particular, tend to be tokens if they are present at all About one third of all law schools in this [1986-87 school year] study have one Black faculty member. Another three have just one. Less than a tenth have more than three.

* * *

Women [in the 1986-87 school year] now constitute over one-third of untenured faculty who are in tenure track positions Legal writing moreover may be on its way to a "woman's job."

And for a contrary view, "what 'race conscious' or 'affirmative action' means in actuality is the virtual abandonment of standards," see Groglin, *Race-Conscious Remedies*, 9 HARV. J.L. & PUB. POLY. 843, 87 (1985).