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LEGAL ASPECTS OF AFFIRMATIVE ACTION ADMISSIONS PROGRAMS IN HIGHER EDUCATION.

THE UNIVERSITY OF NORTH CAROLINA AT GREENSBORO, ED.D., 1979

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LEGAL ASPECTS OF AFFIRMATIVE ACTION ADMISSIONS PROGRAMS IN HIGHER EDUCATION

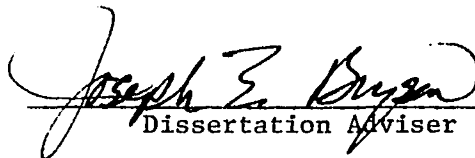
By

Robie W. McClellan

A Dissertation Submitted to
the Faculty of the Graduate School at
The University of North Carolina at Greensboro
in Partial Fulfillment
of the Requirements for the Degree
Doctor of Education

Greensboro
1979

Approved by



Dissertation Adviser

APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of the Graduate School at the University of North Carolina at Greensboro.

Dissertation Adviser Joseph E. Bryson

Committee Members William W. Purkey
Dwight L. Gentry

June 14 1979
Date of Acceptance by Committee

McCLELLAN, ROBIE W. Legal Aspects of Affirmative Action Admissions Programs in Higher Education (1979)
Directed by: Dr. Joseph E. Bryson. Pp. 181

The purpose of this study is to investigate and analyze the issues which confront officials in institutions of higher education as they strive to administer affirmative action admissions programs. This study will provide administrators with comprehensive data which will affect the legal and educational issues involved in selecting students for programs of study. The legal and moral foundations of affirmative action are analyzed in this study, and the salient points of the arguments for and against preferential admissions and preferential hiring programs are enumerated and discussed.

Documentation which supports the factual base of the study is gleaned from a variety of source material. The sources include books, court cases, laws, letters from officers of the Federal courts, personal interviews, professional journals, and ERIC reports. The American Digest System, American Law Reports Annotated, The National Reporter System, and other legal bibliographical aids were consulted in locating case citations.

Events and judicial decisions which led up to the *Bakke* decision are chronicled, and the study offers some basis for implications as to the future impact of the *Bakke* case. The period of the study spans the time between the *Dred Scott* decision (1857) and March of 1979. A review of the Federal and State court cases which relate to affirmative action would logically revolve around cases concerned with public school desegregation. This study reviews the most significant cases which bear upon affirmative action programs in education. Since it is likely that there will be considerable controversy surrounding preferential hiring

practices, in both education and industry, considerable attention is given over to current relevant cases such as _Weber v. Kaiser Aluminum & Chemical Co._, _Sears, Roebuck & Co. v. Attorney General of the United States_, _Communications Workers of America v. Equal Employment Opportunity Commission_, and _Cramer v. Virginia Commonwealth University_.

In summary, the _Bakke_ decision held that race can be a legitimate consideration in placement of employees as well as acceptance and assignment of students, although no quotas may be assigned. Race may be considered, even though no specific proof of racial discrimination exists, according to the Supreme Court's ruling in _Bakke_. State-operated schools may therefore consider an applicant's race in making admissions choices so long as the applicant's race is not the sole factor.

Generally, the research supports the conventional wisdom which holds that "the United States Constitution is just what the United States Supreme Court says it is." Although the influence of the four men whom President Richard M. Nixon appointed to the Supreme Court (Justices Burger, Blackmun, Powell, and Rehnquist) is great, the Court today is not a monolithic body. Even when the justices are of one mind, the practical outcome of a landmark decision may not be easily predicted, nor may a timetable be set up to implement the decision in every case. The Congress, the Executive Branch of the government, Federal and State agencies, and academicians themselves play an important role in affirmative action programs. Their roles are of especial importance in the area of employment practices.

Because such a variety of factions submits inputs, it is difficult to draw specific conclusions as to the future outcomes of issues solely from legal research. However, on the basis of an analysis of this study, the following general conclusions concerning affirmative action admissions

programs can be drawn:

1. The impact of the *Bakke* decision will be a matter of legal interpretation and conceptual analysis for perhaps decades to come.

2. An aura of uncertainty will surround affirmative action programs for quite a span of time to come as cases appear in courtrooms which concern the specifics of the general issues.

3. Educational administrators will be required to develop an even greater tolerance for ambiguity, since clearly drawn guidelines will not be available to them in the immediately foreseeable future.

4. A higher level of dedication to the profession and a fuller measure of devotion to the welfare of humankind will be needed by those administrators who would withstand the pressure of the aforementioned ambiguity and undertainty.

5. Some, perhaps many, admissions officers should employ more diverse criteria in choosing potentially successful nontraditional and minority group students.

6. There is a need for testing devices which are more directly applicable for use in selecting nontraditional and minority group students.

7. The academic community should be more involved in and more supportive of research which aims at understanding and serving the needs of the minority student.

ACKNOWLEDGMENTS

I am grateful to the members of my doctoral committee, Professors Dwight F. Clark, Dwight L. Gentry, William W. Purkey, Donald W. Russell, and Joseph E. Bryson, chairperson, for their guidance and assistance.

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Finally, this research could not have been completed without the support and understanding of my wife, Margaret, to whom this dissertation is dedicated.

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CHAPTER I

INTRODUCTION

Statement of the Problem

This is an historical study of the legal ramifications of affirmative action programs in the United States. Specifically, the research is concerned with affirmative action admissions policy in public universities. When candidates with superior qualifications are not admitted to programs of study (apparently) because minority group members with lesser qualifications fill all the open slots, a question of constitutionality arises.

The reserach will describe the events and adjudications leading up to the *Bakke* case.[1] The research will examine the Supreme Court rationale in the *Bakke* case and will inquire into the possible consequences the decision will have on future admissions policies of public schools and universities. The study will also present an overview of current court cases which are likely to affect policy-level decisions of administrators in institutions of higher education.

Based on the research findings, some recommendations will be made concerning establishing practical guidelines for educational decision making in the future.

Procedures Used

The basic research technique of this historical study will be to examine, analyze, and apply the available primary and secondary references.

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[1] *Regents of the University of California, Petitioner v. Allan Bakke*, (See *U. S. Law Week*, 46 (June 27, 1978) 4896.

Relevant federal and state courts records contained in the National Reporter System, the American Digest System, Corpus Juris Secundum, and United States Reports will be the major primary sources. Secondary references include books related to civil rights concepts and journal and newspaper articles related to the history and significance of affirmative action programs. Judicial decisions which relate to the issue of reverse discrimination, particularly the Bakke case, will be discussed in some detail.

Delimitations

Affirmative action programs are a source of heated debate among scholars, jurists, and members of the general public. Those who support quota systems for selecting minority applicants can construct a persuasive rationale in support of their position. Their opponents are also able to offer up logical reasons for their beliefs. However, discussions of affirmative action programs frequently degenerate into charges of reverse discrimination and countercharges of bigotry and racism. Opponents of quota systems and proponents of quota systems are likely to equate opposition to their cause with oppressive and un-American philosophies of government.

This study will be concerned with the legal questions involved. To some extent, the research will call attention to the reasoning processes which support the morality of some specific position on this issue. However, no exhaustive effort will be expended to analyze the philosophical and educational arguments for and against quota systems or the concept of (so-called) reverse discrimination.

Objectivity and exposition shall be the twin goals of this study. Some treatment of the Bakke decision and related cases will be included, and some suggestions as to the future significances of Bakke will be offered. Since the significance of Bakke is debatable, opinions from

both sides of the broader issues are cited in order to provide a base for analysis only.

Significance of the Study

Preferential admissions has been and remains a deeply divisive issue in American society. Probably no question has so perplexed the courts as well as the academic community. Few people of conscience justify the historical deprivation of minority groups, particularly the systematic exclusion from the benefits of acquiring collegiate and professional training. It is unlikely that a large number of people would oppose the notion of ameliorating the injustices of the past, if such amelioration were possible without creating new injustices by disadvantaging other groups. The critical issue now is whether preferential admissions policies achieve the objective of making amends for past injustices without creating new injustices.

In September of 1971, a trial judge in the state of Washington ordered the University of Washington to admit an applicant to the law school. That applicant, Marco De Funis, Jr. had graduated from the University of Washington with a respectable academic record. When he was twice rejected for admission to law school, De Funis sued the University of Washington to gain admission.[2] The University of Washington challenged the 1971 order to admit De Funis. Ultimately, De Funis lost his case in the Supreme Court of the State of Washington.

When De Funis subsequently carried the case to the Supreme Court of the United States, the Court refused to hear De Funis' appeal on the

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2 De Funis v. Odegaard, 82 Wash. 2d II, 507 P 2d 1169 (1973).

grounds that it was moot; that is, no live issue was involved.[3] This ruling was handed down because De Funis had been allowed to enter the University of Washington Law School pending resolution of his suit. He had in fact registered for his final quarter in that law school when the Supreme Court handed down the De Funis decision in the spring of 1974.

De Funis was widely reported in the national press in 1971, although few state court cases command the attention of the national media. De Funis' newsworthiness was derived from the fact that it represented the first court decision on the legality of preferential admission of minority group members. At that time (1971) some writers and commentators began to refer to preferential admission as "reverse discrimination."

A test case based on issues similar to those of the De Funis case had been expected by observers for quite some time when the case came to trial in the state of Washington in 1971. In April of 1970, Vice President Spiro Agnew had learned of the University of Michigan's commitment to work toward a goal of ten percent black enrollment. In a major televised speech, Agnew called Michigan's commitment "some strange madness" which should be actively resisted by colleges and universities. Agnew said at that time:

> For each youth unprepared for college curriculum who is brought in under a quota system (italics are the writer's) some better prepared student is denied entrance. Admitting the obligation to compensate for past deprivation and discrimination, it just does not make sense to atone by discriminating against someone else.[4]

Thus by the early seventies, preferential admission had developed into a divisive, even an explosive issue. Such issues, in our society, are virtually certain to wind up in court. The French social critic

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[3]Marco De Funis et al., Petitioners v. Charles Odegaard, President of the University of Washington et al., 416 U.S. 312, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974).

[4]Chronicle of Higher Education, April 20, 1970, p. 1.

Alexis de Tocqueville had remarked as early as 1840 upon the unique penchant Americans displayed for carrying political conflicts and issues into the courtroom. It came as no surprise to astute observers that the Supreme Court's decision to hear the De Funis case in 1974 did not put an end to the issue of preferential admissions. The issue was predestined to reappear from the moment the gavel was sounded to dismiss De Funis. Through a series of events and adjudications, the issue was dramatically revived in the Bakke case.

Emergence of the Bakke Case

It was predictable that the Bakke case would reach the Supreme Court, at least it was predictable that someone, if not Bakke would carry the issue of preferential admissions to the highest tribunal of the land. The United States of America was founded on the principle that "all men are created equal," a principle stated in the Declaration of Independence. This statement means, in essence, that all men stand equal before the law. The history of the United States outlines a protracted effort to enact a practical attainment of this ideal, the ideal of equality before the law.

One such effort, affirmative action, has been a highly controversial issue since the late sixties. Bakke, however, marks the first instance in which the Supreme Court of the United States actually faced the issue head on. The fact that the Bakke case has been front page news since its inception in 1974 makes it worthwhile to review the basic facts in the case very early in this study. The Bakke case provides a background analysis of the nature of the problems raised by affirmative action programs generally.

The Bakke Case resulted from the decision of the University of California at Davis not to admit Allan Bakke, a white man, to the Davis Medical School. Bakke was denied admission in 1973 and again in 1974. He then filed suit against the regents of the University of California in State Court. His suit alleged that the special admissions program of the Davis Medical School denied him admission on the basis of his race. Under this special admissions program, 16 of 100 first year openings were, in practice, reserved for certain minority group members.

On June 29, 1978, the Supreme Court by a 5 to 4 vote affirmed the constitutionality of college admissions programs which give special advantage to blacks and other minorities to help remedy past discrimination against them. However, the Court also ruled that the Davis Medical School was obligated to admit Allan Bakke. The Court stated that the school's affirmative action program was inflexibly and unjustifiably biased against white applicants such as Bakke.[5]

In the Bakke opinion, the Court provided some guidance for educators who are trying to insure that their admissions program will bear judicial scrutiny. Future cases will almost certainly result in rulings which will shed more light on what actually constitutes affirmative action. The research will summarize the significance of the Bakke decision to date. Some effort will be made to outline possible approaches the Supreme Court may take in the future. However, no effort

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[5]Regents of the University of California, Petitioner v. Allan Bakke. (See U. S. Law Week, 46 (June 27, 1978) 4896.

will be made to anticipate future rulings of the Court. A highly respected scholar who did attempt to anticipate the *Bakke* decision is Dr. Harold Spaeth of the University of Michigan. In October of 1977, Dr. Spaeth appeared on National Public Radio to discuss the *Bakke* case. Spaeth had programmed a computer to reflect the voting patterns of the nine Supreme Court justices. On the basis of his computer analysis, Dr. Spaeth was confident in his prediction that the Court would decide unanimously in favor of Bakke.

Thus the *Bakke* decision does provide incontrovertible proof of one supposition: the Supreme Court remains unpredictable. In 1954, the Supreme Court ruled that a child could not be denied admission to a public school on account of race.[6] The *Bakke* decision holds that preferential treatment cannot be afforded to blacks over any other racial group. To some, this position signals a retreat from the *Brown* decision; some believe the Supreme Court has actually come full cycle. This study will devote some comment to a comparison of the Burger Court with the Warren Court. The research will analyze the events and adjudications which changed the complexion of desegregation philosophy between *Brown* and *Bakke*.

This study is significant because it will present an analysis which will provide for education advisers and decision makers an organized approach to employ when considering the complexities of preferential admissions programs. To an extent, the study will be of value to

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[6] *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954).

decision makers in industry as well as education. Litigation relative to employment and promotion by preferential treatment of minority group members looms large on the horizon.

It is important that educators and business people refrain from speculation as to what future courses of action the federal judiciary will follow in cases involving preferential treatment of minority group members. This study will afford some insight into the complexity and tenaciousness of legal opinion in these matters. In view of Brian Weber's allegation that he has been deprived of his rights by "reverse discrimination," this study will serve as a timely word of caution to decision makers in education and commerce. Weber's case is scheduled for review by the Supreme Court.

Organization of Remainder of the Study

The remainder of this study will be divided into five major parts. Chapter II will discuss the conceptual foundations of affirmative action, and an historical review of pertinent literature will be presented. This section will summarize the salient points advanced by advocates of affirmative action and preferential admissions programs as well as arguments and counterarguments set forth by opponents of such programs. These arguments raise the question of the validity of traditional methods which are used to select, or reject, nontraditional applicants to educational programs. This chapter will contain an historical treatment of the Federal judiciaries with regard to racial discrimination prior to *Bakke*. The events and adjudications which led to the *De Funis* and *Bakke* cases will be chronicled in a concise manner. The study will follow the

rationale of the judiciary in reaching its decisions. Among the cases which will be analyzed in the section are: Plessy v. Ferguson (1896), Cumming v. Richmond County Board of Education (1899), Gong Lum v. Rice (1927), Sweatt v. Painter (1950), Brown v. Board of Education (1954), Brown v. Board of Education (1955), Bradley v. School Board of City of Richmond (1965), Green v. County School Board (1968), United States v. Montgomery County Board of Education (1969), Swann v. Charlotte-Mecklenburg Board of Education (1971), and Defunis v. Odegaard (1974).

Chapter III will build a scaffolding upon which to construct a logical analysis of the legal aspects of affirmative action admissions programs in higher education. In this chapter, the moral and philosophical aspects of affirmative action programs will be discussed. The way in which affirmative action programs relate to the societal goal of maximizing the welfare of the most people will be analyzed. The discussion draws heavily on the works of Vilfredo Pareto and the concept of Pareto-optimality. Landmark court cases which have highlighted the Supreme Court's philosophy with regard to preferential admissions programs and various conceptual aspects of some landmark cases will be discussed in Chapter III.

Chapter IV will consist of an analysis of landmark decisions of the Federal judiciary which have a direct bearing on preferential admissions programs. The Bakke case, Regents of the University of California, Petitioner v. Allan Bakke[7] and other significant cases

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[7] 98 Sup. Ct. 2733 (1978).

which are now in litigation will be discussed in Chapter IV. Among these cases will be Weber v. Kaiser Aluminum and Chemical Corporation,[8] and Sears, Roebuck and Company v. Attorney General of the United States.[9] In this chapter, the possible implications of the Bakke decision are discussed. The research alludes to the opinions of legal scholars, governmental officials, and the press in analyzing the reasons why Bakke might, or might not, become a landmark decision.

Chapter V will present a summary of the Supreme Court's position with regard to preferential admissions and preferential employment programs, based on information set down in Chapters I through IV. Chapter V will draw tentative conclusions as to the meaning of the Bakke decision. Also, Chapter V will offer some suggestions as to how a practical framework may be established for setting up practical guidelines which school officials may follow in administering affirmative action programs.

Since the implications of the De Funis case are of such great magnitude, the dissenting view of Mr. Justice William O. Douglas is reproduced as a part of this study. Mr. Justice Douglas' dissenting opinion in De Funis will appear in this dissertation as Appendix A. The entire opinion is reproduced in Appendix A. In this opinion, Mr. Justice Douglas declared that there is no constitutional right for

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[8] Weber v. Kaiser Aluminum and Chemical Corporation, 563 F. 2d 216 (5th Cir. 1977).

[9] Sears, Roebuck and Company v. Attorney General of the United States, No. 79-0224 (D.D.C., filed January 24, 1978).

any race to be preferred in admissions decisions. In his opinion, Mr. Justice Douglas stated that a white is not entitled to any special advantage by reason of the fact that he is white, and went on to say that a white must not be the subject of any disability by reason of the fact that he is white. In sum, Mr. Justice Douglas said that whatever the race of an applicant, he has a constitutional right to be considered on his individual merits.

CHAPTER II

REVIEW OF THE LITERATURE

The fundamental issue raised in the Bakke case was how, if at all, race should be relevant to admissions decisions. In the specific sense, the question which the Supreme Court had to answer was whether Allan Bakke, a white man, had been improperly denied admission to the Medical School of the University of California at Davis. Bakke's suit was based on his contention that a special admissions program which reserved sixteen out of one hundred places in each entering calss was unconstitutional.

In a practical sense, admissions directors and their associates must answer such fundamental questions as: What consideration should be taken into account in deciding which particular applicants to admit when space proscribes admitting all applicants? Is it ever morally sound to consdier the race of an applicant in decising whether to admit the applicant? What distinctions may be drawn between using quotas and other approaches to recruitment of minority students?

The very use of the term "race" is fraught with unpleasant connotations and charged with emotional overtones. The issue of preferential admissions is difficult and divisive. People of great substance, sound moral fiber, and keen intellect have weighed the facts in the issue and come to radically different conclusions. The Supreme Court

began hearing oral arguments in the case of Regents of the University of California v. Allan Bakke, respondent, on October 12, 1977.[1] The Chronicle of Higher Education reported that by the time the oral arguments began, 121 persons and organizations had filed amicus curiae briefs. Thirty-two of the briefs were filed in support of Allan Bakke, eighty-four were filed in support of the University of California, and five others were filed which took no definitive position.[2]

Divisive Character of the Issue

It is unlikely that any organizations in the field of education wield more power and influence than the American Federation of Teachers and the National Education Association. It is not surprising that both organizations filed amicus curiae briefs with the U. S. Supreme Court. It is perplexing, if not startling, that the two organizations were on opposite sides of the issue. In its brief the National Education Association concluded that the judgment of the California Supreme Court should have been reversed; that is, this organization supported the position that the Davis Medical School was acting in accordance with the Constitution in denying admission to Allan Bakke. The American

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[1] Regents of the University of California v. Bakke, 98 Sup. Ct. 2733 (1978).

[2] "Briefs in the Bakke Case," Chronicle of Higher Education, September 26, 1977, p. 4.

Federation of Teachers, on the other hand, submitted an _amicus curiae_ brief asking that the decision of the California Supreme Court be affirmed; that is, this group was of the collective belief that Davis Medical School violated Constitutional principles in denying admission to Allan Bakke.[3]

In light of the fact that the issue of preferential admissions is such a controversial one, it is advisable to review the basic concepts which frame the government's activities in the general area of affirmative action.

The Concept of Affirmative Action

It is worthy of consideration that the concept of affirmative action did not spring from legislative or judicial action. Rather, the concept of affirmative action was established through executive orders issued by a succession of U. S. presidents in the 1940's and 1950's. During these two decades, the administrations were seeking to insure fair treatment for and prevent discrimination against employees by firms which were awarded government contracts. Through the 1950's these executive orders were backed by no forceful enforcement procedures nor any viable sanctions to be imposed for noncompliance. Thus, the executive orders during the forties and fifties were merely voluntary measures. Orders issued by President Kennedy in the early 1960's directed that contractors include members of minority groups

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[3] "Bakke: Pro and Con," _Phi Delta Kappan_, 59, No. 7 (March, 1978) 447-455.

and women in their work forces. President Kennedy's executive orders were the first to provide any substantial penalty for noncompliance. By the mid-sixties, affirmative action orders issued by the president's office had acquired forceful significance.

For example, in 1965, Executive Order 11246 established the Office of Federal Contract Compliance, the OFCC. The OFCC was given authority to monitor compliance under Executive Order 11246.

Title VI of the Civil Rights Act of 1964 also served to expand the concept of affirmative action. Title VI provided affirmative remedies such as preferential hiring and quotas for those who were victimized by discrimination. The concept of affirmative action expounded by Title VI was predicated on the idea of proven past discrimination and upon the precedents established by courts is fashioning remedies for such discrimination.

More recently, a more advanced, or at least basically different, concept of affirmative action has evolved. This concept has been instituted in the field of higher education. It includes voluntary preferential treatment for women and minority group members to overcome the effects of discrimination and racism. Significantly, this latter concept functions without the necessity of proving past discrimination in a court room.

Affirmative Action: Pro and Con

Those who support affirmative action programs hold that government is morally obligated to correct past injustices which have been inflicted upon minority groups. Advocates of affirmative action see the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution as legislation whose purpose was to protect black people against oppressive acts passed by southern legislatures in the period following the Civil War.

Affirmative action supporters regard these three amendments as essentially color-conscious legislation; therefore, they are insistent in their belief that it would not be impossible to compensate for past discrimination without taking account of race.

Those who oppose affirmative action programs are prone to refer to such programs in manifesting reverse discrimination. In the minds of opponents of affirmative action, the concept is in blatant conflict with the principle that reward is, and should be, a prime function of individual achievement. Since race is a factor in selection of applicants under affirmative action programs, as opponents say, such programs are unconstitutional.

Opponents argue for legal formalism. In their belief, all persons must be treated alike except when some dissimilar treatment is specifically authorized by law. Proponents subscribe to the doctrine

of legal purposiveness. They advance the argument that it is the purpose of the legal system to insure equality of opportunity and to guarantee equality of results.

At the crux of the issue is the contradiction between the ideal and the reality. There is the ideal of social equality and then there is the reality of racism and the fact of a system built on social domination. Neither opponents nor proponents deny the existence of the contradiction; neither proponents nor opponents challenge the social desirability of resolving the contradiction. The differences among proponents and opponents of affirmative action lie in the area of the means which shall be employed to resolve the conflict between reality and the ideal.

Advocates of affirmative action envision the law as an instrument of social transformation. They believe that the law is obligated by morality to operate in such a manner as to achieve equality of results in our society. A legal intervention should serve to achieve this equality of results, and it is necessary that this legal intervention be guided by racial considerations. "Unless racial considerations are built into the calculus of the legal intervention, the inequalities which are built into our present system will remain institutionalized," say advocates of affirmative action.

The opponents of affirmative action programs believe that assuring all citizens of equal protection under the law without regard to race will bring about total dissipation of the effects of past discrimination. Theirs is a laissez faire world, one in which the law should function to build a scaffold for a competitive and dynamic interaction of all

people, without regard to race or color.

One will not solve the enigma posed by this contradiction between the real and the ideal by referring to the Constitution. The Constitution affords no specific guarantee to present awards for individual merit. Neither does the Constitution spell out any warranty that anyone will be compensated for past discrimination. One may only look to the relative merits displayed by the tenuous social theories enumerated above for concepts to guide one's rationale in legal interpretation involving affirmative action.

In summary then, the principal legal issue in affirmative action arguments (and the heart of the legalities of the Bakke Case) is whether the Equal Protection Clause of the Fourteenth Amendment prohibits the use of racial classifications to implement special admissions programs. An understanding of the legalities of affirmative action, and of the reasoning process relative to Bakke, must therefore be predicated on an understanding of the constitutionality of racial classifications. It is then logical to consider this concept at this juncture in this study.

Arguments For and Against Racial Classification

Two basic constitutional arguments opposing the use of race as a basis for classification by any arm of government are often advanced. The first argument against racial classification is referred to as the "color-blind" doctrine. This position asserts that all racial classifications are invalid, per se; the Constitution proscribes all racial classifications. This is essentially the position taken by Allan Bakke in his brief.

The "color-blind" doctrine has not been supported by Supreme Court decisions in cases prior to Bakke, nor was it supported in the Bakke decision. The Supreme Court has upheld the use of race in student assignments to foster racial integration where there has been a finding of past discrimination.[4,5,6] The Court has also permitted the use of race as a factor in finding remedies in employment discrimination.[7,8] A major difference in the Bakke Case was the absence of showing a pattern of past discrimination. The Davis Medical School was not even in existence long enough to show such a pattern when the Bakke Case arose.

The second basic argument against racial classification insists that the Fourteenth Amendment precludes "invidious discrimination against any person."[9] This thesis asserts that affirmative action programs are unconstitutional because they manifest "invidious discrimination" against members of the white race. Proponents of affirmative action counter this argument with the assertion that in order for invidious discrimination to exist, it must result in a stigmatizing effect against those excluded from some program and that it must be aimed at a minority which has historically been victimized by racism. Whites have not been the victim of

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[4] Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954).

[5] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[6] Green v. County School Board, 391 U.S. 430 (1968).

[7] Griggs v. Duke Power Company, 401 U.S. 424 (1971).

[8] Washington v. Davis, 426 U.S. 229 (1976).

[9] For a more complete analysis of the rationales for and against affirmative action, see M. Kromkowski & I. Bright's "Affirmative Action: History and Results." In National Lawyers Guild Handbook: Affirmative Action in Crisis, Summer, 1977.

the racism and the oppression which the Fourteenth Amendment aimed at preventing, goes the argument, and therefore no invidious discrimination can occur. Discrimination against majority members does not meet the criteria of invidious discrimination.

The analysis of arguments for and against preferential admissions through racial classification places the issues of the Bakke Case in a clearer perspective. It has long been apparent that the courts will support racial classifications only when such classifications promote a compelling state interest and are effected in a manner which is least objectionable in serving that state interest.

A critical question remains intact although the Court has now ruled in the Bakke Case. That question is: Is there any way to accomplish the goals of integration and equal opportunity while completely ignoring racial factors? The Supreme Court's record has trended away from upholding the legality of classifications based on race. Not since 1944 has the Court upheld a racial classification by a state.[10,11] Yet, there is still no definitive answer to the question of whether special admissions programs will be judged differently because they discriminate in favor of oppressed minorities; the ultimate decision as to the constitutionality of special admissions programs was not laid down in the Bakke Case. When such a decision is reached, the effects will be far reaching. If affirmative action programs in admissions are held to be constitutional, the Supreme Court and the Justice Department will have to build new inroads into the traditional area of equal protection rights.

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[10] Hirabayashi v. United States, 320 U.S. 81 (1943).

[11] Korematsu v. United States, 323 U.S. 214 (1944).

If no special admissions programs based on race in any way are permitted, the consequences could be bleak. While there is probably no way to making a conclusive statement, many informed observers believe that if affirmative action does not survive, minorities will be virtually eliminated from professional schools.[12] Nationally syndicated columnist William Raspberry cites sources in support of his estimate that between 59 and 70 per cent of the blacks attending graduate and professional schools in 1977 would have been ineligible for admission except for special admissions programs.[13] It is easily predictable that educational decision makers will face problems centered around special admissions for quite some time. It is equally predictable that the news media will soon be providing a lot of coverage on yet another important case which will revolve around this unsettled and important issue.

From Dred Scott to Allan Bakke: A Judicial Review

An intelligent speculation as to the educational implications of the Bakke decision must be predicated on an understanding of the past out of which the decision arose. We are now no more than two generations removed from a time when teaching a black person to read was a criminal act. Our past has witnessed the rise of the law as a vehicle for converting racism into an unchallenged modality of social control.

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12 See (for example) James W. McGinnis, "The Challenge to Affirmative Action." Journal of Employment Counseling, 15, No. 2 (June, 1978) 73-78.

13 Raspberry, William, "Merit System v. Special Admissions." The Greensboro Record, July 20, 1977, p. A-8.

It was through legalities that slavery became institutionalized. The law enabled the Black Codes, which prevailed after the Civil War, to achieve a degree of oppression over black people which was almost equivalent to slavery.

It is significant that the intent of those who framed the Fourteenth Amendment (which sought to protect and guarantee the threatened rights of former slaves) is still debated by legal scholars today. A central issue in the morality of legislation concerned with human rights is whether the law may rationally and morally seek to change folkways through stateways. This question played an important role in the *Plessy* Case,[14] infra, in which the United States Supreme Court declared that "legislation is powerless to eradicate racial instincts." A review of the Federal judiciary's decisions which are relevant to school desegregation and admissions policies will lend insight into the possible implications of the *Bakke* decision.

The Nineteenth Century Cases: Dred Scott, Plessy, and Cumming

The history of the *Bakke* Case actually commences with the *Dred Scott* decision.[15] In the case of *Dred Scott v. Sanford*, a slave, Dred Scott, sued for his freedom on the grounds that he had lived for a prolonged period of time on free soil. This case progressed through the courts in Missouri and ultimately to the Supreme Court of the United States. The Supreme Court ruled that Dred Scott was not free and stated

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[14] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[15] *Dred Scott v. Sanford*, *Mo.*, 60 U.S. 393, 19 L. Ed. 691 (1857).

moreover that blacks were not citizens. Chief Justice Roger B. Tanney, writing the decision for the Court, declared that blacks, both slave and free, were "so far inferior, that they had no rights which the white man was bound to respect." In a legal sense, this statement summarizes the legal status of blacks in the United States until the adoption of the Fourteenth Amendment after the Civil War.

The next milestone recorded in the progress of the legal positions of blacks was marked by the Supreme Court's decision in the case of Plessy v. Ferguson. Homer Plessy, a black man, was arrested and convicted in Louisiana when he made an attempt to ride in a railroad car which was reserved for whites. Plessy's case progressed through the Louisiana courts and thence to the Supreme Court of the United States. The Court upheld an 1890 Louisiana law segregating railroad carriages.

Justice Brown, in writing for the majority, declared that the creation of "separate but equal" accommodations was a reasonable use of state police power. Additionally, Brown denied that the Fourteenth Amendment had been intended to abolish distinction based upon color, or to enforce social as distinguished from political . . . equality, or a co-mingling of the two races upon terms unsatisfactory to either. Only one Justice, John Marshall Harlan, dissented in Plessy v. Ferguson. Harlan predicted that "the judgment this day rendered will, in time, prove to be quite as pernicious as . . . the Dred Scott Case." "The thin disguise of equal accommodations," wrote Justice Harlan, "will not mislead anyone nor atone for the wrong done this day."[16]

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[16]Plessy v. Ferguson, 163 U.S. 537 (1896).

In Plessy v. Ferguson, the Supreme Court had upheld the constitutionality of a Louisiana statute which provided for "equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train." This "separate but equal doctrine" was the guiding principle in school legislation as well as school policy for at least fifty years, even though the case which gave birth to the policy, Plessy, bore no direct relation to academic endeavors.

Three years later, the U.S. Supreme Court heard Cumming v. Richmond County Board of Education.[17] In Cumming, the plantiffs charged that the school board of Richmond County, Georgia used funds to provide a similar school for colored pupils. A state law in Georgia required that separate-but-equal public educational facilities be provided for children of both races. Despite this provision, the Richmond County Board ceased operations of a high school which served sixty black students, but continued to aid a high school for white boys. According to the school board, this decision was motivated only by a lack of funds, not by any hostility toward blacks. The board's rationale was that circumstances dictated a choice between an elementary school for blacks or a high school for blacks.

In finding against the plantiff, Cumming, the Court ruled that it was constitutionally permissible for a school district to provide a high school education for white children but not for blacks when the reason for failure to provide for blacks is lack of funds, instead of hostility toward blacks.

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[17] Cumming v. Richmond County Board of Education, 175 U.S. 528 (1899).

Gong Lum v. Rice: A Non-Black Issue

Until 1927, no further decisions of major importance insofar as the issue of school desegregation is concerned were handed down. In that year, the U.S. Supreme Court, hereafter referred to as the Court, ruled in the Case of Gong Lum v. Rice.[18] A Chinese-American girl, the daughter of Gong Lum, had been excluded by a Mississippi superintendent of education from attending a white school because she was not a member of the white race. Mississippi laws provided for "separate schools . . . being maintained for children of the white and colored races." The Court ruled against Gong Lum, who sought to have his daughter admitted to a white school. In so ruling, the Court declared that no right of any Chinese citizen is infringed by classifying him or her for purposes of education with black children or by denying him or her the right to attend schools established for members of the white race. Thus, Mississippi was permitted to place Chinese students in black schools, a decision which was based on the Court's belief that a state was permitted to regulate the method of providing for the education of those educated at public expense. Placing Chinese students in black schools was adjudicated to fall within the state's authority to regulate its public schools and did not conflict with the Fourteenth Amendment.

1950: The Modern Era Begins

By the year 1950, when the Court heard the Case of Sweatt v. Painter,[19] issues and attitudes had changed drastically in the United

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[18] Gong Lum v. Rice, 275 U.S. 78 (1927).

[19] Sweatt v. Painter, 339 U.S. 629 (1950).

States. In this case, Sweatt, a black, was denied admission to the law school of the University of Texas, a state-supported law school. Sweatt was denied admission solely on the basis of his race. Texas law forbade the admission of blacks to the University of Texas, and the law school was a division of that University. When a court order directed the State of Texas to provide a legal education for Sweatt, Texas created a separate law school for blacks. This newly-created school was unequal to the University of Texas Law School in many obvious ways. It was not as large, nor was it equal in many intangible respects, such as the reputation of the faculty or the alumni. Neither did the school have any standing in the community or enjoy the prestige of the Texas Law School. Further, the newly-created school was prohibited from enrolling whites. Therefore, Sweatt refused to enroll in the new law school and sought entry into the Texas Law School.

The Court's ruling was the education of Sweatt could have acquired at the new law school was unequal to that he would receive at the Texas Law School. The Court ordered that Sweatt must be admitted to the Law School of the University of Texas, providing he proved qualified for admission.

Thus, in 1950, Texas was ordered to admit blacks to its law school, a school which had previously been all white. In ordering Sweatt's admission, the Court declared that the equal protection clause of the Fourteenth Amendment forbids state action which discriminates against persons on the basis of race.

The year 1950 witnessed yet another landmark Supreme Court decision concerned with racial discrimination. In that year, G. W. McLaurin, a

black man, had been admitted to the University of Oklahoma to pursue a Doctorate in Education. An Oklahoma statute required that blacks be admitted to white programs of study only when comparable programs were unavailable at black state colleges. The law further reuired that blacks would be educated on a segregated basis when they were granted admission to programs in white schools. McLaurin, in compliance with the Oklahoma statute, was assigned isolated seats in the classrooms as well as the library and the cafeteria. McLaurin filed for injunctive relief, challenging the constitutionality of the restrictions imposed upon his attendance.

Chief Justice Vinson and his fellow justices held, unanimously, that McLaurin was entitled to the same treatment by the state as students of other races.[20] The Court declared that assigning McLaurin to special tables in the cafeteria and special seats in the classroom deprived him of his personal and present right to equal protection of the laws.

Thus, the Supreme Court clarified its position that the Fourteenth Amendment prohibits any state action which arbitrarily denies a person or group equal protection of the law, and that any attempts to segregate blacks in the manner McLaurin was segregated would not be tolerated. The rulings handed down in _Sweatt_ and _McLaurin_ set the state for the landmark decision handed down by the U. S. Supreme Court in the case of _Brown et al. v. Board of Education of Topeka, Shawnee County, Kansas et al._[21] This decision was handed down on May 17, 1954.

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[20] _McLaurin v. Oklahoma State Regents for Higher Education_, 339 U.W. 637 (1950).

[21] _Brown v. Board of Education_, 347 U.S. 483 (1954).

Brown I: "Separate But Equal Has No Place"

In actuality, Brown v. Board of Education of Topeka involved three other cases which were quite similar in nature. Class actions originating in Kansas, South Carolina, Delaware, and Virginia were consolidated and decided in the one case, Brown v. Topeka. Because of a case involving similar circumstances and the same plantiff, Brown v. Topeka has come to be known as Brown I. Brown II[22] will be considered following this summary treatment of Brown I.

Brown I arose because in each of the four separate cases (from Kansas, South Carolina, Virginia, and Delaware) black students were seeking admission to public schools on a non-segregated basis. Of the four states involved, only Kansas did not have a statute on the books which required the segregation of black and white pupils in the public schools. South Carolina, Delaware, and Virginia had statutory and constitutional restrictions which required that blacks and whites be segregated in the public schools.

Plantiffs who challenged the state laws were denied relief, except in the Delaware case. The basis on which the federal district courts denied relief was the "separate but equal" doctrine handed down by the Court in Plessy v. Ferguson. As previously stated, the "separate but equal" doctrine held that the Constitution of the United States required only equality of treatment. In Plessy, the Supreme Court had ruled that equality of treatment is attained when the races are provided substantially equal albeit separate facilities. It is important to note at this

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[22] Brown v. Board of Education, 349 U.S. 294 (1955).

point that the Delaware federal district court granted relief in the instance under consideration only because the schools which black children attended in that area were substantially inferior.

The unanimous opinion of the Court was handed down and read by Chief Justice Earl Warren. It is remarkable that one of the attorneys for Belton, the plantiff who sought relief in the Delaware Case (Gebhart v. Belton)[23] was Thurgood Marshall, the current Supreme Court Justice.

The gist of the Court's decision in Brown v. Topeka (Brown I) is simply this: There can be no discrimination against students in their admittance to the public schools on the basis of race. The Court's rationale emanated from its interpretation of the Fourteenth Amendment which guarantees that citizens receive equal protection of the laws. Segregation of children in public schools on the basis of race alone deprives minority children of equal educational opportunities. This deprivation exists under a segregated school system, ruled the Court, even though that school system may offer physical facilities and other tangible considerations which may be equal to those in other school systems. Because of this deprivation, such segregated school systems violate the equal protection clause of the Fourteenth Amendment.

Brown I: Chief Justice Warren's Opinion

Because of the sweeping impact of Brown v. Topeka (Brown I) and because of its relevance in matters involving preferential admissions and affirmative action programs, a portion of Chief Justice Warren's opinion is reproduced here:

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[23]Gebhart v. Belton, 75 S. Ct. 753 (1955).

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter (US) supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In McLaurin v. Oklahoma State Regents, 339 U.S. 637, 94 L ed 1149, 70 S Ct 851, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them 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. The effect of this separation on their educational opportunities was well stated by a finding in

the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question -- the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws.

A companion case to the _Brown I_ Case is _Bolling v. Sharpe_.[24] In _Brown I_, the Supreme Court ruled that the equal protection clause of the Fourteenth Amendment prohibits the states from maintaining racially

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[24] _Bolling v. Sharpe_, 347 U.S. 497 (1954).

segregated public schools. In Bolling v. Sharpe, the Court held that the due process clause of the Fifth Amendment prohibits racial segregation in the public schools of the District of Columbia.

Bolling v. Sharpe arose because black children in Washington, DC were refused admission to public schools attended by white children solely on the basis of race. In rendering the decision in Bolling v. Sharpe, the Court stated:

> Segregation in public education is not reasonably related to any governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.
>
> In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.[25]

Brown II: Responsibility for Desegregation Lies With School Authorities

In Brown I, the Court set forth the fundamental principle that racial discrimination in public education is unconstitutional. In Brown II, the Supreme Court held that local school authorities bear the primary responsibility for implementing the Brown I decision. It is the function of the federal judiciary, said the Court, to decide whether a school board is complying in good faith. It is, said the Court further, also the function of the federal courts to reconcile the public interest in orderly and effective transition to constitutional school systems.

The Court thus acknowledged that Brown I had failed to inspire reform in the schools to the extent desirable. The Court itself stopped

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[25] Ibid.

short of active involvement in Brown II, but stipulated its reliance on the lower courts. In Brown II, the Court asserted that the principle of equal opportunity in education could not be sacrificed merely because of public obstinance. The Court demanded that a "prompt and reasonable start" toward full compliance be made and ordered that such compliance must proceed "with all deliberate speed."

A summary of the opinion of the Court, which was delivered by Chief Justice Earl Warren is reproduced below because of the impact of this ruling on future desegregation activity.

> Mr. Chief Justice Warren delivered the opinion of the Court.
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> These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.
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> Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief. In view of the nationwide importance of the decision, we invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument.
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> These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as amici curiae, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities of Kansas and

Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

in fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider

> the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.
>
> The judgments below, execpt that in the Delaware case, are accordingly reversed _and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed_ the parties to these cases. The judgment in the Delaware case--ordering the immediate admission of the plaintiffs to schools previously attended only by white children--is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion. It is so ordered.[26] (Emphasis added.)

Backlash: School Systems Attempt to Circumvent Desegregation Orders

To comply with the decisions handed down by the Supreme Court in _Brown I_ and _Brown II_, the school board in Little Rock, Arkansas, laid out a plan for gradual desegregation of the public school system. The school board's plan included a stipulation that nine black students be admitted to a high school which had previously been all white. The state legislature, in an effort to abort the plan to admit blacks, passed laws which short-circuited the process of their admission. The Governor of Arkansas then dispatched troops to keep the nine black students from entering the high school.

The public's opposition was so violent to the integration of this school that the blacks could attend the school only at great risk to their safety. Federal troops were dispatched to protect the blacks. In the face of violence and the threat of further violence, the Little Rock

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[26] _Brown v. Board of Education_, 349 U.S. 294 (1955).

School Board sought to postpone implementation of their desegregation plan.

The Supreme Court turned a deaf ear to the Little Rock School Board's effort. In the case of Cooper v. Aaron,[27] which arose out of the Little Rock School Board's efforts to postpone the desegregation of the aforementioned high school, the Court ruled that public hostility cannot justify the implementation of school desegregation plans. The Court remarked that this held true especially when acts of public hostility are encouraged by the laws passed by the legislature and by the acts of public officials.

In Cooper v. Aaron, the Court declared that the Fourteenth Amendment, as interpreted by the Court in Brown I and Brown II, is the supreme law of the land. Further, the Court stated, Article VI of the Constitution makes this law binding on the states. The Court, in Cooper v. Aaron, made clear its position that state support of segregated school systems would not be tolerated inasmuch as such support is proscribed by the Fourteenth Amendment. Cooper v. Aaron was heard by the Supreme Court in 1958. Five years later, in the case of Goss v. Board of Education[28] the Court again ruled against state action which tended to create or maintain segregated public school systems. In the Goss case, the Court made specific reference to the Equal Protection Clause of the Fourteenth Amendment. Elsewhere, this study will address itself to an analysis of the rationale of the Court in deciding what does and what does not make provision for equal protection of various groups.

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[27] Cooper v. Aaron, 358 U.S. 1 (1958).

[28] Goss v. Board of Education, 373 U.S. 683 (1963).

The interpretation of the meaning of "Equal Protection" is of vital importance in questions of affirmative action and preferential admissions.

Goss: "Racial Classifications Violate the Equal Protection Clause"

In the Goss Case, the Board of Education of Knoxville, Tennessee sought to effect desegregation plans which provided for rezoning of school districts. In essence, the Knoxville plan permitted a student who had been reassigned to a school to transfer back to his former school, where his race would be in the majority. The effect of this provision was clearly seen as moving the students in only one direction, back across racial neutral zones and back into segregated schools. The Court asserted in Goss that no transfer plan based on racial factors can be valid. Since it offers some insight into the Court's interpretation of the Equal Protection Clause, and since this interpretation is crucial in matters of preferential admissions, a portion of the Court's decision is quoted below. Justice Tom C. Clark delivered the opinion of the Court in Goss, a decision which was unanimous. In part, the opinion of the Court declared:

> This provision is attached as providing racial factors as valid conditions to support transfers which by design and operation would perpetuate racial segregation. It is also said that no showing is made that the transfer provisions are actually essential to the effectuation of desegregation in that other procedures are available.
>
> It is readily apparent that the transfer system proposed lends itself to perpetuation of segregation. Indeed, the provisions can work only toward that end. While transfers are available to those who choose to attend school where their race is in the majority, there is no provision whereby a student might transfer upon request to a school in which his race is in a minority, unless he qualifies for a "good cause" transfer. As the Superintendent of Davidson County's schools agreed, the effect of the racial transfer plan was "to permit a child (or his parents) to choose segregation outside of

his zone but not to choose integration outside of his zone." Here the right of transfer, which operates solely on the basis of a racial classification, is a one-way ticket leading to but one destination, i.e., the majority race of the transferee and continued segregation. This Court has decided that state-imposed separation in public schools is inherently unequal and results in discrimination in violation of the Fourteenth Amendment. Brown v. Board of Education, 347 US 483, 98 L ed 873, 74 S Ct 686, 38 ALR2d 1180 (1954). Our task then is to decide whether these transfer provisions are likewise unconstitutional. In doing so, we note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another.

Classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment. As the Court said in Steele v. Louisville & N. R. Co. 323 US 192, 203, 89 L ed 173, 184, 65 S Ct 226 (1944), racial classifications are "obviously irrelevant and invidious." The cases of this Court reflect a variety of instances in which racial classifications have been held to be invalid, e.g., public parks and playgrounds, Watson v. Memphis, 373 US 526, 10 L ed 2d 529, 83 S Ct 1314 (1963); trespass convictions, where local segregation ordinances pre-empt private choice, Peterson v. Greenville, 373 US 244, 10 L ed 2d 323, 83 S Ct 1119 (1963); seating in courtrooms, Johnson v. Virginia, 373 US 61, 10 L ed 2d 195, 83 S Ct 1053 (1963); restaurants in public buildings, Burton v. Wilmington Parking Authority, 365 US 715, 6 L ed 2d 45, 81 S Ct 856 (1961); bus terminals, Boynton v. Virginia, 364 US 454, 5 L ed 2d 206, 81 S Ct 182 (1960); public schools, Brown v. Board of Education, 347 US 483, 98 L ed 873, 74 S Ct 686, 38 ALR 2d 1180, supra; railroad dining car facilities, Henderson v. United States, 339 US 816, 94 L ed 1302, 70 S Ct 843 (1950); state enforcement of restrictive covenants based on race, Shelley v. Kraemer, 334 US 1, 92 L ed 1161, 68 S Ct 836, 3 ALR 2d 441 (1948); labor unions acting as statutory representatives of a craft, Steel v. Louisville & N. R. Co. 323 US 192, 89 L ed 173, 65 S Ct 226, supra; voting, Smith v. Allwright, 321 US 649, 88 L ed 987, 64 S Ct 757, 151 ALR 1110 (1944); and juries, Strauder v. West Virginia, 100 US 303, 25 L ed 664 (1879). The recognition of race as an absolute criterion for granting transfers which operate only in the direction of schools in which the transferee's race is in the majority is no less unconstitutional than its use for original admission or subsequent assignment to public schools. Be Boson v. Rippy, 285 F2d 43

(CA5th Cir).

> The alleged equality -- which we view as only superficial -- of enabling each race to transfer from a desegregated to a segregated school does not save the plans. Like arguments were made without success in Brown, 347 US 483, 93 L ed 873, 74 S Ct 686, 38 ALR2d 1180, supra, in support of the separate but equal educational program. Not only is race the factor upon which the transfer plans operate, but also the plans lack a provision whereby a student might with equal facility transfer from a segregated to a desegregated school. The obvious one-way operation of these two factors in combination underscores the purely racial character and purpose of the transfer provisions. We hold that the transfer plans promote discrimination and are therefore invalid.
>
> This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein. _But no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment_. (Emphasis added.)

In yet another case based principally on an interpretation of the Equal Protection Clause of the Fourteenth Amendment, the Court ruled that a school board could not constitutionally close county-operated public schools while giving financial aid to white private schools. This case, _Griffin v. County School Board_,[29] developed because of certain activity in Prince Edward County, Virginia. In that county, the school board, faced with a court order to desegregate, refused to appropriate funds to operate the public schools. In spite of this refusal to release funds to support the public schools however, the County granted tax credits to some citizens who made contributions to private white schools.

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[29] _Griffin v. County School Board_, 377 U.S. 218 (1964).

When the federal court ordered the reopening of the public schools, the school board challenged the validity of the court order. The Supreme Court ruled that the local federal court was justified in ordering that the schools be reopened, remarking that the action of the Prince Edward County School Board was tantamount to failure to provide equal educational opportunity to black students.

Two other cases, Bradley v. School Board of Richmond[30] and Rogers v. Paul,[31] are deserving of at least passing comment. Both cases were related to desegregation plans proposed by school systems.

In Bradley, desegregation plans for two school systems were approved by a local district court. These plans made no provision for assignment of school teachers on a nonracial basis. The Court ruled, in Bradley, that the assignment of faculty on a nonracial basis must be considered in a desegregation plan.

So-called "grade-a-year" plans were challenged in the Case of Rogers v. Paul. Under a grade-a-year plan, a particular grade is selected and integration begins with that grade. For example, a school system might elect to begin integrating in the tenth grade. Under such a system, some students will continue attending segregated schools. This was the case in Fort Smith, Arkansas, the city which gave birth to Rogers v. Paul. Additionally it was clear that blacks in Fort Smith attended a high school which did not offer as wide a range of courses as was offered to white students in other schools in the area. At issue in Rogers v. Paul, there

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[30]Bradley v. School Board of City of Richmond, 382 U.S. 103 (1965).

[31]Rogers v. Paul, 382 U.S. 198 (1965).

was also the question of the allocation of faculty on a racial basis. In Rogers v. Paul, the Court vacated the judgment of the Court of Appeals and remanded the case to the District Court for the Western District of Arkansas.

The net effect of the Court's action was to order that black students who could not avail themselves of equal course offerings under grade-a-year plans be admitted to a white school which offered a superior curriculum. Further, the Court declared that racial allocation of teachers is unconstitutional inasmuch as such allocation denies students an equal educational opportunity.

The "Freedom of Choice" Issue

The issue of "freedom of choice" was attacked head on in the Case of Green v. County School Board.[32] In 1965, the School Board of New Kent County, Virginia adopted a freedom of choice plan in order to retain its eligibility for financial aid from the federal government. The plan permitted students, except those students entering the first and eighth grades to make a choice each year as to which school they wished to attend.

The New Kent County school system served around 1,300 students. The student population was roughly fifty per cent white and fifty per cent black. Within Kent County, there was no residential segregation. Members of both races were disbursed throughout the school system. There were only two schools in the county, one for whites and one for blacks, and a fleet of twenty-one buses transported students to segregated classes. It was not uncommon for bus routes to overlap.

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[32] Green v. County School Board, 391 U.S. 430 (1968).

After three years of operation under the freedom of choice plan, there had been no student of the white race who had elected to attend the all-black school. Eighty-five per cent of the black students in the system still attended the all-black school.

Justice William J. Brennan, Jr. delivered the unanimous opinion of the Court in Green. The Court's opinion noted that the freedom of choice plan in New Kent County had a long history of failure, and remarked that there seemed to be little promise that the plan would achieve the required nonsegregated school system. The Court therefore remanded Green v. County Board to the District Court "for further proceedings consistent with this opinion." While falling short of declaring freedom of choice plans unconstitutional, the Court made it clear that a plan which proves ineffective must be discontinued, and that it must be replaced by an effective plan. Such a substitution, said the Court, must be quick in coming in order that the requirement of equal protection under law for black students may be complied with.

From the mid-sixties until the end of the decade, federal district courts pushed the efforts to desegregate the schools. Dilatory tactics and patterns of token integration typified the results in many parts of the nation.

In the Case of United States v. Montgomery County Board of Education,[33] the Court chastised the school board of Montgomery County, Alabama for its failure to act in bringing about desegregation. Justice Hugo L. Black, in delivering the unanimous opinion of the Court, said:

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[33]United States v. Montgomery County Board of Education, 395 U.S. 225 (1969).

> The record shows that neither Montgomery County nor any other area in Alabama voluntarily took any effective steps to integrate the public Schools for about ten years after our Brown I decision. In fact, the record makes clear that the state government and its school officials attempted in every way possible to continue the dual system of racially segregated schools in defiance of our repeated unanimous holdings that such a system violated the United States Constitution.

The Question of Majority-Minority Ratios

The 1968 Court order which resulted in *U.S. v. Montgomery County Board of Education* becoming a Supreme Court case dealt with several issues. One of the issues in the case was the requirement that the Montgomery County School Board integrate certain grades and prepare reports based on yearly proceedings by the Board. Another issue centered around the 1968 court order to take steps in the direction of integrating facilities and staffs. The order provided that the board should move toward a goal whereby "in each school the *ratio* of white to Negro faculty members is substantially the same as it is throughout the system." The case came to the Supreme Court from the Court of District Judge Johnson, whose name became famous because of his involvement with Alə a a desegregation cases. Johnson's Court had ordered the nonracial allocation of faculty and had also directed the school board to comply with definite mathematical ratios. The school board challenged the reliance on mathematical ratios.

Alluding to Judge Johnson's record of patience and fairness and lamenting the school board's lagging pattern of compliance, the Court accepted the need for specific goals. In yet another unanimous decision, the Court ruled that numerical ratios are proper guidelines for desegregation.

On October 29, 1969, the Court handed down still another unanimous decision which attacked the efforts of officials to delay the integration process. In Alexander v. Holmes County Board of Education,[34] a case originating in Mississippi, the Court declared that continued operation of racially segregated schools under the previous standard of "all deliberate speed" was no longer constitutionally permissible. The Fifth Circuit Court of Appeals had granted a motion for delaying implementation of an earlier order mandating desegregation in several Mississippi school districts which educated thousands of children. Alexander v. Holmes County Board of Education was remanded to the lower court with the instruction that the court "issue its decree and order, effective immediately, declaring that each of the school districts here involved may no longer operate a dual school system, and directing that they begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color."

In Green v. County School Board, supra, the Supreme Court first adopted the percentage of black-white students attending a school as a primary criterion for deciding upon the effectiveness of a desegregation plan. Of course, the Court sought to provide guidelines which would reduce litigation in Green. In actuality, the Green decision increased the number of segregation-related cases heard by the courts. School systems looked for and found loopholes left open by the Green decision. The loopholes existed because of the Court's failure to provide a working outline of what an acceptable desegregation plan would entail.

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[34]Alexander v. Holmes County Board of Education, 369 U.S. 19 (1969).

Neither did the Court specify what a "unitary school system" was. The ambivalence which radiated from these two points generated considerable confusion and gave rise to many subsequent court cases.

Busing: Dilemma Within a Dilemma

For many years, the issue of busing has held center stage in desegregation activity. Some of the complex problems relevant to desegregation plans were directly addressed by the U.S. Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education.[35] Federal District Court Judge James McMillan of Charlotte, North Carolina had handed down a decision which supported a program of racial balancing which required busing school children in Charlotte and Mecklenburg County. The Supreme Court of the United States granted certiorari in Swann on June 29, 1970. School districts everywhere in the country awaited the Swann decision anxiously. The federal courts operated without definite guidelines as to the extent to which busing could be employed while the Court weighed the evidence in Swann. In Swann, the Court considered for the first time the nature of corrective steps which district courts might take in ordering a school system to cease operating as a segregated system.

The Court, in a unanimous opinion, upheld several remedies included in Judge McMillan's order, specifically upholding the transporting which he had ordered. Some guidelines for corrective action were finally laid down in Swann. The principle established was that when school aurhorities do not find and use effective methods to eliminate state-imposed segregation, then the district courts have broad power in devising remedies

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[35] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

that insure prompt transition to a unitary school system. Four courses of action were open to district courts because of the Supreme Court's decision in Swann. The Court said in Swann that:

> (1) The courts may alter school attendance zones. They may require busing to schools which are not nearest the student's home in order to achieve desegregation. Objections to busing will be sustained by the courts only when the travel time is excessive.
>
> (2) District courts may forbid patterns of school construction and abondment which operate to reestablish or perpetuate a dual system.
>
> (3) When racial quotas are not used as inflexible requirements but as a starting point to shape a desegregation plan, then the courts may impose racial quotas upon a school system.
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> (4) District courts may constitutionally order that teachers be assigned to achieve a certain degree of faculty desegregation.

The Language Barrier: Guey Hung Lee v. Johnson

With notable exception of Gong Lum v. Rice, major desegregation suits in the fifties, sixties and seventies involved blacks. In 1971, the Supreme Court heard the Case of Guey Hung Lee v. Johnson, a case which involved Chinese students in San Francisco. In 1947, a California Education Code provision which established separate schools for students of Chinese ancestry was repealed. Nonwithstanding the appeal, the board of education persisted in drawing lines which tended to perpetuate the existence of Chinese majority schools. In Guey Hung Lee v. Johnson,[36] parents of children of Chinese ancestry were trying to stay implementation of a court-approved desegregation plan. The plan involved the reassignment

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[36] Guey Hung Lee v. Johnson, 404 U.S. 1215 (1971.

of Chinese-American pupils to elementary schools. Justice William O. Douglas, rendering a one-judge opinion in chambers, ruled that when a program of desegregation had been fostered by state law and state action, it was mandatory to take prompt steps to desegregate. Only the most unusual circumstances would permit delay, wrote Justice Douglas, adding his opinion that no such unusual circumstances prevailed in the Case of *Guey Hung Lee v. Johnson*. In so ruling, Justice Douglas remarked:

> *Brown v. Board of Education was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment*, one of the first beneficiaries of which were the Chinese people of San Francisco. See *Yick Wo v. Hopkins*, 118 U.S. 356. The theme of our school desegregation cases extends to all racial minorities treated invidiously by a state or any of its agencies. (Emphasis added)

Desegregation by Redistricting

Two years after Guey Hung Lee v. Johnson, the Supreme Court ruled in a landmark case which involved Hispanics as well as black pupils. *Keyes v. School District No. 1, Denver, Colorado*,[37] developed after a Denver, Colorado school board adopted a voluntary plan for the desegregation of the predominantly black Park Hill section of the city in 1969. Many of Denver's public schools were in fact segregated, although the school system had never operated under any statute or constitutional provision which required or permitted segregation. Following the development of the voluntary desegregation plan, a school board election was held. As a result of the election, a majority of the members of the new board opposed the plan for voluntary desegregation. A court order was

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[37] *Keyes v. School District No. 1*, 413 U.S. 921 (1973).

obtained which mandated the desegregation of the Park Hill section, an order which stated previous segregation in the area had been caused by the policies of prior school boards. In *Keyes*, proponents of integration sought out desegregation orders for the remaining schools in the district. These proponents of integration also asked that Hispanics be counted along with blacks for purposes of defining segregated schools. It was their reasoning that this act of combining blacks and Hispanics was just because Hispanics, like blacks, suffered the penalties imposed by educational inequities.

In *Keyes*, the Court ruled, in a split decision, that a local court may order a district-wide remedy for segregation when a substantial portion of a district is shown to be segregated. The Court also agreed with the faction which held that Hispanics and blacks should have been counted together in defining a segregated school. *Keyes* stands out as a significant case for yet another reason. In *Keyes*, the Court required the desegregation plan in Denver to reflect the bilingual and bicultural needs of Hispano-Americans.

The *Swann* and *Keyes* cases mark the onset of a new area insofar as resistance to court-ordered desegregation through busing is concerned. In recent years both Congress and the Executive branch of the government have resisted court-ordered busing. These two cases offer good illustrations of the two basic types of segregation with which the courts must cope. *Swann* is illustrative of *de jure* segregation; segregation had actually been legislated in North Carolina. *Keyes*, by contrast, involved *de facto* segregation; although segregation had never been mandated by law in Denver, it did exist in fact.

In Keyes, the Court handed down a ruling which sought to eliminate segregation by means of crossing school districts when pupil assignments were made. This involved, of course, an increase in court-ordered transportation of students. In contrast to the Keyes decision, when the Court heard Milliken v. Bradley (in 1974),[38] the Court agreed that the Detroit school board had contributed to the perpetuation of segregation. Yet the Court failed to make a recommendation which required inter-district participation. The Court commented that it would not make a recommendation of inter-district particiation since there was insufficient evidence that inter-district violation of desegregation efforts had indeed occurred. In sum, the Court ruled in Milliken v. Bradley, 418 U.S. 717, (the 1974 case which is known as Milliken I) that court-ordered school desegregation plans cannot cross school district lines to include a district. This prohibition against crossing district lines may not apply when it can be shown that districts have failed to operate unitary school systems or have committed acts which fostered segregation in other school districts.

The previous cases have dealt almost exclusively with desegregation in the public school systems. A basic understanding of the issues underlying the Bakke and Weber cases requires a summary analysis of three other cases which have little direct bearing on pupil problems. These three cases are Griggs v. Duke Power, Lau v. Nichols, and Washington v. Davis.

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[38] Milliken v. Bradley, 418 U.S. 717 (1974) (Milliken I).

Employment Testing and Language Classes: Unresolved Issues

Griggs v. Duke Power Company[39] grew out of Duke Power Company's employment practices. In 1955, the Duke Power Company began to require that employees have a high school diploma unless they would settle for assignment to only the lowest paid jobs. These jobs were invariably in departments that had been traditionally black. It was virtually impossible to transfer from or be promoted from one of the traditionally black departments unless the worker had a high school diploma.

Beginning in 1965, Duke Power required that anyone who would be transferred to higher paying departments (which were traditionally white) make satisfactory scores on professionally-prepared general aptitude tests. It was shown that whites who lacked high school diplomas and who failed the aptitude tests had been working adequately in higher-paying departments for years. The requirements of passing the aptitude tests and having a high school diploma tended to make a disproportionate number of blacks ineligible for promotion or transfer from the low-paying departments. Black employees of Duke Power Company challenged these diploma and testing requirements in Griggs v. Duke Power.

The Supreme Court ruled in Griggs that neither diploma nor degree requirements, nor generalized aptitude tests may be used to disqualify a disproportionate number of minority group members, in the general case. Griggs places a burden on the employer to demonstrate a direct correlation between the skills being tested for and adequate performance on the job. In Griggs, the Court ruled that Duke Power's job and transfer requirements

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[39] Griggs v. Duke Power Company, 401 U.S. 424; 28 L. Ed. 2d 158; 91 St. Ct. 849 (1971).

were not directly indicative of the employee or applicant's ability to perform adequately on the job. The Court's ruling in Griggs was based on the language of Title VII, Section 703 (h) of the Civil Rights Act of 1964. Title VII, Section 703 (h) of the Civil Rights Act of 1964 forbids employers to use tests and diploma requirements as a means to disqualify disproportionate numbers of minority group members except when the tests are shown to be directly indicative of the ability to perform adequately on the job.

Washington v. Davis,[40] like Griggs, is an employment-related case. The Washington v. Davis case grew out of the procedure used by Washington, D. C. officials in selecting recruits for the police academy. The selection process involved the use of "Test 21," a test which was generally used also to test verbal ability in applicants for federal civil service jobs.

Test 21 could be shown to be a valid test, inasmuch as a passing score on the test correlated with successful completion of the police academy's course of study. Although the test correlated with completion of the course of study, a correlation with performance on the job was not shown.

There was no apparent or deliberate effort to engage in discriminatory action in administering or evaluating the test. However, four times

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[40] Washington v. Davis, 426 U.S. 229 (1976).

as many blacks as whites had failed the test. Black applicants challenged the test on the basis that its impact was racially disproportionate and that the test was, therefore, unconstitutional.

The Court's decision in Washington v. Davis was split 4/3/2; that is, four justices were in the majority, three concurred, and two dissented. Test 21 was ruled to be a constitutional device for selecting applicants for the policy academy in the nation's capital. The Court noted that Test 21 was (1) racially neutral on its face, (2) administered without racially discriminatory action or intent, and (3) reasonably related to a legitimate state purpose. The legitimate state purpose was that of insuring a minimum level of verbal ability in police recruits.

Lau v. Nichols[41] involves the obligation of a school district to provide special instruction for non-English-speaking students. State statute in California imposed the teaching of English as a major goal in public education. In San Francisco, the school system failed to offer any special compensatory program to about 1,800 Chinese-speaking students. Chinese students claimed the school system to be in violation of the Equal Protection Clause of the Fourteenth Amendment and also to be in violation of Section 601 of the Civil Rights Act of 1964. Section 601 prohibits recipients of federal aid from discriminating against students on the basis of race, color, or national origin. Under Section 602 of the Civil Rights Act of 1964, the Department of Health, Education, and Welfare has the authority to promulgate regulations which further Section 601. HEW guidelines say that "where inability to speak and

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[41] Lau v. Nichols, 414 U.S. 563 (1974).

understand the English language excludes national-origin minority children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

In Lau v. Nichols, the Court ruled that those districts which receive federal aid are obligated to provide instruction of a special nature for some non-English-speaking students. The special instruction must be provided for those students whose education is severely hampered by language barriers when there is a substantial number of non-English-speaking students within the school district.

In ruling that the district in San Francisco was obligated to provide special instruction to Chinese-speaking students, the Court declared that failure to do so was violative of Section 601 of the HEW regulations. It is interesting to note that the Court did not decide whether the San Francisco school district had violated the Equal Protection Clause of the Fourteenth Amendment in ruling in the Case of Lau v. Nichols. The importance of the Court's interpretation of the Equal Protection Clause can scarcely be overstated in matters which involve affirmative action and preferential admissions. The next section of this study is, therefore, given over to a discussion of the federal judiciary and its application of the Equal Protection Clause of the Fourteenth Amendment.

The Meaning of the Equal Protection Clause

Much debate concerning programs of preferential admissions (and affirmative action programs of any kind) centers around an interpretation

of the Equal Protection Clause of the Fourteenth Amendment. It is often said that the Constitution is just what the Supreme Court says it is. When we trace the history of the Supreme Court's interpretation of the Equal Protection Clause, we find that the Court has consistently upheld reasonable racial discriminations. Where regulatory discriminations have been regarded by the Court as supportive of the intent and purpose of the Fourteenth Amendment, and where the Court has regarded such discriminations as enhancing the general welfare, then the Court has ruled the discriminations to be constitutional.

Notwithstanding the Thirteenth, Fourteenth, and Fifteenth Amendments, discrimination against women and minority groups prevailed long after the Civil War. Obviously the amendments did not wipe out discrimination overnight, nor even in a century; yet a pattern of some toleration of discrimination in the interest of the general good emerges when one examines the overview of Supreme Court decisions which bear directly on the Equal Protection Clause.

In 1872, the Court handed down its decision in the _Slaughter House Cases_,[42] the first cases which interpreted the Equal Protection Clause. In the _Slaughter House Cases_, the Court stated:

> The existence of laws in the States where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this Clause, and by it such laws are forbidden.

It is apparent that the Court was explicit in establishing the purpose of the Fourteenth Amendment; its purpose was to serve the general

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[42] _Slaughter House Cases_, 83 U.S. (16 Wall.) 36 (1872).

good by remedying the historical evil of discrimination.

In the year 1885, the Court recognized the police power of states to prescribe regulations which would "promote health, peace, morals, education and good order of the people and to legislate resources and add to its wealth and prosperity." Thus the Court began applying the Equal Protection Clause to the already burgeoning number of economic regulations being imposed on various segments of the economy. This application of the Equal Protection Clause to economic regulation was manifested in the Case of Barbier v. Connoly,[43] a case in which the Court stated that:

> From the very necessities of society, legislation of a special character having these objects in view, must often be had in certain districts . . . Special burdens are often necessary for . . . general benefits. Regulations for these purposes may press with more weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little inconvenience as possible, the general good.

Under the above interpretation of the Equal Protection Clause, the Courts have permitted discriminatory regulations which have imposed unequal burdens on various segments of the economy. Such discriminatory regulations have been allowed whenever they are deemed to be reasonable and when their net effect has been to promote the general good. A statutory discrimination will be held Constitutional whenever the Court perceives a rational basis for the discrimination. The Case of New Orleans v. Dukes[44] offers a vivid illustration of this fact.

In New Orleans v. Dukes, the Court ruled that opticians may be restricted from selling eyeglasses without a prescription, while sellers

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[43]Barbier v. Connoly, 113 U.S. 27, 31 (1885).

[44]New Orleans v. Dukes, 42 U.S. 297 (1976).

of ready-to-wear eyeglasses are exempted from this restriction. One may conclude that the reason for exempting the ready-to-wear eyeglass merchant is that his glasses merely magnify. On the other hand, the optician may be involved in a more complex effort to correct problems of a nature which could require the supervision of a medical expert. In any case, if a reasonable purpose, one which promotes the general good, can be ascribed to a discriminatory restriction, then that restriction will be upheld as constitutional.

It is important to note in considering the implications of the Equal Protection Clause that the party objecting to a regulation bears the burden of proving that a classification is arbitrary; that is, the classification does not rest on any reasonable basis. This principle was established in _Lindsley v. Natural Carbonic Gas Company_.[45]

In cases involving racial classification, it is also true that the burden of proving a regulation to be arbitrary lies on the party who raises the objection to the regulation. The Court held that a statute which made it a crime for blacks and whites to intermarry was unconstitutional in the Case of _Loving v. Virginia_.[46] This statute was declared unconstitutional under the Equal Protection Clause. The Court stated that a reasonable mind "cannot conceive of a valid legislative purpose. . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense."

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[45] _Lindsley v. Natural Carbonic Gas Company_, 220 U.S. 61, 78-79, (1911).

[46] _Loving v. Virginia_, 388 U.S. 1 (1966).

The Supreme Court developed "a most rigid scrutiny" test to determine whether or not racial classifications are permissible after the question of internment of Japenese-American citizens emerged during World War II. In the Case of Hirabayashi v. United States,[47] the Court was dealing with distinctions "odious to a free people whose institutions are founded upon the doctrine of equality." These distinctions were made on the sole basis of racial ancestry. A related Case, Korematsu v. United States,[48] involved similar circumstances and a similar outcome.

The Court required a stricter standard in cases where the purposes of the Equal Protection Clause appeared to be subverted. After subjecting the law to the "most rigid scrutiny," the Court decided that the law was necessary for our "national security and therefore, was constitutional." This ruling has been criticized since the end of World War II.

Judge Wisdom in United States v. Jefferson County Board of Education stated:[49]

> The Constitution is both color blind and color conscious. To avoid conflict with the Equal Protection Clause, a clasification that denies a benefit, causes harm, or imposes a burden must not be based on race. But the Constitution is color conscious to prevent discrimination being perpetrated and to undo the effects of past discrimination. The criteria is the relevancy of color to a legitimate governmental purpose.

Remedial racial classification is acceptable. If racial classification does not amend past discrimination, it necessitates the application of

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[47] Hirabayashi v. United States, 320 U.S. 81 (1943).

[48] Korematsu v. United States, 323 U.S. 214 (1944).

[49] United States v. Jefferson County Board of Education, 327 F. 2d 836, 876 (1966).

the strict scrutiny test.

In Norwalk CORE v. Norwalk Redevelopment Agency, the Court stated:[50]

> (Classification by race) is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purposes of maintaining a racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.

The Federal Appellate Courts have approved affirmative action goals in a variety of cases. Reversal of historical racial discrimination has been promoted through the hiring and promotion of minorities and women in Carter v. Gallagher,[51] Associated General Contractors v. Altschuler;[52] NAACP v. Allen,[53] and United States v. Masonry Contractors Association.[54] Racial classification has also been permitted for school integration purposes. The Supreme Court upheld a 1969 district court order requiring that two teachers out of twelve within a given school district must be Negro. This ruling was handed down in the Case of United States v. Montgomery County Board of Education.[55]

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[50] Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920, 931-32 (1968).

[51] Carter v. Gallagher, 452 F. 2d 315 (1972).

[52] Associated Gen. Contractors v. Altschuler, 490 F. 2d 9 (1973).

[53] NAACP v. Allen, 493 F. 2d 61A (1974).

[54] United States v. Masonary Contractors Assn., 497 F. 2d 876 (1974).

[55] United States v. Montgomery County Board of Education, 395 U.S. 255 (1969).

In the 1971 case of Swann v. Charlotte-Mecklenburg Board of Education,[56] the Supreme Court said that:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion of the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

The Supreme Court has shown that it will sometimes sustain the use of quotas or classification by race in order to achieve school integration. The presence of historical racial discrimination, or the absence thereof, has become a very important factor in rulings handed down by the federal judiciary. In the Case of Moe v. Confederated Selish and Kloteni Tribes,[57] the Court upheld a special tax immunity for Indians as a preferential treatment based on special historical relationships. In a related case, Morton v. Mancari,[58] the Court upheld discrimination based on special historical relationships. In Moe v. Confederated Selish and Kloteni Tribes, the Court ruled that such discrimination was not "invidious" and was therefore permissible under the Equal Protection Clause of the United State Constitution.

In very recent years, the United States Supreme Court has emphasized the requirement that discriminatory intent must be proven before a violation of the Equal Protection Clause of the United States Constitution

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[56]Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[57]Moe v. Confederated Selish & Kloteni Tribes, 96 Sup. Ct. (1976).

[58]Morton v. Mancari, 417 U.S. 535 (1974).

will be adjudicated. The importance of this requirement is graphically illustrated in the Case of Washington v. Davis.[59] The Court ruled on the practice of redistricting on racial percentages in the Case of Gaffney v. Cummings,[60] declaring that:

> (Courts) have no constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes not to minimize or eliminate the political strength of any group or party but to recognize it and, through redistricting, provide a rough sort of proportional representation in the legislative halls of the state.

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[59] Washington v. Davis, 426 U.S. 229 (1976).

[60] Gaffney v. Cummings, 413 U.S. 735, 754 (1973).

CHAPTER III

A FRAMEWORK FOR ANALYZING THE LEGAL ASPECTS OF AFFIRMATIVE ACTION ADMISSIONS PROGRAMS IN HIGHER EDUCATION INSTITUTIONS

Probably very few people would attempt to construct a rational denial that Americans who are members of certain groups have received inequitable treatment during most of this country's history. Very few now openly question the desirability of affording an equal opportunity to members of minority groups and women in this enlightened age. Practically every American will agree that it is only just that these disadvantaged Americans be afforded the opportunity to catch up with other Americans and share in the fruits of our abundance. As a philosophical principle, the great majority supports "affirmative action" as the method whereby those who have suffered previous discrimination may now be drawn into the mainstream of America's socioeconomic activity. Of course, no American wants "reverse discrimination" to occur; that is, after all, just another form of the evil which we have fought so diligently for at least three or four decades.

Reverse discrimination is affirmative action which is practiced in violation of some statute or in violation of the Constitution of the United States. It is unfortunate, however, that a review of the court opinions yields no definite guidelines as to what affirmative action is or should be.

The purpose of this chapter is to clarify the meaning of the term "affirmative action" to the extent that such clarification is possible.

Conflicts involving affirmative action (and Bakke, De Funis, and many other cases grew from such conflict) arise from two sources. The first source relates to case law, and in the area of education, that case law relates directly to racially segregated public schools. The second source of conflict arises from legislation which is aimed at preventing discrimination in employment. The Civil Rights Act of 1964 marks the beginning of a new era in legislation which focuses primarily on employment discrimination.

Chapter II of this dissertation reiterates and summarizes case law as related to desegregation in the public schools. Following the decision of the Court in Brown I, a large number of failures to desegregate school systems were recorded. The Green case dealt with so called freedom of choice plans, and offers but one of many examples of a case in which the Supreme Court ruled that a school system fell short of the mark in effecting a workable plan of desegregation.[1] In Green, the Court declared that school officials must bear the responsibility for initating action to dismantle school systems which were racially dual. The Court directed, in the Green case that:

> School officials are clearly charged with the affirmative duty TO TAKE WHATEVER STEPS MIGHT BE NECESSARY to convert a unitary system. (Emphasis added.)

There has been no doubt that the federal judiciary requires that affirmative action be taken in discharging affirmative duty imposed on school officials by the Green decision. Federal courts, and particularly the Supreme Court, have shown a consistent reluctance throughout

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[1]Green v. County School Board, 391 U. S. 431 (1968).

our history to become involved in the administrative affairs of schools and corporations as well. The Court has gone further than is its usual custom toward assuming an administrative role where school desegregation cases have been involved. Lower courts have also been more administratively involved in desegregation cases than in other types of litigation. The courts have assumed an obligation to establish standards for evaluating school officials' efforts to desegregate. The standard, established in the Green Case, has been the degree to which desegregation did in fact occur.

The precedents which were laid down in the school desegregation cases were standing freshly at hand when Congress enacted the nondiscrimination acts of the 1960's. It was logical that administrative agencies charged with enforcing the nondiscrimination acts would adopt the standards of evaluation employed in the desegregation cases.

Insofar as evaluating the validity of a charge of discrimination, the approach of the administrative agencies has been to classify the people involved by race, analyze their situations and ascribe number to race and situation. A disparity of figures could be regarded as prima facie evidence of discrimination.[2] Disparity of numbers has been used as the criterion for taking action, and the criterion for evaluating the action has been the numerical result achieved. It has been a common practice for the administrative agencies to establish numerical goals which would enable the institution involved to know when it had met the agency's standards. This approach appears logical on the surface. The

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[2] State of Alabama v. U.S., 304 F. 2d 583 (1962).

weakness inherent in employing numerical goals is that such goals are difficult to distinguish from quotas. Quotas have consistently been declared to be themselves discriminatory, and therefore not permissible.

The courts have lately been exerting a great effort to establish a clear distinction between goals and quotas. The courts agree that if a numerical target serves only as an objective, it is clearly nondiscriminatory. Goals which serve only as objectives constitute an appropriate form of affirmative action. Whenever the target numbers are functioning in a legal manner, the target numbers may not be used to establish automatic proof of discrimination; that is, failure to hit the target does not, _per se_, become proof of discrimination. When the numerical goal becomes a _required_ objective, however, that goal becomes a quota. Quotas are, of course, objectionable because they may be attained only by excluding some in order to select or except others. Reduced to simplest terms, a quota functions within a system of preferential selection. Such a system is a system which practices reverse discrimination.

Preferential Admissions Programs

De Funis v. Odegaard[3] is probably the most famous case involving so called reverse discrimination except for the _Bakke_ case. In his case against the law school of the University of Washington, Marco De Funis charged that the law school had adopted an admissions policy which selected nonwhite applicants who scored lower than white applicants on the law school admission test. The University of Washington did not challenge this allegation, and readily admitted that it did indeed employ a racial classification for admission purposes. However, the Washington

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[3] _De Funis v. Odegaard_, 416 U.S. 312 (1974).

Law School defended it as a means of compensating for previous racial inequities. The law contended that racial classification for admission purposes was not unconstitutional, but was, in fact, representative of the kind of affirmative action which the Supreme Court required. There was considerable evidence in support of such a contention at the time the De Funis Case arose. In the Case of Norwalk Core v. Norwalk Redevelopment Agency,[4] for example, the Second Circuit Court said:

> What we have said may require classification by race. That is something which the Constitution usually forbids. Not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality, it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required. (Emphasis added.)

How the Court might have applied its wisdom to the De Funis Case will never be fully known. Although the Court did accept the De Funis Case and did hear it argued, the Court, in a 5-4 decision, ruled that the case was moot. In a dissenting opinion, however, Justice William O. Douglas declared that any system based on racial classification must be subjected to close scrutiny under the Equal Protection Clause. Justice Douglas voiced the fears of those who oppose racial classifications in his dissenting opinion in the De Funis Case. In response to the argument that there could be a compelling state interest in selecting candidates for law school by racial classification, Justice Douglas wrote:

> To many "compelling" would give members of one race even more than pro rata representation. The public payrolls might then be deluged say with Chicanos because they are, as a group, the

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[4] Norwalk Core v. Norwalk Redevelopment Agency, 395 F. 2d 920, 921-32 (2d Cir. 1968).

> poorest of the poor and need work more than others, leaving desperately poor individual blacks and whites without employment. By the same token large quotas of blacks and browns would be added to the Bar, waiving examinations required of other groups, so that it would be better racially balanced. The State, however, may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the examination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized.[5]

However, Justice Douglas believed that the courts would look favorably upon criteria that measure the achievement of an individual who struggled under the weight of past disadvantages. If an applicant had pulled himself up by his own bootstraps, this fact could be given consideration in making the admission decision. Justice Douglas wrote in commenting on this consideration:

> A black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perserverance and ability that would lead a fair-minded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would not be offered admission because he is black, but because . . . he has the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered him.[6]

In a dramatic footnote-to-history piece of journalism, Time Magazine reported in commenting on the Bakke decision that it has learned that the Court had reached a majority ruling in favor of Marco De Funis, the white applicant who alleged that his failure to gain admission to the University of Washington Law School was caused by reverse

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[5] De Funis, 416 U.S. at 312, 342-343.

[6] Ibid.

discrimination.[7] The Court ducked that issue in 1974 by declaring the case moot because De Funis had already been admitted to the University of Washington Law School. De Funis was, in fact already registered for his final quarter in law school at the time the decision in De Funis' case was handed down.

De Funis filed suit for himself alone. The case was not brought as a suit for a class of applicants to the law school. In his suit, De Funis asked that the school's admissions policies be declared to be racially discriminatory. He further asked that he be admitted to the school. De Funis was indeed admitted by court order to the law school, and completed all but his final quarter while the appeal of his case was still pending.

A fact of importance in the *De Funis* case is that the Constitution of the United States requires that the courts are obligated to decide all controversies which are actively involved in live issues. This duty is imposed on the courts by Article III of the Constitution. In ruling on the *De Funis* case, the Supreme Court stated that an actual controversy must exist at the time of review as well as the time the legal action begins.

The rationale followed by the Court in *De Funis* held that since De Funis' opportunity to complete law school was assured, there was no

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[7]"Bakke Wins, Quotas Lose," *Time*, July 10, 1978, p. 9.

actual controversy at the time the case was reviewed by the Court.

The Supreme Court of the State of Washington had upheld the University of Washington Law School admissions policies which allowed for preferential treatment of "minority" applicants. The court ruled that considering racial or ethnic background as one factor to be used in selecting students did not violate equal protection provisions of the state and federal constitutions. This, ruled the court, was true even though the selection policy resulted in the rejection of some white applicants who had higher grade point averages and higher test scores than those of "minority applicants."[8]

Since the implications of the De Funis case are of such great magnitude, the dissenting view of Chief Justice Hale of the Supreme Court of Washington should be noted. In De Funis, the Washington case Chief Justice Hale declared:

> Racial bigotry, prejudice and intolerance will never be ended by exalting the political rights of one group or class over that of another. The circle of inequality cannot be broken by shifting the inequities from one man to his neighbor.

The dissenting opinion of Mr. Justice William O. Douglas in the De Funis case (in the Supreme Court of the United States) is replete with issues, and merits inclusion in a study of this scope. Mr. Douglas' dissenting opinion is therefore reproduced herein as Appendix A.

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8 De Funis v. Odegaard, 507 P. 2d 1169 (Wash. 1973).

In his dissenting opinion, Mr. Justice Douglas stated that there is no constitutional right for any race to be preferred. He further declared that a white is entitled to no advantage by reason of the fact that he is white. Nor, said Mr. Justice Douglas, should the white man be the subject of any disabling factors due to his race alone. Mr. Justice Douglas stressed the necessity, on constitutional grounds, to consider each applicant on the applicant's individual merits alone.

The burden of responsibility borne by admissions committees is awesome, considering that committees are obligated to judge the merits of each applicant without regard to race, sex, ethnicity, or religion. Lacking firm guidelines from the Supreme Court as to what constitutes a fair set of criteria, the burden must fall on the shoulders of some few individuals. Theirs is the responsibility to use their best judgment in making decisions. These decisions will almost always not be acceptable to everyone.

The seed of this dilemma is identified at this juncture with the name of Allan Bakke. However, the seed was already growing at the time Marco De Funis was in court. To refuse to face the issue again in Bakke's case would have left the Supreme Court open to charges of shirking its responsibility. If De Funis had been proven right, then the implied course of action which would flow from previous Supreme Court decisions was discriminating and unconstitutional.

If the University of Washington Law School were right, then the Supreme Court would have to hold actions which appeared to be clearly discriminatory to be legal and constitutional. As was recorded in Chapter II of this study, school desegregation cases moved swiftly from ruling *de jure* segregation impermissible to invalidating specific

techniques for effecting integrated school systems. Very soon, under pressure from the Department of Health, Education and Welfare, and the Equal Employment Opportunity Commission, educational administrators began applying preferential selection methods in both educational admissions and employment areas. The move from student body to employment applications was logical to administrators, since a number of the desegregation cases involved faculty and staff assignments as well as pupil assignments. Thus, the stage was set to apply the rationale of desegregation cases to complaints of employment discrimination under the Civil Rights Act. It was predictable that the cry of "reverse discrimination" would soon be heard in the areas of school employment.

Indeed it is now being heard and sometimes heeded. In Chapter IV, this study will make mention of some of the cases which relate to alleged reverse discrimination in employment situations. The school administrator will ultimately have to be concerned with this issue as the institution performs its personnel function.

The Dilemma of Preferential Admissions

Thurgood Marshall is, of course, a member of the Supreme Court, the only black justice sitting on the Court today. In 1947, Justice Marshall was the director of the NAACP Legal Defense and Educational Fund. At that time, Mr. Marshall unleashed a scathing attack on classification by race. Under such a classification, the laws of the State of Texas deprived Herman Sweatt, a black man, of admission to the University

of Texas Law School.[9] In 1947, Mr. Marshall denounced racial classification thusly:

> There is no understandable factual basis for classification by race, and under a long line of decisions by the Supreme Court, not on the question of Negroes, but on the Fourteenth Amendment, all Courts agree that if there is no rational basis for the classification, it is flat in the teeth of the Fourteenth Amendment.[10]

Today, however, those who support special admissions programs contend that racial classification is not only rational but absolutely necessary. Many of those who have become vigorous advocates of special admissions programs are the same people who, a short time ago, denounced any form of racial classification. Justice Marshall himself now seems perfectly willing to tolerate racial classifications which operate to remedy the wrongs of previous discrimination. In a dissenting opinion in the _Bakke_ Case, Justice Marshall wrote:

> During most of the past 200 years, the Constitution, as interpreted by this Court, did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe this same Constitution stands as a barrier.
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> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, to bring the Negro into the mainstream of American life should be a state interest of the highest order. The racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America is not merely the history of slavery along, but also that a whole

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9 See Sweatt v. Painter, 339 U.S. 629 (1950).

10 See McGeorge Bundy, "The Issue Before the Court: Who Gets Ahead in Am?rica?" _Atlantic_, 240, No. 5 (November, 1977), 43.

people were marked inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of the color of his skin, he never even made it into the pot...

Inasmuch as the misfortunes of one man affect all mankind, it is difficult to disagree with Justice Marshall's statement that "none... has managed to escape the impact" of racism. To all but the most optimistic, it seems unlikely, even today, that all members of all groups can escape some degree of discrimination. Prior to *Bakke*, the most important case concerning (so called) reverse discrimination was the Case of *De Funis v. Odegaard*. De Funis, it will be remembered, challenged the University of Washington Law School's policy of giving some preference in admissions decisions to members of minority groups. It is ironic that Marco De Funis, a second generation Sephardic Jew, is himself a member of a minority group.[11] Paradoxes of this ilk abound in the literature of affirmative action and preferential admissions. It is beyond the scope of this dissertation to delve deeply into the metaphysics of equal opportunity as a philosophical concept. Yet some mention of societal goals must be made in any thesis which addresses itself to the topic of racial discrimination. The *sine qua non* of any governmental policy (at least of a democratic governmental policy) is that it maximize the welfare of the most people. The Italian sociologist and economist Vilfredo Pareto is regarded by social scientists as an excellent resource in examining the reality of supposedly egalitarian social and economic systems. Systems which maximize the welfare of the community as a whole are said by

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[11] David L. Kirp and Mark G. Yodof, "De Funis and Beyond," *Change*, 6, No. 9 (November, 1974), 23.

Authorities in the social sciences to be "Pareto optimal." Pareto saw the distinction between maximizing the welfare of the individual and maximizing the welfare of the community. With respect to utility for a community, Pareto lays down as principles of government policy "that a government ought to stop at the point beyond which no 'advantage' would accrue to the community as a whole; that it ought not to inflict 'useless' sufferings on the public as a whole or in part; that it ought to benefit the community as far as possible without sacrificing the 'ideals' it has in view 'for the public good'; that it ought to make efforts 'proportionate' to purposes and not demand burdensome sacrifices for slight gains."[12]

Pareto offered only formal analysis, and was well aware that the use of such terms as "advantage" and "useless" and "utility" had reduced his analysis for formality. The question of specific application was left up to the policy _process_ in Pareto's world; but this is the genesis of Pareto optimality. The system must function within the limits imposed by the status quo distribution of property, personal ability, and so on, with no necessarily unique optimum emerging for once and for all. As Pareto expressed it, when the community can adopt a policy procuring greater benefits for all individuals, it should pursue it as long as it is advantageous to all, and . . . "where it is no longer possible . . . it is necessary, as regards the advisability of stopping there or going on, to resort to other considerations foreign to economics--to decide on grounds

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12 Vilfredo Pareto, _A Treatise on General Sociology_ (New York: Dover 1963), Sections 2131-2133.

of ethics, social utility, or something else, which individuals it is advisable to benefit, which to sacrifice."[13] Pareto himself offers an example of the principle mentioned here in his monumental work Treatise on General Sociology:

> When it (government) shuts a thief up in prison, it compares the pain that it inflicts on him with the utility resulting from it to honest people, and it roughly guesses that the latter at least offsets the former; otherwise it would let the thief go. For the sake of brevity, we have here compared two utilities only. A government of course--as best it can, and that is badly enough--compares all the utilities it is aware of. Substantially, it does at a guess what pure economics does with scientific exactness: it makes certain heterogeneous quantities homogenous by giving them certain coefficients thence proceeding to add the resulting quantities and so determine...the maximum of utility for a community.[14]

Thus, government must constantly weigh the relativity of sacrifice. In evaluating the degree of sacrifice, Pareto sees the necessity for a redetermination of the norms and a change in existing limits. In his Treatise on General Sociology, he offers this example:

> Let us imagine a community so situated that a strict choice has to be made between a very wealthy community with large inequalities in income among its members and a poor community with approximately equal incomes. A policy of maximum utility of the community may lead to the first state, a policy of maximum utility for the community to the second. We say, may, because results will depend upon the coefficients that are used in making the heterogeneous utilities of the various social classes homogeneous. The admirer of the 'superman' will assign a coefficient of approximately

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[13]Joseph Lopreato , Vilfredo Pareto: Selections from His Treatise (New York: Thomas Y. Crowell Company, 1965), pp. 23-31.

[14]Vilfredo Pareto, A Treatise on General Sociology (New York: Dover, 1963), Sections 2131-2133.

> zero to the utility of the lower classes, and get a point of equilibrium very close to the equalitarian condition. There is no criterion save sentiment for choosing between the one and the other.[15]

Pareto's recurrent theme is the importance of psychic states:

> We are to conclude...not that problems simul taneously considering a number of heterogeneous utilities cannot be solved, but that in order to discuss them some hypothesis which will render them commensurate has to be assumed. And when, as is most often the case, that is not done, discussion of such problems is idle and inconclusive, being merely a play of dirivations cloaking certain _sentiments--and those sentiments we should alone consider_, without worrying very much about the barb they wear.[16] (Emphasis added).

As Pareto and others have written, the utility of a community (or individual) is a function of the end the community (or individual) seeks to attain. Talcott Parsons underscored the necessity for societal goals when he wrote that the ultimate ends of individual action systems are integrated to form a _single common system_ of ultimate ends which is the culminating element of unity holding the whole structure together.[17]

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[15] Ibid., Section 2135.

[16] Ibid., Section 2137.

[17] Talcott Parsons. _The Structure of Social Action_. (New York: McGraw-Hill, 1937), p. 249.

Pareto's wisdom offers much food for thought to the social theorist. Yet there may be, within the volumes penned by Pareto, something for use by those who would actually effect constructive change. In analyzing the work of Pareto, the eminent legal and economic scholar G. H. Bosquet remarked:

> The method is always the same: seek for the common elements in variable phenomena; i.e., the method that has been so successfully used in other sciences.[18]

Economists, in their efforts to describe the situation which maximizes the welfare of most people, refer to "the general equilibrium of exchange." This equilibrium of exchange will occur on a "contract curve," which is an optimal locus. At some point on this curve, one or both parties to a transaction may benefit, and neither will suffer a loss by exchanging goods. When society as a whole has attained exchange equilibrium, there is no reorganization that will benefit some members of society without causing harm to some other members of society. A Pareto-optimal organization, then, is one such that any change which makes some people better off will make others worse off. An organization is Pareto-optimal if and only if there is no change that will make one or more persons better off without making anyone worse off.[19]

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[18] G. H. Bosquet, The Work of Vilfredo Pareto (Hanover, N. H.: The Sociological Press, 1928), p. 29.

[19] For a thorough and graphic analysis of the principles of economics which relate to Pareto-optimality, see C. E. Ferguson, Microeconomic Theory, 3d ed., (Homewood, IL: Richard D. Irwin, Inc., 1972), pp. 456-501.

Affirmative Action, Pareto-Optimality, and Preferential Admissions

As is the case with most emotionally-charged issues, the arguments which favor and oppose a particular position tend to run into tomes. This study has chosen a few of the arguments, for and against preferential treatment based on race, which seem most based in reason rather than emotion. These arguments were first grouped together and subsumed under pro and con categories in laundry-list fashion. Because this orderly presentation seemed to imply that some of the arguments were superior to others, or that some of the people quoted were more authorative, the arguments are presented in a non-selective random fashion.

A Summary of Arguments For and Against Preferential Admissions

The trump card in the hand of the team which opposes preferential admissions seems to be the argument that any classification by race is violative of the Constitution of the United States. Specifically, opponents of the preferential admissions concept (and their allies who oppose affirmative action programs generally) believe that any preferential treatment based on race violates the Fifth Amendment guarantee that no citizen shall "be deprived of life, liberty, or property without due process of law." Anti-affirmative action forces also believe preferential treatment based on race is not in keeping with Section II, Article IV of the Constitution which says that "the citizen of each state shall be entitled to all privileges and immunities of citizens in the several states." The element which opposes affirmative action programs which classify by race also believes that such classification violates the

Fourteenth Amendment, which directs that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The anti-preferential admissions contingent believes that the typical program for granting admissions by racial classifications will deteriorate into a form of quota system. Quota systems are invalid under the due process clause of the Fourteenth Amendment. They also believe that any form or racial classification deprives some citizens of the rights under the Equal Protection Clause. In defense of this belief, they cite many school desegregation cases which point up the constitutional necessity of refraining from any effort to classify by race. One such case is Cooper v. Aaron:

> The constitutional provision (of the Fourteenth Amendment), therefore, must mean that no agency of the state or the officers or agents by whom its powers are exacted, shall deny to any persons within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a state government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibitions; and as he acts in the name and for the states and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning . . . thus the prohibitions of the Fourteenth Amendment extend to all laws of the state denying equal protection of the laws, whatever the agency of the state taking action . . . or whatever guise in which it is taken.[20]

Opponents of preferential admissions programs which consider race as a criterion also cite Loving v. Virginia, the landmark case in which

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[20]Cooper v. Aaron, 78 S. Ct. 1401 (1958).

the Supreme Court struck down the iscegenation laws of the state of Virginia. In Loving, the Court stated:

> The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the states.[21]

Advocates of programs which employ racial classification are also able to cite Supreme Court cases which they believe support the constitutionality of such programs. In the Case of San Antonio Independent School District v. Rodriguez,[22] for example, the Court lent support to a classification designed to help a disadvantaged class in their efforts to overcome the effects of past discrimination. In this instance, the classification did serve as a limitation of benefits available to those who weren't members of the disadvantaged class. However, the limitation placed on others was only incidental. Because benefits to other classes were only indicentally limiting, the Court ruled that those benefits were not a suspect class and therefore not subject to close scrutiny. In San Antonio School District v. Rodriguez, the Supreme Court ruled that population groups which had been disadvantaged by a school financing scheme were not a suspect class. Therefore, they were not entitled to a review under the close scrutiny standard. The Court explained in its judgment that the class of disadvantaged persons had:

> . . . none of the traditional indicia of suspectness: The class is not saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness, as to command

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[21] Loving v. Virginia, 87 S. Ct. 1817 (1967).

[22] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

extraordinary protection from the majoritarian political process.[23]

In analyzing the status of Allan Bakke and others who have alleged themselves to be victims of reverse discrimination, those who would utilize preferential admissions policies see "none of the traditional indicia of suspectness."[24] Proponents of preferential admissions programs believe that such programs which affect classes of applicants who lack "the traditional indicia of suspectness" are "not presumtively unconstitutional, even though they directly limit their (white applicants') opportunities by assuring the inclusion of minorities."[25]

Court Cases Relating to Affirmative Action

It is not difficult for those who support preferential admissions and/or affirmative action programs to cit cases in which the Supreme Court has upheld race-conscious efforts aimed at eradicating (or providing redress for) discrimination against protected minorities. A list of cases in which recognition of a racial classification has been made by the Court follows: *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *United Jewish Organization v. Carey*, 97 S. Ct. 996 (1977); and *Morton v. Mancari*, 417 U.S. 535 (1974).

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23 *Ibid*.

24 See "Bakke: Pro and Con, the National Education Association *Amicus Curiae* Brief," *Phi Delta Kappan*, 5, No. 7 (March, 1978), 448.

25 *Ibid*.

The above cases were concerned with a wide variety of situations. In Morton v. Mancari, for example, the Court unanimously upheld, against an equal protection challenge, a statute that requires the Bureau of Indian Affairs to give a preference in hiring to native Americans. Such a position, say proponents of preferential hiring and preferential admissions programs, is totally inconsistent with the tenet that racial classifications are presumptively unconstitutional. Proponents of programs which involve preferential treatment hold that, where racial classifications are installed for the purpose of redressing disadvantage or discrimination, the normal presumption is in favor of the constitutionality of state action.

In defending special admissions programs, their advocates are quick to point to the record. The figures cited by proponents of preferential admissions programs show that in the 1969-70 academic year there were a total of 1,042 black students enrolled in medical schools throughout the country. This represented 2.8% of the total enrollment, and was not significantly greater than the percentage of black physicians in the country. There were 18 American Indians in medical schools, a figure which represented .04% of total medical school enrollment. 92 Mexican-Americans, 0.2% of total enrollment were attending medical schools.

The figures quoted reveal that a substantial increase in minority enrollment had materialized in the medical schools by the 1974-75 school year. By 1974-75, the percentage of black medical students rose to 6.3%. The percentage of American Indians had risen to 0.3%, and the percentage of Mexican-Americans had risen to 1.2%.[26]

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[26] Ibid., pp. 448-449.

Whether or not those admitted to medical schools under special admissions programs are qualified is another issue. In the New England Journal of Medicine, Bernard Davis of the Harvard Medical School (who favors "stretching the criteria for admission and . . . trying to make up for earlier educational disadvantages") questions "how far faculties should stretch the criteria for passing." Davis also notes that it is "cruel to admit students who have a very low probability of measuring up to reasonable standards." Those who oppose preferential admissions programs are quick to allude to the potential danger of turning out incompetent physicians and to express concern about the traumatic effect of failure on minority group members, as Davis has done in the New England Journal of Medicine.[27]

Proponents of preferential admissions programs readily admit, quite often, that their methodology will result in some inconvenience for some majority group members. They see this inconvenience as far the lesser of two evils. In their view, the alternative is protracted racial injustice. They call attention to white America's penchant for continually deferring the minor "inconvenience cost" of racial integration. In their minds, there is no effective way to ameliorate the effects of past discriminatory treatment unless race may be considered as a factor in selecting who may avail themselves of educational programs. This faction points the finger at the University of California system for its failure to make redress for its own past discriminatory conduct, a failure which

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[27] Malcolm J. Sherman, "Bakke: Viewpoint 2: The Case Against Preference," Change, 9, No. 10 (October, 1977), 60.

they say created the Bakke issue in the first place.[28]

One of the most eloquent and persuasive arguments in favor of preferential admissions programs has been advanced by McGeorge Bundy, a luminary in both academe and the world of government, and a former dean at Harvard. Bundy is now president of the Ford Foundation.[29]

As discussed earlier in this study, the most significant challenges to failure to pursue a vigorous program of school desegregation were made on the basis of the Equal Protection Clause. Opponents of preferential admissions and affirmative action programs have also made compelling arguments against preferential treatment by using the Equal Protection Clause as the springboard for their rationale. Bundy cannot accept the notion that the Equal Protection Clause in some way operates to perpetuate *de facto* white supremacy. Yet, neither does he see special admissions programs as a panacea for all social ills. In Bundy's view, the minor inconvenience and suffering imposed on a relatively few majority members is justified by the ends being sought. He addresses the issue thus:

> No one can deny that special admissions programs, even at their best, have costs and dangers; the grievances of Allan Bakke and others may be overstated and even misdirected, but they are deeply felt. Racial preference can arouse racial antagonism, and the general rule that judgment should be based on personal merit alone has its high claims. Still, it seems clear that to take race into account today is better than to let the doors swing almost shut because of the head start of others. We must hope and believe that in the long run our effort for equal opportunity will put the need for special

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[28] Lee Daniels and Francesta E. Farmer, "Bakke: Viewpoint 1: The Case for Preference," *Change*, 9, No. 10 (October, 1977),

[29] See McGeorge Bundy, "The Issue Before the Court: Who Gets Ahead in America?" *The Atlantic Monthly*, 240, No. 5 (November, 1977), 41-54.

> programs behind us. In that deep sense there is no conflict between special admissions and every other form of action to help the disadvantaged, white and nonwhite alike. But what special admissions, and only special admissions, can do today is to make access to the learned professions a reality for nonwhites. To get past racism, we must here take account of race. There is no other present way. In the words of Alexander Heard of Vanderbilt, 'To treat our black students equally, we have to treat them differently.'[30]

Still another argument in favor of preferential admissions programs has been advanced by various commentators. This argument holds that the general interest is served by preferential admissions programs because minority graduates are more likely to be able to serve the communities from which they came to the programs. In this context, proponents cite the crying need for medical services in disadvantaged communities. The shortage of physicians in ghetto areas aggravates the health problems of minority group members, a situation which is inhumane and which adversely affects the efforts of the minority group to better its economic status. According to figures quoted by the Phi Delta Kappan, the infant mortality rate for black infants in the United States is almost double that of whites, and approximates the infant mortality rates of developing countries.[31]

The Phi Delta Kappan also calls attention to studies quoted in the National Education Association amicus curiae brief filed in the Bakke Case. It has been established, according to NEA, in several studies that minority professionals tend to practice in minority communities. Significantly, every student admitted to the Davis Medical School under the

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[30] Ibid., p. 44.

[31] "Bakke: Pro and Con: The National Education Association Amicus Curiae Brief, Phi Delta Kappan, 5, No. 7 (March, 1978), 449.

special admissions program had expressed an intention to serve disadvantaged communities upon graduation.[32] Pointing to the direct link between preferential admissions programs and improved health care in minority communities, proponents conclude that there exists a compelling societal interest in programs which include minorities in medical schools.

On the other side of the ledger, there are those who hope to reverse the trend for minority professionals to practice among minority communities. Opponents of preferential admissions programs say that a protracted trend of minority professionals practicing only among minorities is a regressive rather than a progressive proposition.

A point which is often made by those who advocate special admissions programs is that the programs make for diversification of the student body. The academic community as a whole derives cultural benefits from association with minority students who have first-hand insight into the folkways and needs of their fellow minority group members. A similar argument stresses the need for leadership which can be supplied by minority professionals. As role models practicing in their own communities, graduates of special admissions programs will serve to demonstrate the feasibility of professional and educational advancement. Thus, the presence of minority professionals, made possible by preferential admissions programs, serves to offset the effect of forces which produce racial polorization.

Anti-preference people counter that preferential admissions programs promote polorization of the races by creating resentment among minority

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[32] Ibid.

members. The rationale employed here holds that being admitted on "a pass" undermines the confidence which minority group members have finally built up in their own abilities. Minority group members, the argument states, resent the implicit assumption that they are intrinsically inferior and must be given some special form of consideration. This theme was dramatically expatiated upon via national television in the critically acclaimed series The Paper Chase. Academy award winning actor John Houseman, who portrays the irascible but wisely humane Professor Kingsfield in the series, becomes involved in assisting a black female law student who has been admitted to a highly prestigious law school on an affirmative action program. The fictional law student, Donna Scott, who is portrayed by actress Denise Nichols, is subjected to a variety of pressures as a result of her status as a student admitted on "a pass." The pressure intensifies when a wealthy alumnus appear on the scene to protest the fact that Donna Scott has been admitted although her grades were inferior to those of his own son, whom the school rejected. In the debate over Ms. Scott's admission to the law school, most of the issues surrounding Bakke unfold, and many of the sources which are cited in this dissertation are coincidentally quoted by the actors. Sensitive performances by superb actors underline the emotionality of the issue involved, and the fact that the program was produced serves to underscore the general interest in the Bakke case. Realistically, the dramatization offers no definitive answers to the legal questions raised. Realistically also, Ms. Scott does not solve her own personal dilemma in the allotted

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"With Justice for Some," The Paper Chase, CBS-TV, February 13, 1979.

time span of one hour. Evidence, legal and otherwise, indicates that Ms. Scott's counterparts in the real world will also face considerable personal stress for years to come.

Summary of Arguments

In summary, most arguments against preferential admissions programs hold that they are (1) impermissible because they are unconstitutional, or (2) improper because they are predicated on the assumption of some other criterion than ability and therefore penalize the guiltless. Most arguments in favor of preferential admissions programs assert that they are (1) constitutional because they make partial recompense for past racial discrimination, and (2) are the only viable alternative for correcting the imbalance of educational opportunity which prevails.

The gist of most arguments opposing any form of special treatment in admissions programs is that the more qualified should simply be preferred to the less qualified. This concept states that the Constitution requires color blindness in making choices among individual applicants. The center of the matter, says McGeorge Bundy, is that in affirmative action programs, blacks and other minority group members undeniably score lower on tests. The first point which Bundy makes is that there is a clear relation between low scores and low economic status. The second point made by Bundy is that there is much confusion about scores and records and that their significance is vehemently disputed by even the experts. There is, among these experts, says Bundy, a tacit agreement that test scores and performance records do not constitute an absolute guide to later performance. Bundy indicates that most admissions officers, particularly at the undergraduate level, would say that mechanical

reliance on tests and measurements would be morally wrong and practically disastrous. Admissions officers look at other things, says Bundy, "not only for help at the margins, but because they think these other things are critical to the quality of the student body as a whole." In this tactic, Bundy believes they have struck a mother lode of wisdom and justice. Bundy asks:

> Now we are right at the heart of it. Is race itself permissibly such another thing to look at? If I am a qualified black (in the basic sense already discussed), may not my blackness perhaps make me more qualified? Have I had something extra to go through? If I score 550 where a middle-class white scores 650, have I shown as much or more of what is so critical to success in learning--a determination to learn? Can I bring a different and needed perspective? Is there a special need for people like me in courts and hospitals and on college faculties? May the profession itself be better if more people of my race are in it? Can my presence and participation as a student enlarge the educational experience of others? Does the whole society somehow have a need for me in this profession that it simply does not have, today, for one more white? If the answer to these questions, or some of them, is yes, are not my qualifications by that much improved, and improved precisely by my blackness? If so, at some point it becomes right that I should be admitted; I am not 'less qualified' when all things are considered.[34]

Admissions officers, as Bundy indicates, are morally obligated to "consider all things" in the process of selecting candidates. Much has been written in the past decade about the probabilities of selecting out qualified minority candidates through the use of standardized testing techniques. Many standardized tests may be so constructed as to penalize the minority applicant because of the applicant's socioeconomic background. These tests are said to have a built-in cultural bias. Very

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[34] McGeorge Bundy, "The Issue Before the Court: Who Gets Ahead in America?" The Atlantic Monthly, 240, No. 5 (November, 1977), 48.

recently, standardized tests have come under fire because they purportedly are guilty of promulgating a built-in sex bias (against women) as well. The age factor is also important and should be among those things considered in selecting candidates for admission to academic programs.

When the Supreme Court ordered that Allan Bakke be admitted to the Davis Medical School, he had reached the age of thirty-eight. Thus, he is well over the average age of his classmates, exceeding their average age by at least a full decade. Bakke is, therefore, a living argument in favor of considering the individual abilities of each candidate. Indeed, many observers feel that the Bakke decision will make it easier for blacks and whites to work together on affirmative action programs. New York Senator Patrick Moynihan, for example, has said:

> A bureaucracy that says, 'white teachers get in this line and blacks in this line,' threatens to break up the coalition that worked for affirmative action in the first place. The Bakke decision gets us back into a sensible mainstream idea of what affirmative action should be. Maybe now we can put the coalition back together.[35]

The coalition of which Senator Moynihan speaks is not merely a rhetorical one. Many educational institutions have, of course, adopted affirmative action programs without overt pressure from the federal government. One minority admissions program which has won acclaim from many quarters is that of Harvard.[36] Harvard's plan is described as a "flexible" approach to considering race in selecting applicants. This plan won a special nod of approval from Justice Lewis F. Powell, Jr. in

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[35] "Bakke Wins, Quotas Lose," Time, July 10, 1978, p. 15.

[36] Arthur Lubow and Phyllis Malamud, "Harvard's Way," Newsweek, July 10, 1978, p. 30.

his opinion in Bakke.[37] Justice Powell was familiar with the Harvard plan because a description of the plan had been attached to an *amicus* curiae brief submitted for consideration in the *Bakke* case. Harvard had submitted the brief along with Columbia, Stanford, and the University of Pennsylvania. The brief declared in no uncertain terms that "scholarly excellence" is "not the sole or even predominant criterion" for a student's acceptance at Harvard. Instead, the brief goes on to say, Harvard seeks diversity, and "the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on the farm may tip the balance in other candidates' cases.

Harvard can show impressive results in minority recruiting. In the early 1960's, fewer than ten blacks would be accepted in a typical year from among fifteen to 25 who applied to Harvard College. In 1968, 52 blacks were enrolled, representing 3.1% of a Harvard College class of 1,600. In 1977, when 12,700 candidates vied for 2,196 acceptances to the class of 1982 at Harvard and Radcliffe, 631 blacks made application. One hundred and seventy-eight of the 631 applicants were admitted, a figure which constituted 8.1% of the total. Additionally, Harvard accepted 102 Hispanics (4.6% of the total), 125 Asians (5.7%) and eight native Americans. A total of 413 minority students were accepted, and that number represented 18.8% of the total number accepted.[38]

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[37] "The Harvard Admissions Plan: Acceptable Affirmative Action in Justice Powell's View," *The Chronicle of Higher Education*, July 10, 1978, 9.

[38] Arthur Lubow and Phyllis Malamud, "Harvard's Way," *Newsweek*, July 10, 1978, 30-31.

Since many educational institutions have initiated affirmative action programs without overt pressure from the federal government, there is little reason to expect them to abandon their efforts. The Bakke decision places the Supreme Court's stamp of approval on affirmative action programs, although racial quotas are forbidden. Stanford University political scientist Martin Lipset believes that "racial quotas" could become a type of unwritten criterion much like geographic quotas are an unwritten point of consideration among admissions officials.[39] In view of the willingness of educational institutions to act on their own in making room for minority group members, Professor Lipset's logic rings true. If Lipset is correct, then race will become a subjective point of analysis on the part of admissions officers. This means that there will still exist a definite opportunity for directors of admission to discriminate on the basis of race. Professor Lipset, however, believes that "in this day and age, minorities will probably get the advantage if left to subjective selection."[40] In relating to this subject, Norman Dorsen, board chairman of the American Civil Liberties Union, makes a highly significant point, if his analysis is accurate. "Institutionally and practically," Dorsen declares, "it is the school admissions officers and administrators who will be crucial in determining what the impact of the Bakke decision will be.[41]

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[39]"Bakke Wins, Quotas Lose," Time, July 10, 1978, p. 15.

[40]Ibid.

[41]Ibid.

Assuming the accuracy of Dorsen's belief in the importance of the admissions director's ethics and power, it is logical to give some consideration to the admissions official's role in selecting or rejecting the nontraditional applicant. Herman Sweatt, James Meredith, and Allan Bakke fit the same mold, in the sense that all three were adults rather than just-graduated high school seniors when they sought admission to college programs of study.

Appendix A of this thesis is a study-within-a-study which treats the subject of testing programs which are used to select or reject older nontraditional applicants for admissions to academic programs.

CHAPTER IV

ANALYSIS OF LANDMARK DECISIONS

The Bakke Case

The Bakke decision held that race can be a legitimate consideration in placement of employees as well as acceptance and assignment of students, although no quotas may be assigned. Race may be a consideration even though no specific proof of previous racial discrimination exists, according to the Court's ruling in Bakke. State-run schools may consider an applicant's race in making admissions choices so long as the applicant's race is not the sole factor.

The Bakke case arose when Allan Bakke was twice denied admission to the Davis Medical School, an institution within the University of California system. Bakke was denied admission in 1973 and again in 1974. He then filed suit against the regents of the University of California in state court. His suit alleged that the special admissions program of the Davis Medical School denied him admission on the basis of his race. This denial, Bakke alleged, was a violation of (1) the equal protection clause of the Fourteenth Amendment of the Constitution of the United States; (2) Article 1, Section 21, of the California Constitution; and (3) Section 601 of Title VI, Civil Rights Act of 1964. Title VI provides, in essence, that no person shall on the ground of race or color be excluded from participating in federally supported programs.

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[1] Regents of the University of California, Petitioner v. Allan Bakke. See U. S. Law Week, 46 (June 27, 1978), 4896.

This should be done even though some particular university or college had not itself discriminated against any racial group. Mr. Justice Powell did not accept the thesis that a university which had not discriminated itself against some racial group should seek to redress society's past racism. Justice Powell said that what a university should properly do would be to seek a diverse student body. Any institution which had itself discriminated in the past could use race-conscious corrective measures in selecting students.

By the logic of the Bakke decision, a plan similar to that of the Harvard Admissions Program would be acceptable to the Court. This is reason for believing that the Bakke decision will not result in a requirement for radical change in policy across the country. Indeed very few professional schools or undergraduate schools use such explicitly numerical affirmative action programs as Davis Medical School's plan. Most affirmative action plans in institutions of higher learning more closely approximate the methodology of the Harvard Plan.

Unquestionably, the Bakke decision permits universities and colleges to use a good deal of discretion in affirmative action programs. This allays the fear of many university and college officials who were concerned that they would be held to some rigid legal standard in countless lawsuits arising over admissions decisions. One fact which is clearly evident is that a state institution which is itself free of any taint of past discrimination is under no obligation to initial any affirmative action program. Beyond these guidelines, the result of the Bakke case has been to leave a number of issues in a vague, dynamic state. The depths of the philosophical conflicts raised by Bakke are yet to be explored, and future cases will certainly deal with the issue in a more specific manner.

As previously stated, Dr. Harold Spaeth appeared on National Public Radio to discuss the *Bakke* case. Dr. Spaeth had programmed a computer to reflect the voting patterns of the nine Supreme Court Justices. On the basis of his computer analysis, Dr. Spaeth was confident in his prediction that the Court would decide unanimously in favor of Bakke.

Thus, the *Bakke* decision does provide incontrovertible proof of one supposition: The Supreme Court remains totally unpredictable. In 1954, the Supreme Court ruled that a child could not be denied admission to a public school on account of race.[2] The *Bakke* decision holds that preferential treatment cannot be afforded to blacks over any other racial group. To some, this position signals a retreat from the *Brown* decision; some believe the Supreme Court has actually come full cycle. This chapter devotes some comment to a comparison of the Burger Court with the Warren Court. The research analyzes the events and adjudications which changed the complexion of desegregation philosophy between *Brown* and *Bakke*.

This study is significant because it presents an analysis which will provide for educational advisers and decision makers an organized approach to employ when considering the complexities of preferential admissions programs. To an extent, the study will be of value to decision makers in industry as well as education. As previously stated, litigation relative to employment and promotion by preferential treatment of minority group members looms large on the horizon.

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[2] *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954)

It is important that educators and business people refrain from speculation as to what courses of action the federal judiciary will take in the future with regard to preferential hiring and preferential admissions programs.

The Bakke decision was in fact two decisions, because the nine Justices formed clusters of two groups. Justice Lewis F. Powell, Jr. was a swing man. This made it possible for there to exist, in fact, two majorities. There was, therefore, not a unified voice from the bench.

Justices Harry A Blackmun, William J. Brennan, Jr., Thurgood Marshall, and Byron White called affirmative action lawful under the Civil Rights Act of 1964. This act forbids racial discrimination. Justices Blackmun, Brennan, Marshall, and White concluded that the Davis Medical School program was constitutional. Chief Justice Warren E. Burger and Justices William H. Rehnquist, John Paul Stevens, and Potter Stewart agreed that under the Civil Rights Act of 1964 Allan Bakke was unfairly treated, although Justice Stevens opined that the issue before the Court was not a constitutional one. Justice Powell found for affirmative action programs since the Civil Rights Act of 1964 did not rule out such programs. However, he ruled for Mr. Bakke on the grounds that the Davis Medical School program was, on constitutional grounds, too restrictive.

Justice Powell, in announcing the Court's judgment stated that race is permissible as one of several admissions factors. Justice Powell

commented on the sixty-odd amicus curiae briefs which were submitted in the Bakke case, saying, "as we speak today, with a notable lack of unanimity, it may be fair to say we needed all this advice."

In his opinion, Mr. Justice Powell singled out the Harvard College Admissions program as one which was deserving of imitation. Justice Powell's comments on the Harvard Admissions Program and a part of his rationale in the Bakke decision are reproduced below because of their usefulness as possible guidelines for administrators in setting up admissions programs which seek to serve applicants from diverse backgrounds:

> .. .. In Harvard college admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year . . . But that awareness (of the necessity of including more than a token number of black students) does not mean that the Committee sets the minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students. Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae. App. 2,3.

> .. .. This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration from that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

> .. .. In summary, it is evident that the Davis special admission program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or "Chicano" that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admission seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.
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> The fatal flaw in petitioners' preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1, 22 (1948). Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.[3]

Mr. Justice William J. Brennan, Jr. dissented in part from Justice Powell's opinion and in part concurred with the opinion of Justice Powell. It is worthwhile to examine the rationale of Justice Brennan in this portion of his opinion which follows:

> .. .. We disagree with the lower courts' conclusion that the Davis program's use of race was unreasonable in light of its objectives. First, as petitioner argues, there are no practical means by which it could achieve its ends in the foreseeable future without the use of race-concious measures. With respect to any factor (such as poverty or family educational background) that may be used as a substitute for race as an indicator for past discrimination, whites greatly out-number racial minorities simply because

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[3]Regents of the University of California v. Bakke, 98 Sup. Ct., 2733 (1978).

> whites make up a far larger percentage of the total population and therefore far out-number minorities in absolute terms at every socioeconomic level. For example, of a class of recent medical school applicants from families with less than $10,000 income, at least 71% were white. Of all 1970 families headed by a person not a high school graduate which included related children under 18, 80% were white and 20% were racial minorities. Moreover, while race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appear that economically disadvantaged whites do not score less well than economically advantaged whites, while economically advantaged blacks score less well than economically disadvantaged whites. These statistics graphically illustrate that the University's purpose to integrate its classes by compensating for past discrimination could not be achieved by a general preference for the economically disadvantaged or the children of parents of limited education unless such groups were to make up the entire class.
>
> .. .. The "Harvard" program as those employing it readily concede, openly and successfully employs a racial criterion for the purpose of insuring that some of the scarce places in institutions of higher education are allocated to disadvantaged minority students. That the Harvard approach does not also make public the precise workings of the system while the Davis program employs a specific, openly stated number, does not condemn the latter plan for purposes of Fourteenth Amendment ajudication. It may be that the Harvard plan is more acceptable to the public than is the Davis "quota." If it is, any State, including California, is free to adopt it in preference to a less acceptable alternative, just as it is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program. But there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.[4]

It is noteworthy that while Justices Brennan and Powell were poles apart in their opinions, both cited the Harvard College Admissions Programs as exemplary in its legality. Mr. Justice Brennan's opinion, which

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[4] *Ibid.*

expressed the minority view that the Davis program was a valid means of redressing past discrimination against members of minority groups, argued that past decisions by the Supreme Court, as well as federal regulations which had been formulated to carry out Title VI of the Civil Rights Act had established the principle that "race-conscious action is not only permitted but required to accomplish the remedial objectives of Title VI." [5]

Mr. Justice Brennan advocated race-conscious action even in the absence of specific evidence that the Davis Medical School had itself been guilty of past racial discrimination. The Brennan opinion held that "Davis' special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive fact to be considered in evaluating the applicants of disadvantaged minority applicants." [6]

Mr. Justice Powell in his opinion conceded that the need to attain diversity in a student body "clearly is a constitutionally permissible goal for an institution of higher education." Justice Powell, however, stated that "ethnic diversity...is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." Mr. Powell denied that an admissions program which considers race only as one factor "is simply a subtle and more sophisticated--but no less effective--means of according racial preference than the Davis program."

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[5] Ibid.

[6] Ibid.

The minority opinion written by Mr. Justice Brennan held the Davis program to be constitutional, arguing:

> That the Harvard approach does not also make public the extent of the preference and the precise workings of the system while the Davis program employs a specific, openly stated number, does not condemn the latter plan, (under the Equal Protection Clause of the Fourteenth Amendment.)[7]

In a separate opinion in Bakke Mr. Justice Thurgood Marshall also addressed himself to the Harvard College Admissions Programs. A portion of Justice Marshall's opinion is reproduced here because of its direct relevance to affirmative action admissions programs in higher education:

> I am convinced, as Mr. Justice Powell seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant. The line between the two is a thin and indistinct one. In each, subjective application is at work.
>
> Because of my conviction that admissions programs are primarily for the educators, I am willing to accept the representation that the Harvard program is one where good faith in its administration is practiced as well as professed. I agree that such a program, where race or ethnic background is only one of many factors, is a program better formulated than Davis' two-track system.
>
> .. .. It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in veterans' preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax. We see it in the Indian programs.
>
> We may excuse some of these on the ground that they have specific constitutional protection, or, as with Indians, that those benefitted are wards of the Government.
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> .. .. I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible.

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[7] Ibid.

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.[8]
>
> We cannot--we dare not--let the Equal Protection Clause perpetrate racial supremacy. So the ultimate question, as it was in the beginning of this litigation is: Among the qualified, how does one choose?

It is fitting to recapitulate the alignment of the Supreme Court Justices in the Bakke decision before making a final commentary on just what was decided. Four Justices (Justice Stevens, Chief Justice Burger, Justice Stewart, and Justice Rehnquist) ruled that Allan Bakke had been treated unlawfully under the terms of the Civil Rights Act of 1964. This act proscribes discrimination "on the ground of race" in federally aided programs. The four aforementioned Justices interpret the Civil Rights Act of 1964 as requiring "color blind" policies.

Another four Justices (Justices Brennan, White, Marshall, and Blackmun) stated that the 1964 Civil Rights Act was designed to help minorities and did not outlaw affirmative action programs. They said that the act conveyed exactly the same rights as the constitutional guarantee that no one shall be denied "the equal protection of the laws." These four also found the Davis Medical School program to be constitutional. Citing the long history of racism in the United States, they declared that a university was entitled to use preferential admissions policies to remedy "the past effects of societal discrimination," even though that university had not discriminated itself. Otherwise, declared these four Justices, "color blindness" would become "myopia

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[8] Ibid.

which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."

The ninth vote was cast by Mr. Justice Powell. He agreed that the Civil Rights Act did not rule out the Davis program. As to the Constitution, Mr. Justice Powell found that Allan Bakke's rights had been violated because the Davis Medical School Program set up an unjustifiable racial classification. Mr. Justice Powell, therefore, cast the fifth vote which resulted in the requirement that Allan Bakke be admitted to the Davis Medical School. The Powell viewpoint, which for now is decisive, does leave margin for effective admissions programs. State universities may take race into account as one factor in deciding which applicants to admit. The state universities have considerable leeway, under the Constitution and Federal law, to adopt and/or retain affirmative action programs for minorities. Although Allan Bakke won in the Bakke decision, affirmative action as a principle was also the victor. The question now becomes what kind of affirmative action programs are likely to be acceptable in the eyes of the judiciary in the future. Five justices addressed themselves to the constitutional issue in the Bakke case, and their opinions offer some clues as to what the Supreme Court feels about the manner in which affirmative action programs should be constructed.

Four of the justices indicated that a proper objective for an institution of higher learning was to redress society's past racism.

Under the special admissions program of the Davis Medical School, 16 of 100 first year openings were, in practice, reserved for certain minority groups. These minority groups were comprised of blacks, Chicanos, Asians, and American Indians. Special admissions applicants were rated by a separate committee. The majority of the members of the special committee were themselves members of minority groups. Theoretically, a white Caucasian might be regarded as disadvantaged and considered for admission under the special admissions program; in practice, no white applicant was ever selected for one of the 16 openings.

Under the regular admissions procedure, any applicant with a grade point average of below 2.5 on a scale of 4.0 was automatically disqualified. Applicants for the special admissions program were not disqualified because their grade point averages were lower than 2.5.

Allan Bakke's grade point average was 3.51 when he applied in 1973. In that year, his combined numerical rating for purposes of admission was 468 out of a possible 500. When he reapplied in 1974, his numerical rating was 549 out of a possible 600. Bakke was not admitted, nor was he placed on the alternate list in either year he applied. However, some minority students who were admitted in 1973 and 1974 did have grade point averages below 2.5. Some who were admitted had grade point averages as low as 2.11 in 1973 and 2.21 in 1974.

The trial court in California agreed with Allan Bakke, and ruled that the special admissions procedure of the Davis Medical School was unconstitutional. On appeal, the California Supreme Court affirmed the judgment in favor of Bakke, by a six-to-one majority.

On June 28, 1978, the Bakke decision was announced by the Supreme Court of the United States.

The Unpredictable Impact of Bakke

Since that fateful day, June 28, 1978, a plethora of articles, opinions, and commentary have sought to pinpoint the meaning of the Bakke decision. The Supreme Court's decision, which runs to 154 pages and 40,000 words, will provide grist for legal scholars for many years to come. The Supreme Court has provided no definitive rules in the Bakke decision. Rather, the Court has offered (as it often has throughout our history) what constitutional scholar A. E. Howard, of the University of Virginia, refers to as a "Solomonic Compromise.")[9]

The Court answered (though it did not settle) the question raised by Allan Bakke's rejection to admission to the Davis Medical School. The special admissions program was declared invalid for its violation of the individual rights secured by the equal protection clause. The Court did order that Allan Bakke be admitted to the Davis Medical School. Yet the door remains open for schools to design and use race-conscious programs of admission, provided such programs properly consider the individual rights protected by the Fourteenth Amendment.

What social consequences are likely to follow the ambivalent decision handed down in the Bakke case? Does the verdict in favor of Bakke signal a retreat from our commitment to equality of educational opportunity? Many influential blacks feared the worst when the Bakke

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[9] Tom Matthews with Mary Lord and Lucy Howard. "The Landmark Bakke Ruling," Newsweek, July 10, 1978, p. 20.

decision was handed down, For example, Jesse Jackson, the Chicago civil rights leader, compared the impact of Bakke on blacks to a "Nazi march in Skokie or Klan marches in Mississippi."[10] Yet, only three months later, HEW Secretary Joseph Califano declared:

> I can announce today the major conclusion we have reached: in general, the Bakke decision will not interfere with or restrict HEW programs of special value and concern to minority groups.[11]

In summary, most legal experts believe that the Bakke decision was actually too plit to provide definitive guidelines. The ruling of the Court actually involves six separate opinions and leaves many questions regarding the legality of racial classifications unresolved. Five of the nine justices reversed that part of the California Supreme Court's decision which forbade Davis Medical School to consider race in future admissions decisions. Justice William Powell, who is regarded as a potential "swing man" in future cases similar to Bakke declared in his opinion that admissions committees which are attempting to achieve a diverse student body may constitutionally consider an applicant's race or ethnic background as one among several "plus" factors in the applicant's file. It is evident that more litigation will be required in order to determine the exact weight which may be given to race in employment and academic admissions programs as well as other selection decisions. A number of suits which bear upon claims of reverse discrimination are currently working their way up through the federal judiciary.

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[10] Ibid.

[11] "Notes and Notions," The Greensboro Record, September 28, 1978, p. A-6.

The Weber Case

Yet unanswered is the question of how far private employers may go in giving special preference to members of minority groups. This question may well have more far-reaching legal consequences and more important social significance than the issues raised in the Bakke case. The Supreme Court has now been asked to resolve an issue of so-called reverse discrimination in employment. The Associated Press announced, on January 30, 1979,[10] that the Court had agreed to hear an appeal in the case of Weber v. Kaiser Aluminum and Chemical Corporation.[11] In this case, the Court of Appeals for the Fifth Circuit affirmed the decision of the district court.[12]

The Weber case is important to educators because it bears heavily on hiring and promoting practices and because it also relates to another live issue, that of collective bargaining. The importance of the Weber case justified a review of the facts surrounding the case.

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[10] See William Raspberry, "From Bakke to Weber," The Greensboro Record, 30 January 1979, p. A-4, Cols. 3-6.

[11] Weber v. Kaiser Aluminum and Chemical Corporation, 563 F. 2d 216 (5th Cir. 1977).

[12] Weber v. Kaiser Aluminum and Chemical Corporation, 415 F. Supp. 761 (E.D. La. 1976).

The plaintiff, Brian F. Weber, is and was at the time suit was filed, an employee of Kaiser Aluminum and Chemical Corporation at its plant in Gramercy, Louisiana. Weber, a white man, was denied admission to an on-the-job training program under a racial quota system. Under the system, majority and minority workers were admitted to the training program on a one-for-one basis. The quota system was part of a collective bargaining agreement between Kaiser, Weber's employer, and the United Steelworkers of America. Under the agreement, one minority worker for every white worker would be admitted to on-the-job training for craft positions. It was understood that this plan would continue to operate until the percentage of minority craft workers approximated the percentage of the minority population in the area surrounding each plant.

In 1974, when the agreement between Kaiser and the union was drawn, the area around Gramercy, Louisiana, had a black population of around 46%. Blacks represented only 15% of the work force at the Gramercy plant. There were 273 skilled craft workers at the plant, of which only five were black. There was little hope that the ratios among skilled craft workers would change, because blacks were drastically underrepresented in apprenticeship and other training programs at the plant.

In theory, the program was democracy in action. In practice, the quota system operated in such a way that blacks were admitted to the program who had less seniority than their white competitors. On the

basis of this fact, Weber, who had applied to the training program several times, but was never accepted, claimed that he had become the victim of reverse discrimination. As previously stated, the district court agreed with Weber's position. The district court enjoined operation of the training program at Gramercy. The ruling was handed down on the ground that Kaiser had failed to establish a prima facie case of past hiring or promotion practices of discrimination against minorities. In upholding the district court, the Court of Appeals for the Fifth Circuit ruled that absent a showing of prior employment discrimination, racial quotas for admission to on-the-job training programs violate Title VII of the Civil Rights Act of 1964.

Under Title VII, it is an unlawful employment practice for an employer to discriminate against any individual with respect to the terms, conditions, or privileges of employment, or to limit, segregate, or classify his employees so as to deprive any individual of employment opportunities because of such individual's race, color, religion, sex, or national origin. Union activities which cause or attempt to cause an employer to discriminate against an individual, apprenticeship, or other on-the-job training programs controlled by either an employer or union which discriminate against a protected class are also forbidden.

The Civil Rights Act of 1964 outlaws obvious, ongoing discrimination. Additionally, the Act prohibits neutral practices which actually serve to perpetuate a status quo created by previous employment discrimination. Yet the Civil Rights Act does permit an employer to apply different terms, privileges, or conditions of employment to majority and minority employees if such application is pursuant to a bona fide

seniority system. However, this application of different terms or conditions to members of majority and minority groups may not result in intentionally discriminatory seniority systems. This point was clarified in the Case of United States v. N.L. Industries.[13] In United States v. N.L. Industries, the Eighth Circuit Court held that an employer violated Title VII by assigning blacks to one seniority group and whites to another group, even though both groups performed identical tasks.

It is also true that the 1964 Civil Rights Act does not require an employer to grant preferential treatment to a member of a protected class merely because an individual's class is underrepresented in an employer's work force. Section 703 (j) of the Act contains language specifically directed at percentage relationships between majority and minority workers in an employer's work force:

> Nothing contained in this subchapter shall be interpreted to require any employer to grant preferential treatment to any individual or to any group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin . . . employed by any employer . . . in comparison with the total percentage of persons of such race, color, religion, sex, or national origin. . . .

It is therefore apparent that Title VII does not guarantee a job to every person regardless of qualification. Instead, Title VII forbids discriminatory preference for any group, either majority or minority. This point has been further clarified by the Supreme Court in Griggs v. Duke Power Company.[14] In Griggs, the Court asserted:

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[13] United States v. N.L. Industries, 479 F. 2d 354 (1973).

[14] Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

Thus, it is clear that the Civil Rights Act of 1964 is not only directed at the protection of women and minority groups. The prohibition of discrimination on the basis of race and color also makes it illegal to discriminate against whites because of their color. It is noteworthy that when an individual can prove that he has been victimized by past discrimination, the remedial purposes of the Act make it mandatory that an employer "make the employee whole" by restoring him to his "rightful place" in the employment scheme. This requirement was originally stipulated in a decision handed down by the Fifth Circuit Court of Appeals in the Case of Local 189, United Papermakers & Paperworkers v. United States.[15] The Supreme Court of the United States later articulated the same principle in the Case of Franks v. Bowman Transportation Company.[16]

Franks involved a discriminatory seniority system as does Weber. In Franks, the Supreme Court sought to remedy past discrimination by authorizing fictional seniority which would place victims of discrimination in as good a position as they would have enjoyed had they never been victimized by discriminatory hiring practices. The Court made mention of the possibility that relief might be given to those victimized by false seniority creation. It was noted that such false seniority might diminish the expectations of other employees. The Court viewed this possibility as an unavoidable conflict of interest which might exist in

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[15] Local 189, United Papermakers & Paperworkers v. United States, 416 F. 2d (5th Cir. 1969), Cert. denied, 397 U.S. 919 (1970).

[16] Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

any seniority system, but viewed the possibility as inconsequential in the implementation of Title VII.[17]

Under this construction of the Civil Rights Act of 1964, beneficiaries of prior discrimination are not displaced from their jobs as of the effective date of the Act. Displacement occurs when a Post-Act vacancy occurs in a job which is sought. Qualified victims of prior illegal acts are given preference unless there exists a compelling business reason for not giving them preference. This pattern of preference will continue until all vestiges of prior discrimination are removed. A case which relates to this process of removing prior discrimination through preferential placement in employment is that of Gamble v. Birmingham S.R.R.[18] In this case, the railroad argued that a "vacancy" would occur only when it decided that it needed more conductors. For fifteen years, no such vacancy had occurred. The Fifth Circuit Court rejected the railroad's argument, asserting that "business necessity" is not synonymous with "management convenience." The Court ruled that the railroad would not suffer by having a large pool of conductors for use when extra switchmen crews were necessary. The Court reasoned that it would cost the railroad nothing to qualify black switchmen who had previously been prevented by discrimination from becoming or even qualifying as conductors. In Gamble, the Circuit Court ruled that incumbent whites working regular assignments as conductors could not be "bumped" by black switchmen with longer railroad seniority. However, those white conductors who were working on

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[17]Ibid at 774.

[18]Gamble v. Birmingham S.R.R., 514 F. 2d 678 (1975).

"extra jobs" were not protected from "bumping." All extra conductor jobs in the future had to be open to all qualified conductors, black and white, on the usual bidding basis.

Thus, although an employer cannot treat a class preferentially solely to correct imbalance in minority group employment, such devices as artificial or remedial seniority have been permitted by the federal judiciary where deemed necessary to correct the effects of discriminatory employment practices. Even racial quotas, as distinguished from absolute preferences, have been held to be permissible in cases where past employment discrimination has been shown.[19]

It is important to note that Title VII is complemented by Executive Order 11246. The order requires certain employers who do business with the government to adopt affirmative action plans which implement racially conscious hiring practices. In response to charges of reverse discrimination, courts have upheld temporary employment goals as a means of correcting under-utilization of minority employees. In the Case of Contractors Association of Eastern Pennsylvania v. Secretary of Labor,[20] the Third Circuit Court upheld a plan known as the "Philadelphia Plan." The Philadelphia Plan imposed goals and timetables on employers who were moving slowly in implementing programs to utilize minority group members. The employers alleged reverse discrimination under Title VII and the Due Process Clause because of the imposition of the goals and timetables. The

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[19] See (for example) Patterson v. Newspaper & Mail Deliverers' Union 514 F. 2d 767, 773 (1975), denied, 427 U.S. 911 (1976); and Carter v. Gallager, 452 F. 2d 315, 331 (1972).

[20] Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F. 2d 159 (1971).

Third Circuit Court ruled that the reverse discrimination proviso of the Act (Section 703 (j)) does not restrict remedying racial imbalance by other means. The court concluded that under subsection 703 (j) of the Act and the Due Process Clause, class conscious goals are a permissible means of remedying past racial discrimination.

Summary

In summary, the Fifth Circuit Court considered, in Weber v. Kaiser Aluminum and Chemical Corp., whether voluntary implementation of an affirmative action plan by an employer, absent of any prior employment discrimination, is violative of Title VII of the Civil Rights Act of 1964. The court focused on the lack of any prior discriminatory practices by the defendant, Kaiser Aluminum and Chemical Corporation. The court considered the Act's objective to restore employees to their "rightful place" in the employment scheme, and ruled that prior discrimination is a prerequisite to preferential treatment of minority workers. The court reasoned that, absent a finding of prior discrimination, racial quotas cannot be termed remedies which are permissible as favoring victims of discrimination. Absent a finding of prior discrimination, the court ruled, racial quotas become unlawful preference based on race. Such preferences are prohibited by sucsections 703 (a) and 703 (d) of the Civil Rights Act of 1964. The court rejected Kaiser's attempt to justify a quota system as a remedial measure designed to compensate for the lack of job training caused by past societal discrimination. The court also ruled that, to the extent that Executive Order 11246 mandates the discrimination practiced by Kaiser, the Executive Order must yield to contradictory congressional

expressions.

The majority in Weber arrived at an incisive solution to a substantive legal enigma. Logically and simply, the court concluded that the value of restorative justice depends on the presence of prior injustice. However, it must be noted that the court did not express an aversion to preferences for those victimized by societal discrimination. The language of the court clearly indicates that the court felt sympathetic to the idea of preferential treatment for those who have been victims of discrimination. The Supreme Court will ultimately resolve the issue of whether prior employment discrimination must exist if preferential hiring practices are to be permissible. Based on that decision by the Supreme Court, Weber v. Kaiser Aluminum and Chemical will play a greater or lesser role in affirmative action decisions in the future.

Sears v. EEOC Suit

Sears, Roebuck & Company has been on the receiving end of several edicts issued by the Equal Employment Opportunity Commission. These edicts have charged Sears with discrimination on the basis of race or sex. On January 24, 1979, Sears upset the pattern by filing a massive class action lawsuit against EEOC and nine other federal agencies. Sears charges that the plethora of conflicting government regulations actually restricts rather than promotes equal opportunity practices. The suit, which runs to 34 pages of documentation, asserts that federal agencies have violated the public trust by:

(1) failure to enforce civil rights laws, including education and housing provisions;

(2) violation of anti-discriminatory provisions within their own departments;

(3) placing the blame for government's failures on the undeserving shoulders of private employees; and

(4) initiation of Social Security and Internal Revenue Service policies which discourage women from working.

The Sears suit has potential for growing into a highly significant case because of Sears' size and sphere of influence. Time Magazine reports that Sears is the largest retailer in the world, tallying annual sales in excess of $17 billion.[21] Sears is the acknowledged leader in retailing, an industry which employes more than 15% of the total labor force.[22] Time reports that Sears has about 417,000 people on its payroll.[23] This means that one out of every 200 workers in the nation is employed by Sears. The Washington Post states that Sears is the country's second largest employer of women. Only American Telephone and Telegraph employes more women than Sears. Sears spokesmen estimate one out of every 30 Americans will work for Sears at some time.[24]

Sears' suit thus offers a potentially far-reaching challenge to government-enforced affirmative action programs. The Sears case, docketed as Sears, Roebuck & Company v. Attorney General of the United States was filed in the U.S. District Court for the District of Columbia on January

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[21] "A Sears Suit," Time, February 5, 1979, p. 127.

[22] Ibid.

[23] Ibid.

[24] Jerry Knight, "Sears Sues U.S. In Challenge to Job-Bias Policy," The Washington Post, 25 January 1979, p. A-1, col. 5; p. A-10, cols. 1-3.

24, 1979 as previously stated. The major legal remedy Sears asks for is an injunction preventing the EEOC or other government agencies from taking action against Sears for job bias.[25]

Sears' troubles with EEOC date back for many years, but began to press hard in 1973. In that year, EEOC charged that Sears had followed discriminatory hiring and promoting practices. Sears then added a new dimension to its existing affirmative action program. Under the new program, Sears outlets were to hire one minority group member for every white person hired until the payroll reflected the composition of the local area. It was also agreed that women would be hired for jobs which were traditionally men's jobs, and vice versa.

Despite Sears' 1973 program, the EEOC was not satisfied. After an investigation in 1977, EEOC concluded that there was still "reasonable cause" to believe that Sears was still discriminating. Since that time, Sears and EEOC have been at odds, with neither camp willing to concede even minor points. Sears, according to Newsweek, has spent $100 million since 1965 in trying to comply with Federal antidiscriminatory rules.[26] Ray Graham, Sears' director of equal opportunity, indicates that Sears has made remarkable progress since 1966. Graham notes that since 1966 the company's proportion of women managers has risen from 20% to 30%; of women craftworkers from 3.8% to 8.1%; of black managers from 4% to 7.2%; and of black craftworkers from 2.8% to 8.9%.[27]

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[25] Jerry Knight, "Sears Facing Major Bias Complaint," The Washington Post, 26 January 1979, p. D-1, Cols. 1-3; p. D-3, Cols. 5-6.

[26] "Sears Turns the Tables," Newsweek, February 5, 1979, pp. 86-87.

[27] "A Sears Suit," Time, February 5, 1979, p. 128.

The EEOC now demands that 50% of the new management positions and 33% of the new craft positions be given to women. Sears officials protest these goals as unfair and arbitrary.

Sears has filed its suit in Federal District Court in Washington, DC. The suit is filed as a class action on behalf of all retailers who employ more than fifteen persons. In the suit, Sears charges that government activity, not private industry, is responsible for creating "an unbalanced civilian work force" which is dominated by white males. William D. Snider, editor of the Greensboro Daily News, chronicles the rationale of Sears in shifting the blame to the government.[28] Sears indicates that it sometimes faces insurmountable obstacles as it attempts to comply with regulations which often contradict each other. The government, says Sears, is trying to "hold private employers liable for the work force the government itself created." White males dominate the work force in America. This situation, Sears claims, was created by the "G.I. Bill of Rights, Veterans' preference laws, the selective service system, restrictions on the number of women and blacks in the armed forces and the types of military assignments available to them." Sears also asserts that the 1978 amendment to the Age Discrimination in Employment Act "further restricts job opportunities for women and minorities."

Sears offers up its own retirement system in support of Sears' logic. Since the passage of the 1978 amendment, Sears has suspended its mandatory retirement policy. Sears had anticipated that only about one third of workers reaching retirement age would choose to continue working. The

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[28] William D. Snider, "Sears Challenges Federal Confusion," The Greensboro Daily News, 4 February 1979, p. G-3, cols 1-4.

number actually electing to stay on has far exceeded the 1977 estimates. 76.7% of the salaried employees and 60.6% of the hourly employees have continued to work beyond normal retirement age. Sears originally anticipated that about 5,000 fewer openings would be created by retirement in the five-year period following passage of the 1978 amendment. It now appears that at least double the number of job openings will be eliminated over the next five-year period.

The personalities involved in the Sears suit are as lively as the issues. Sears is represented by Charles P. Morgan, Jr., a well-known civil liberties attorney. Morgan has served as director of the American Civil Liberties Union Southern Region. In the past, he has represented clients in suits for integrated prisoins. integrated juries, legislative reapportionment, and voting rights. He has defended clients such as Muhammad Ali, Julian Bond, and Aaron Henry, the Mississippi N.A.A.C.P. leader. Morgan sees no conflict in his representation of Sears. "There's nothing in the Constitution that says anybody isn't entitled to a defense against discrimination," says Morgan, "and in that sense there's no difference between cases involving Bull Connor and the blacks and the EEOC and Sears."[29] Interest in the case may also be heightened by the fact that the Sears suit has been assigned, by random draw, to Judge June Green. She is the only woman on the district court bench in Washington.

There has been speculation that the Sears suit is largely a pre-emptive public relations and legal manuever. Some have charged that

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[29] "Corporations Have Civil Rights, Too," Time, February 5, 1979, p. 128.

the suit is designed to blunt charges by EEOC that Sears remains guilty of discriminatory practices in employment. Sears, however, is evidently intent on its purpose of proving its legal point. At a Washington press conference, Sears President A. Dean Swift stated that the firm filed the suit not only because of its own problems with Federal government regulations, "but for all corporations and for the Country as a whole. . . . This is not a smoke screen. It is not cutesy. It was not done capriciously or without a log of thought."[30] Sears Chairman Edward Telling describes the suit as a needed effort "to cut through conflicting regulation and to force a clarification of irreconcilables."[31]

The Sears suit has drawn a mixed reaction from constitutional experts. Some regard the case as highly significant; others are unimpressed. Philip B. Kurland of the University of Chicago commented: "I don't think it's going very far, if the case rests on the premise that the Federal government is responsible for Sears' problems. But I don't think that premise is necessary. The argument about multiplicity and duplication of obligations has some merit."[32]

Charles Morgan, Sears' counselor, ruined what was developing into a thriving practice in Birmingham, Alabama, when he defended civil rights demonstrators. He is now being accused by liberals of selling out to the establishment because of his role in the Sears suit. When asked about this accusation, Morgan alluded to his stands on civil rights, his

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[30] "Sears Turns the Tables," Newsweek, February 5, 1979, p. 86.

[31] "A Sears Suit," Time, February 5, 1979, p. 128.

[32] "Sears Turns the Tables," Newsweek, February 5, 1979, p. 86.

opposition to the war in Vietnam, and to his early push for the impeachment of Richard Nixon. "I just get there five years ahead of them every time," says Morgan.

Only time will tell just how prophetic Morgan's involvement in this case will be. When Sears, Roebuck & Company v. Attorney General of the United States was filed, EEOC director of public affairs, Daisy Voight, issued a statement which read: "This latest litigation is part of a series of court cases initiated by Sears in an effort to defend its current practices for hiring and promoting minorities and women."

"The reason for the government's concern about Sears will become clear in the appropriate papers," declared Ms. Voight's prepared statement. When asked if the Sears case might turn into another Bakke case, Ms. Voight replied: "It looks like its going to turn into a joke."[33]

The combatants in Sears, Roebuck & Company v. Attorney General obviously have divergent views of the potential significance of the case as well as the issues themselves. As if to accentuate the divisive nature of affirmative action programs, the nation's press has been quick to present its own disparate views of the Sears case. The research undertaken by this dissertation reveals a divergence of opinion rivaled only by that of the litigants and the federal bureaucracy. Two of the nation's most pretigious and powerful newspapers, The New York Times and The Washington Post, find few points in the Sears brief upon which their philosophies agree. The New York Times dispatched Sears v. Attorney General in an incisive and cursory editorial, which is reproduced in its

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[33] Jerry Knight, "Sears Sues U.S. In Challenge to Job-Bias Policy," The Washington Post, 25 January 1979, p. A-1, col. 5; p. A-10, col. 1.

entirety below:[34]

> For all its deficiencies as a lawsuit, the case of <u>Sears, Roebuck & Company v. Attorney General of the United States</u>, et al., has struck some responsive chords. Sears, the target of job discrimination charges by Federal agencies, has turned on its accusers and blamed them for race and sex bias in employment. Sears says that their confusion, oppressive tactics, incompetence and delay have denied Sears and other employers 'the right to comply' with equal opportunity laws. It asks a Federal court to block a lawsuit by the Equal Employment Opportunities Commission and any Federal contract cutoffs until Washington provides a properly balanced national work force.
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> Much of the evidence is buried in the confidential conciliation processes of the employment commission and the Government contracts machinery; it is premature to judge whether the offender is the Government, Sears, or both. But some citizens are ready nonetheless to cheer Sears on. Even a giant retailer may evoke sympathy when the adversary is Big Government. Moreover, the notorius inefficiency of the commission has caused distress for employees and employers alike; it prompted a Presidential reorganization plan last year which has already resulted in improved performance.
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> But Sears would close down the Federal civil rights effort until a court finds it to be efficient. Much as one may dream of the days of simpler government, it is plainly impossible to suspend present operations pending wholesale reform. We must all live with complexity and contradiction--arguing with the tax collector one day, profiting from a tax break the next. Government programs continue to coexist, clash and accomodate.
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> The Sears lament harmonizes, regrettably, with yet another current theme that blames Government for every ill. But did the founders of Sears play no part in past inequities? Did they shut down their premises 'until such time as the Federal Government's policies have created a national work force' to their liking?
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> The suit plays on collective guilt for past mistreatment of women and minorities, but in this it proves too much. A nation that fostered slavery and held back women may never completely cleanse itself of guilt. It would be guiltier still if it stopped trying.

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[34] Editorial, "The Sears Refrain," <u>The New York Times</u>, 1 February 1979, p. A-22, cols. 1-2.

In the editorial eye of The New York Times, Sears' management is little more than a self-seeking group of latter-day robber barons. The Washington Post, on the other hand, sees altruism and public spiritedness behind every Sears executive's desk. The Post's editorial commentary is reproduced, in part, below:[35]

> Sears has assembled an impressive bill of particulars to to support its claims. Government policies in the past, particularly those involving military training and veterans benefits, have worked to give white males preference over black males and women both in learning skills and in getting jobs. Present government policies, which bar employers from discriminating against almost everyone, do not take into account the impact these earlier policies have had on the qualifications of minority and female workers now in the job market. Similarly, the racial mixture of the pool of workers from which a particular company hires is influenced by the housing patterns in areas near its location. Those patterns were created, at least in part, by government practices. Yet by relying on statistical data that ignores both housing and individual qualifications, agencies like the EEOC assume certain employers must be discriminating against female and black applicants solely because of the low percentage of such employees on their payrolls.
>
> Sears, and many other employers, have been trying for years to impress the government with the significance of factors other than just numbers. Their inability to do so by conventional means will lead most private employers to applaud the unconventional methods Sears has chosen. That should not be interpreted as a rejection by private industry of non-discriminatory hiring or affirmative action. Instead, it is a plea that the government be realistic and get its own house in order.
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> A government that gives priority to veterans for its own jobs, even though that priority discriminates against most blacks and women, ought to understand some of the problems of private industry -- problems that bureaucracies around this town don't understand and, so far as we can tell, don't even try to understand. At the very least, this lawsuit brings these problems into sharp focus. It may well trigger a complete overhaul of all the government's anti-job discrimination programs before they collapse of their own weight or are killed off by the courts because of their internal inconsistencies.

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[35] Editorial, "Sears' Sweeping Challenge," The Washington Post, 29 January 1979, p. A-22, cols. 1-2.

It is impossible to judge whether Sears v. Attorney General will have great impact on affirmative action programs at this juncture. The suit seeks court orders which would "require the defendants (the government) to issue uniform guidelines to instruct employers how to resolve existing conflicts between affirmative action requirements based on race and sex and those based on veteran status, age, and physical or mental handicaps."

Whether this case will become a landmark case remains to be seen. But in seeking to reconcile and coordinate the mountains of directives which industry must scale today, Sears has certainly exerted a landmark effort.

Other Cases Related to Employment

Another case which could develop into a fight such as the Bakke Case is the Case of Communications Workers of America v. Equal Employment Opportunity Commission.[36] The final outcome in the case will affect many of the 730,000 workers employed by the American Telephone and Telegraph Company. The case developed in 1973 when AT&T agreed to a consent order designed to balance the racial, sexual, and ethnic mix of all AT&T operations. AT&T's acceptance of the consent decree came only after considerable pressure was exerted by EEOC, the Justice Department, and the Labor Department. Under the plan which AT&T accepted, it was agreed that the company would follow specific timetables and goals for preferential hiring and promotions of minority workers.

The union now challenges the plan as a form of "reverse discrimination." Union counsel holds that the plan violates the Equal Protection Clause and

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[36] Communications Workers of America v. Equal Employment Opportunity Commission, 556 F. 2d 167 (1973).

the Due Process Clause of the Fourteenth Amendment since it undercuts seniority rights won in collective bargaining.

The Third Circuit Court of Appeals ruled that "the use of employment goals and quotas admittedly involves tensions" with the Fourteenth Amendment. However, the Court of Appeals did uphold the plan "because it seems reasonably calculated to counteract the detrimental effects of a particular, identifiable pattern of discrimination. In October of 1977, the union filed a petition asking the Supreme Court to review the case. The association of the case with AT&T, one of the largest employers in the world, enhances the significance of the case's final outcome.

Another case involving an educational institution directly alleges reverse discrimination on the basis of sex. In _Cramer v. Virginia Commonwealth University_,[37] James Cramer, a sociologist lost his bid for tenure to a woman. The woman had been hired for one year as Cramer had. Cramer's suit claims that the preferential program violates Title VII's ban on employment discrimination by sex and is also violative of the Equal Protection Clause of the Fourteenth Amendment. The _Cramer_ case is now pending in the Fourth Circuit Court of Appeals.

Yet another case which will be influenced by the _Bakke_ decision is _Associated General Contractors of California v. Secretary of Commerce of the United States_.[38] This case grew out of a challenge to the Public Works Employment Act of 1977. This act stipulates that ten percent of Federal grants disbursed under the act must be allocated to businesses which are

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[37] _Cramer v. Virginia Commonwealth University_, 415 F. Supp 673 (1973).

[38] _Associated General Contractors of California v. Secretary of Commerce of U.S._, 441 F. Supp. 995 (1977).

controlled by minorities. The Association of Contractors in California filed suit against the Department of Commerce of the United States, charging that the minority-grant rule was unconstitutional. Judge Andrew Hauk of the Federal District Court agreed with the contractors. Hauk ruled that the minority-grant rule amounted to a quota which violated the due process provisions of the Fifth Amendment and Title VI of the Civil Rights Act of 1964. Title VI bars discrimination in programs funded by the Federal government. "Affirmative action programs are permissible; race quotas are not -- it's as simple as that," ruled Judge Hauk. The Justice Department has appealed Judge Hauk's ruling directly to the Supreme Court, which must now decide whether to hear the case.

Uzzell v. Friday

On February 5, 1979, the Fourth U.S. Circuit Court of Appeals reviewed a significant North Carolina case in the light of the Bakke decision. This case, Uzzell v. Friday, relates to regulations which were designed to get more minority participation in student government activity on the campus of the University of North Carolina at Chapel Hill. Two regulations are involved. The first requires that the Campus Governing Council must have at least two blacks sitting on the board. The second provides that if a student who is brought before a student disciplinary panel so requests, then four of the seven judges must be of the same race or sex as the defendant. The Court of Appeals of the Fourth Circuit ruled in 1977 that these regulations were discriminatory.[39] The review of

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[39] Uzzell v. Friday, 547 F. 2d 801 (1977).

case also resulted in the same decision.[40] A deputy attorney general for the State of North Carolina announced upon hearing the decision that there was a great likelihood that the State would probably appeal to the Supreme Court.[41] Hugh Beard, attorney for the plaintiffs, Uzzel and Arrington, indicated that this decision is the first lower-court decision to come down as a direct result of the Bakke decision.[42] Uzzell v. Friday can thus become a highly memorable, or even a landmark, Supreme Court case.

The Warren and Burger Courts: A Comparison

Since the Bakke decision, speculation has run rife with regard to future decisions relating to affirmative action. A word of caution is in order for those who have a penchant for indulging in speculative activity on the subject of the Supreme Court. First, as was stated in the introduction to this thesis, the Court has confounded experts and computer technology with its decision-making process. Secondly, the Federal courts, as important as they are, do not establish all policy. The Executive branch of government plays a substantial role in affirmative action programs, particularly in the area of employment. Congress has the ability to vote additional powers to agencies such as EEOC. Congress did increase the power of EEOC in 1972, a time when there was already heavy opposition on the part of business, labor, and the academic community to the emerging

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[40] Lawrence A. Uzzell and Robert Lane Arrington v. William C. Friday, Individually and as President of Univ. of North Carolina, C-74 - 178-D (February 5, 1979).

[41] Bill Morris, "UNC Bias Ruling is Upheld," The Greensboro Record, 5 February 1979, p. A-2, col. 1.

[42] Ibid.

pattern of hard affirmative action. Finally, the speculator who deals in Supreme Court futures places great stock in the knowledge that the Justices are bound to follow the weight of judicial opinion. However, the entire process is guided by the weight of opinion, albeit an educated opinion, which is convinced that morality and the hope for progress lie on a particular side of an issue.

Nonwithstanding these caveats, a cursory analysis of current Supreme Court philosophy may be useful in anticipating future court decisions. Of the associate justices on the Court when Chief Justice Earl Warren retired, four remain. These are William J. Brennan, Potter Stewart, Byron R. White, and Thurgood Marshall. In terms of judicial philosophy, Brennan and Marshall have most often aligned with the activist element. White and Stewart have been known as conservatives. It is more difficult to categorize the four newer members of the Burger Court, Harry A. Blackmun, Lewis F. Powell, William H. Rehnquist, and John Paul Stevens. As a group, however, these four have not subscribed to the activism that characterized the Warren Court during the sixties. The great majority of school desegregation cases decided by the Warren Court were unanimous decisions; in fact, all but one major decision was unanimous. A review of eleven desegregation opinions handed down by the Burger Court from 1971 through 1978 reveals that only six were unanimous decisions. In the last four terms, the justices of the Burger Court have handed down only one unanimous substantive desegregation opinion.

It is interesting to note that since 1972 Justices Marshall, Brennan, Burger, Blackmun, Powell, Rehnquist, Douglas, and White have all dissented in school desegregation cases. Like other recent decisions, the <u>Bakke</u>

case makes it obvious that the Court has no leader who can marshal the support for the Court to speak with unanimity. The justices evidently are unwilling to put the force of their opinions behind an all-out desegregation effort. In ruling on desegregation cases, the Court has displayed a penchant for narrowly drawn and often ambiguous decisions.

Two major considerations therefore affect the future of affirmative action programs: (1) the absence of a philosophical unity on the Supreme Court bench, and (2) the recognition that the judiciary alone cannot steer the course of future policy in affirmative action. The case review conducted by the researcher evidences a likelihood that the Burger Court will continue to rule on a one-decision-at-a-time basis, offering little predictability. In this respect, the Burger Court will manifest a grant departure from the philosophy of the Warren Court.

The Impact of *Bakke* on Affirmative Action Programs

The *New York Times* News Service reported on the effect on *Bakke* insofar as admissions policy among professional schools is concerned.[43] The results of a nationwide survey among administrators led the *Times* to conclude that "many administrators are finding last year's Supreme Court decision in the *Bakke* case sent out decidedly mixed signals." The *Times* saw the educational administrator's current position as "a little like that of a baseball hitter getting the bunt sign from the first-base coach and a swing-away message from third."

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[43] "Bakke, UNC Decisions Confuse College Policies," *The Greensboro Daily News*, 13 February 1979, p. E-8, cols. 1-3.

The *Times* reports widely disparate views among administrators as to what the Supreme Court expects of them with regard to the programs of preferential admissions. For example, the New York University School of Law concluded after careful study that the *Bakke* decision placed its affirmative action program "outside the law." The NYU faculty voted, in January of 1979, to abolish a special committee that judged minority-group-applicants separately and instead established a single panel to evaluate all prospective students. At the other extreme, the Johns Hopkins Medical School has expanded its minority recruitment program since the *Bakke* decision came down in June of 1978. "I viewed the *Bakke* decision as an affirmation of what we have been doing," declared Dr. John Yardley, associate dean for academic affairs.

The University of North Carolina Law School has put forth the most commendable effort which the researcher found in an intensive analysis of many responses to the *Bakke* decision. The UNC Law School revised its admissions policies to conform to the mandates of the *Bakke* decision in November of 1978. Dean Robert Byrd of the Law School at UNC declared that the school's new policy is in accord with the *Bakke* decision's directive that an applicant's race cannot be a decisive factor in any admissions process.[44]

The school's admissions policy now establishes a two-part process which avoids an identifiable racial quota system, according to Byrd. About 25 percent of the slots in each entering class are reserved for

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[44]"Bakke Alters UNC Admission," *The Greensboro Daily News*, 7 December, 1978, p. D-3, col. 1.

applicants who do not meet a minimum qualifying score based on grade point averages and law school admissions tests. Byrd indicates that race and ethnic origin will be considered, but adds that seven other criteria will also be considered. Among these seven criteria will be "unique work or service experience," and "demonstrated compassion." The inclusion of such subjective criteria makes race only one factor in the admission decision, Byrd said. Byrd emphasized that the new policy was adopted "in the light of the Bakke decision" and "not because we were doing anything unconstitutional under the old policy." Dean Byrd singled out the opinion of Justice Lewis Powell which, he indicated, provided guidelines for the school to follow in setting admissions policy.[45]

It is predictable, however, that even the most conscientious efforts of administrators will be insufficient to penetrate the cloud of ambivalence which hangs over the Bakke decision. "The Bakke decision resolves nothing, absolutely nothing," says Harry Wellington, dean of the Yale Law School. "I don't even know what the decision is. I think there will be further litigation," Dean Wellington said recently.[46] Perhaps Fred Graham of CBS-TV will emerge as the most prophetic of all those who speculated about the consequences of the Bakke decision. On the evening of June 28, 1978, the day the Court ruled in Bakke, CBS-TV ran an hour-long documentary on the decision. CBS law correspondent Fred Graham, himself a licensed attorney who has practiced law, declared that Bakke will become a "highly

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[45] For the opinions of Justice Powell and his colleagues as well as an incisive analysis of the Court's rationale, see The Chronicle of Higher Education, July 3, 1978, pp. 3-10.

[46] "Bakke, UNC Decisions Confuse College Policies," The Greensboro Daily News, 13 February 1979, p. E-8, Cols. 1-3.

memorable if not a landmark case." Graham sees the Bakke decision as a case which "lays the groundwork for a new body of law," and envisions the Supreme Court as adopting, in Bakke, a "middle-ground position, leaving itself leeway to expand in several directions." Graham compares the position of the Court at the juncture of Bakke to a great ocean liner whose change of course is at first imperceptible, but then becomes inexorable.[47]

That metaphorical ocean liner which is the Supreme Court has not merely one captain, but nine. The researcher concludes that insofar as affirmative action is concerned, the Court's course remains largely uncharted, and the speed with which it will proceed is still the subject of debate among the nine justices.

[47] Fred Graham, The Bakke Decision, CBS-TV, June 28, 1978.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

The purpose of this study was to investigate and analyze the issues which confront educational administrators in the administration of affirmative action admissions programs. The research yielded data which will assist educators in dealing with educational, legal, and moral issues related to affirmative action programs.

To achieve this purpose, the study achieved two basic objectives. The first objective was to examine the legal aspects of affirmative action programs. This objective was attained by tracing the evolution of the Federal judiciary's thought processes in deciding cases related to affirmative action programs. The second objective was to alert administrators to the pitfalls which await those who attempt to anticipate the future policies of the Federal government. To achieve this goal, the study highlighted the dynamic nature of legal philosophy in the United States insofar as racial discrimination and affirmative action programs are concerned.

Summary

In outlining the history of the Federal courts' activity, the researcher sought out, summarized, and analyzed those court cases which bear most directly on the educational administrator's decision-making responsibilities. To provide the administrator with a broad background of information, the study presented an overview of the policies of the Federal government as they relate to preferential admissions programs. Policy related to preferential employment policies was also discussed.

In the interest of aiding the educator in his quest to envision the large aspects of governmental policy, the study also addressed the subject of the administrative branch of government and its sphere of influence. The importance of Executive orders was stressed, and the educator was admonished that the administrative branch still wields great power, particularly in the area of employment practices.

To enlighten the administrator about the reasoning process of the courts, with respect to racial discrimination, the study presented an historical treatment of the Supreme Court's activity in cases involving race. While most cases reviewed were directly related to education, some cases were covered because of their bearing on educational circumstances. The historical presentation reflected a judicial role after the Civil War (and for half a century following the war) which was counterproductive in promoting racial justice. The net effect of Supreme Court decisions following the Civil War was to put the Thirteenth, Fourteenth, and Fifteenth Amendments into mothballs. The Court lent impetus to segregation practices in Plessy v. Ferguson when it upheld a Louisiana statute which required racial segregation of passengers on trains. Three years later, in 1899, in the Case of Cumming v. Board of Education, the Supreme Court sustained the action of a Georgia school board in closing down a black high school although the board continued to find funds to operate the county's white high school. In 1908, in Berea College v. Kentucky, the Court upheld as a valid regulation of corporate charters a Kentucky law requiring both white and black schools to keep

the races separate in their operations.

In Sweatt v. Painter, a 1950 case, the Court moved into the modern era. In Sweatt, the Court moved in the direction of overturning the "separate but equal" doctrine established in Plessy v. Ferguson. Chief Justice Fred Vinson's opinion forecasted the demise of "separate but equal." Justice Vinson noted that there were "qualities which are incapable of objective measurement," and that the law school of the University of Texas "cannot be effective in isolation from the individuals and institutions with which the law interacts."

In 1954, the landmark decision striking down the "separate but equal" doctrine was handed down in Brown v. Board of Education of Topeka. This case was decided under the due process clause of the Fifth Amendment. Chief Justice Earl Warren also found that segregation of the races with the sanction of the law denies black children the equal protection of the laws. On May 31, 1955, in Brown v. Board of Education, the Court leaned more toward a "gradualism" approach to desegregation, remanding certain cases to Federal district courts with instructions to order local school districts to proceed with desegregation of public schools "with all deliberate speed."

In Aaron v. Cooper, a 1958 case, the Court made it clear that it would not tolerate postponement of court orders, even in the face of threatened violence.

There followed a series of cases which came to the Supreme Court as the result of resistance to the Court's orders to desegregate the public schools. This pattern was broken by the Court in *Alexander v. Holmes County Board of Education*, a 1969 case in which the Court dashed any hope that "freedom of choice" or any other plan could be used constitutionally to delay further the implementation of *Brown*.

Despite the fact that President Richard M. Nixon used busing as an emotionally charged campaign issue in the presidential election of 1968, the Burger Court approved busing as an acceptable vehicle which could be utilized in effecting constitutionally acceptable desegregation plans. This approval of busing came in the 1971 case, *Swann v. Charlotte-Mecklenburg Board of Education*.

An issue which rivals busing for sheer controversial content is affirmative action admissions programs. This issue was sidestepped by the Supreme Court in 1974. The case in point, *De Funis v, Odegaard*. Since De Funis (the plaintiff who alleged his rejection by the University of Washington Law School constituted reverse discrimination) was allowed to complete law school, the Court saw no need to decide the issue, and declared the case to be moot. The four appointees of President Richard Nixon and Justice Potter Stewart voted to moot the *De Funis* case. These four appointees of President Nixon are: Justices Blackmun, Burger, Rehnquist, and Powell.

Predictably, the issue of preferential admissions programs reappeared before the Supreme Court, this time in the case of Regents of the University of California v. Bakke. On June 28, 1978, the Supreme Court by a 5-to-4 vote affirmed the constitutionality of college admissions programs which gave special advantage to blacks and other minorities in order to help remedy past discrimination against them. However, the Court also ruled, by a 5-to-4 vote, that the University of California Medical College at Davis was obligated to take Bakke into its program. The Court declared that Davis Medical School's affirmative action program was invalid because it was inflexible and unjustifiably biased against white applicants.

The Court ruled that although race may be considered as one factor in university admissions procedures, the Davis Medical School must admit Allan Bakke because its special admissions had illegally excluded him from consideration for sixteen seats in two of its freshman classes. The denial of Mr. Bakke "of this right to individualized consideration without regard to race is the principal evil" of the Davis program, said Mr. Justice Lewis F. Powell. Mr. Justice Powell thus joined four members of the Court in upholding an order by the California Supreme Court that Mr. Bakke, who is a white engineer, be admitted to the Davis Medical School. Justice Powell joined the other four members of the Court, however, in holding that the California courts had erred in ruling that the Davis Medical School could not take the race of the applicant into consideration.

Finally, this dissertation selected the situations which are most likely to shed some light on the probable future of affirmative action programs. The consensus among legal and educational scholars is that the *Bakke* decision of 1978 offered no definitive answers to those administrators who must set policy for admitting minority applicants to programs of study and for hiring, promoting, and transferring applicants and employees who are members of minority groups.

Two cases which loom large in the future of affirmative action programs involve two of the nation's largest employers American Telephone and Telegraph, and Sears, Roebuck and Company. In the case of *Communications Workers of America v. Equal Employment Opportunity Commission*, the union challenges EEOC's plan for preferential hiring and promoting of minority workers. Many of American Telephone and Telegraph's 730,000 workers will be affected by the outcome of this case, a case which the union has asked the Supreme Court to hear.

In a suit entered on January 24, 1979, Sears filed a massive class action against EEOC. In the suit, Sears alleges that conflicting government regulations concerning preferential employment practices operate as a deterrent to equal opportunity practices rather than as a catalyst for eliminating discrimination in employment. Whether this case, *Sears v. Attorney General of the United States*, will become a landmark decision is impossible to say at this writing. It is easy enough to quote experts who believe the case will fade into obscurity as well as those who think the *Sears* case will arouse interest on a plane with that aroused by *Bakke*, and will ultimately produce a decision at least as meaningful as that

handed down in Bakke.

A meaningful case which will be heard by the Supreme Court sometime in the future is Weber v. Kaiser Aluminum & Chemical Corporation. In this case, which observers are billing as a "blue collar Bakke" and "son of Bakke," the plaintiff, Brian Weber, charges that Kaiser's promotion policies result in his being victimized by reverse discrimination. This case is doubly important to educators because it involves both hiring and promotion practices and the issue of collective bargaining.

The Macro-View of the Problem

This study does not attempt to cover a wide range of governmentally-based forces which affect the administrator's realm of policy making. The central purpose of the study is to provide, in a concise and coherent fashion, a collation of leading Supreme Court cases which focus on affirmative action. The decisions of the Court form one of the pillars upon which much of our civil rights and civil liberties policy is constructed. This study should enable the reader to see and interpret what the Court has decided on basic issues relating to affirmative action. The reader should also be able to acquire some insight into the reasons why the Court has ruled as it has. This insight should focus the attention of the astute administrator on the more basic question of the role and the limitation of courts and the law in facing problems within the context of a highly complex political system.

The "macro-view" of the system permits the administrator to observe the continuity and the changes in the posture of the Supreme Court. As an example of this change in posture, this study summarized the changes

which came about in the transition from the era of the Warren Court to the era of the Burger Court. The thrust of this study is aimed at highlighting the conceptual and philosophical changes which occur with the passage of time.

In the beginning pages of the Review of the Literature section of the study, the black man in the United States was seen to be a being with no status as a citizen, a nonentity to whom it was unlawful to teach reading and writing. As the legal and educational history of the issues--discrimination, preferential admissions and hiring, reverse discrimination--unfolded, conflicts of a different nature emerged, but the basic question as to what constitutes true equality remains unsettled.

A basic reason why the issue of what constitutes equality is an open question is that the Supreme Court must, as was stated in this dissertation, operate within the bounds of public opinion. As the cases cited in this study illustrate, the Constitution is written in broad and sometimes ambiguous language. As a result, the Supreme Court has interpreted the meaning of the Constitution very differently at different times. When the Supreme Court hands down a landmark decision, as it did in _Brown I_, a period of social upheaval follows. The civil rights movement of the 1960's and the continuing controversy over busing in the 1970's followed in the wake of Supreme Court decisions. There will be another decision which will have an impact like _Brown I_ some time in the future, but this study can discern no pattern which will reveal the nature of the decision or the date it will be handed down.

Conclusions

It is difficult, often foolhardy, to draw specific conclusions as to the future outcome of societal issues solely on the basis of legal research. However, the following general conclusions may be reached, on the basis of an analysis of this study, with regard to affirmative action admissions programs.

1. The impact of the Bakke decision will not be fully decided for some time to come. Application of the principles laid down in Bakke will be a matter of prolonged legal interpretation and conceptual analysis.

2. The Supreme Court ruled in favor of Allan Bakke in the Bakke decision, to the extent that Bakke was admitted to the Davis Medical School by Supreme Court decree. Quotas, that is, the requirement that a certain number or percent of applicants be selected from certain minority groups, were ruled to be unconstitutional by the Court in Bakke. However, race may be considered, among other factors, in establishing admissions policies and criteria. The Supreme Court did not state the extent to which the criterion of race could be employed. Admissions officials and other administrators thus bear a greater burden than before Bakke. Their subjective judgment must be exercised in assigning weights to the factors which affect final selection policy.

3. Universities and colleges which receive federal aid are under no obligation to initiate affirmative action programs unless their particular institutions are guilty of prior discrimination against some minority group. This point was made clear in the Bakke decision.

4. This study focused, logically enough, on Supreme Court decisions in analyzing the legalities of affirmative action admissions policies. However, the educational administrator, as well as the administrator in industry, should not minimize the broad range of activities which influence the formulation and exercise of civil rights and civil liberties policies. Other decisions which affect civil rights and liberties are those made by lower courts, special interest groups, the administrative arm of government, a variety of Federal and State agencies, legislators, both State, Local, and National, and educational administrators themselves.

5. The legal view of what constitutes a social contract varies widely over time, and what is regarded as inhuman today was "the law of the land" as decreed by the Supreme Court only a short while ago.

6. The administrator will operate in a fog of uncertainty insofar as affirmative action programs are concerned for the immediately forseeable future. Cases will subsequently be heard which will determine the final definition of "affirmative action." In the interim, the administrator will be required to develop an even greater tolerance for ambiguity. Clearly drawn guidelines will be lacking for years, perhaps decades.

7. A higher level of dedication to the profession and a fuller measure of devotion to the welfare of humankind will be required of those who will withstand the pressure of the aforementioned ambiguity and uncertainty.

8. The most commonly used device for selecting students for admission to college-level programs of study is the SCAT-II Test. The research conducted by this study suggests that a need exists to

re-examine the selective devices used to choose from among nontraditional and minority group applicants.

9. An analysis of the personalities who are involved in affirmative action issues will preclude the supposition that there exists a good person/bad person dichotomy. People of keen intellect, sound moral fiber, and impressive educational backgrounds may be found on both sides of any sub-issue which relates to affirmative action.

10. The *Bakke* case will serve as a legal springboard, propelling a series of affirmative action cases toward the doorstep of the Supreme Court. The next major issue which the Court will decide will be concerned with affirmative action programs which are related to hiring and employment practices.

Recommendations

This study provides up-to-date information about the legal aspects of affirmative action programs and reviews the conceptual and philosophical foundations upon which preferential admissions and hiring programs are based. As previously stated, it was not the intent of this study to provide definitive answers to questions concerning the constitutionality of specific affirmative action programs. Legal scholars are in disagreement as to the significance of the *Bakke* decision, the most important decision to date which relates to preferential admissions and hiring programs. *Brown* v. *Board of Education of Topeka* was a landmark decision which changed the face of public education; yet the Courts are still interpreting the *Brown* case every day. Based on the results of this study, however, the following approaches to establishing and administering affirmative action programs are recommendable:

1. Because of the dynamic nature of the preferential treatment issue school officials must be wary of making decisions in this area without advice of legal counsel. To protect the constitutional rights of all, and to avoid adverse criticism and litigation, administrators and university and college boards should keep abreast of all developments which bear upon preferential admissions and hiring programs. It is advisable that school officials, and their legal counsel, seek out acceptable models, such as the Harvard Plan, to base their programs on.

2. Another highly recommendable practice is that institutions which admit minority group members on a preferential basis should inform legislators, board members, and the general public exactly what their policy is. When a school admits minorities preferentially, this information will surely and quickly become common knowledge. It is far better that the public and all applicants be informed of preferential admissions policies than to learn of them because a complaint or a law suit is filed. This sort of publicity leads to the impression that some nefarious or underhanded practice is going on in the institution.

3. The institution which has a preferential admissions policy must realize that the obligation to the minority student only begins when the admissions decision is made in his favor. The emotional and financial needs of minority students often far exceed those of traditional students. Every institution which accepts minority group members on a preferential basis incurs a responsibility to assist those students in progressing all the way through their programs. Providing continuous assistance to those who are preferentially admitted is obligatory because it is humane, decent and highly desirable; moreover, it minimizes the potential for criticism and possible litigation.

4. Educators should make their viewpoints known to the public and to elected officials. It should be remembered that the Supreme Court is and always has been a political institution. In considering any case, the Court must find a way to maximize public acceptance of its decision. To achieve that goal, the Warren Court, for example, put off a decision in the Brown I case until it could hand down a unanimous opinion. The political ties of the courts contribute to the tendency of the law to move slowly. Progress toward a just society is tediously slow. In the history of the United States, progress has been measured by the passage of generations rather than by the passage of months and years. The educator who seems perfectly willing to wait for justice appears to be consenting by silence to injustice.

5. The academic community should support and engage in research which aims to develop testing programs and procedures designed to bring the maximum number of nontraditional students into the mainstream of higher education. Also, the institution which adopts preferential admissions policies should employ standardized test scores with great caution until new and more sophisticated techniques for developing performance predictors are found, and until these performance predictors are thoroughly tested.

Concluding Statement

As societies change, they tend to become increasingly complex. As the complexity of a social structure increases, solutions to societal problems are more difficult to derive and even more difficult to organize. The difficulty inherent in organizing complex social solutions results in more frequent incidences of social disruption. During extremely chaotic periods,

social values are put to the test. New values are chosen, values which are deemed to be more capable of directing behavior toward the fulfillment of a society's needs.

The effort to compensate for past discrimination, which has taken the form of affirmative action programs, seeks to preserve the best of the old social order; that is, affirmative action seeks to provide a solution which permits much of the old structure to remain ongoing and viable. The objective of the faction which supports affirmative action programs is to permit the victims of discrimination to catch up with other Americans, and to catch up without the necessity of tearing down the underpinnings of American capitalism and move toward a total welfare state. Opponents of affirmative action call it reverse discrimination, and present the argument that any form of preference offered to groups rather than to individuals is unfair and unconstitutional.

To attack reverse discrimination because it also exemplifies invidious racial discrimination now seems commendable. Such an attack is the act of one who is deeply concerned for the sufferings of others. The major objection to this position is that the existence of some reverse discrimination would serve as badly needed compensation for protracted oppression in the past. Some reverse discrimination would, according to proponents, also insure a more equal, more diversified, more productive society. Such a society is an ideal which is logically associated with the commitment to democracy in education, to the belief that every pupil has the right to the kind and level of schooling which enables him or her to achieve the largest measure of growth. In the face of confusion and ambivalence, the dedicated professional continues to place the goal of helping students first on the list.

However, even the most dedicated educators have differing views as to the desirability of any program which affords preferential treatment to members of some minority group. The official positions of the American Foundation of Teachers and the National Education Association were on opposite sides of the courtroom in the Bakke case.

The American system of jurisprudence supports the principle that access to any privilege is allocated to the individual. When access to privilege is based on membership in a group, the principle which declares that rights belong to individuals rather than groups is abrogated. This observation deserves as much respect as the declaration that all whites have an obligation to share in the collective guilt for the black condition in America. Both Statements are basically sound philosophically. Each concept, if adhered to and applied with good intent and common sense, could yield desirable results for all. There has emerged a tendency for the opposing factions in the affirmative action issue to shout past each other. The forces ultimately deploy themselves along racial lines. At this critical stage in the development of the American democracy, the simplistic treatment of discrimination as purely a function of racism serves no viable end.

The final goal, if the issue of affirmative action is to be addressed constructively, must be the goal of redefining discrimination and reassessing cultural disadvantages. When affirmative action is seen as a contest which sets black against white, the concept of affirmative action will not command the respect and support which is required within the white community. The Bakke decision has delineated a new and greater challenge; a challenge which is laid down to all racial groups. That challenge is to refrain from

and present the argument that any form of preference offered to groups rather than to individuals is unfair and unconstitutional.

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APPENDIX A

THE DISSENTING OPINION OF MR. JUSTICE WILLIAM O. DOUGLAS IN THE CASE OF DE FUNIS V. ODEGAARD

I agree with Mr. Justice Brennan that this case is not moot, and because of the significance of the issues raised I think it is important to reach the merits.

I

The University of Washington Law School received 1,601 applications for admission to its first-year class beginning in September 1971. There were spaces available for only about 150 students, but in order to enroll this number the school eventually offered admission to 275 applicants.

All applicants were put into two groups, one of which was considered under the minority admissions program. Thirty-seven of those offered admission had indicated on an optional question on their application that their "dominant" ethnic origin was either Black, Chicano, American Indian, or Filipino, the four groups included in the minority admissions program. Answers to this optional question were apparently the sole basis upon which eligibility for the program was determined. Eighteen of these 37 actually enrolled in the Law School.

In general, the admissions process proceeded as follows:

An index called the Predicted First Year Average (Average) was calculated for each applicant on the basis of a formula combining the applicant's score on the Law School Admission Test (LSAT) and his grades in his last two years in college. On the basis of its experience with previous years' applications, the admissions committee, consisting of faculty, administration, and students, concluded that the most outstanding applicants were those with averages above 77; the highest average of any applicant was 81. Applicants with averages above 77 were considered as their applications arrived by random distribution of their files to the members

of the committee who would read them and report their recommendations back to the committee. As a result of the first three committee meetings in February, March, and April 1971, 78 applicants from this group were admitted, although virtually no other applicants were offered admission this early. By the final conclusion of the admissions process in August 1971, 147 applicants with averages above 77 had been admitted, including all applicants with averages above 78, and 93 of 105 applicants with averages between 77 and 78.

Also beginning early in the admissions process was the culling out of applicants with averages below 74.5. These were reviewed by the Chairman of the Admissions Committee, who had the authority to reject them summarily without further consideration by the rest of the Committee. A small number of these applications were saved by the Chairman for committee consideration on the basis of information in the file indicating greater promise than suggested by the Average. Finally during the early months the Committee accumulated the applications of those with averages between 74.5 and 77 to be considered at a later time when most of the applications had been received and thus could be compared with one another. Since De Funis' average was 76.23, he was in this middle group.

Beginning in their May meeting the Committee considered this middle group of applicants, whose folders had been randomly distributed to Committee members for their recommendations to the Committee. Also considered at this time were remaining applicants with averages below 74.5 who had not been summarily rejected, and some of those with averages above 77 who had not been summarily admitted, but instead held for further consideration. Each Committee member would consider the applications competitively, following rough guidelines as to the proportion who could be offered admission. After the Committee had extended offers of admission to somewhat over 200 applicants, a waiting list was constructed in the same fashion, and was divided into four groups ranked by the Committee's assessment of their applications. De Funis was on this waiting list, but was ranked in the lowest quarter. He was ultimately told in August 1971 that there would be no room for him.

Applicants who had indicated on their application forms that they were either Black, Chicano, American Indian, or Filipino were treated differently in several respects.

Whatever their averages, none were given to the Committee Chairman for consideration of summary rejection, nor were they distributed randomly among committee members for consideration along with the other applications. Instead, all applications of Black students were assigned separately to two particular Committee members; a first-year Black law student on the Committee, and a professor on the Committee who had worked the previous summer in a special program for disadvantaged college students considering application to Law School. Applications from among the other three minority groups were assigned to an assistant dean who was on the Committee. The minority applications, never directly compared to the remaining applications, either by the subcommittee or by the full Committee. As in the admissions process generally, the Committee sought to find "within the minority category, those persons who we thought had the highest probability of succeeding in Law School." In reviewing the minority applications, the Committee attached less weight to the Average "in making a total judgmental evaluation as to the relative ability of the particular applicant to succeed in law school." 82 Wash. 2d 11, 21, 507 P. 2d 1169, 1175. In its publicly distributed Guide to Applicants, the Committee explained that "(a)n applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions."

Thirty-seven minority applicants were admitted under this procedure. Of these, 36 had Averages below De Funis' 76.23, and 30 had averages below 74.5, and thus would ordinarily have been summarily rejected by the Chairman. There were also 48 nonminority applicants admitted who had Averages below De Funis. Twenty-three of these were returning veterans, se n.2, supra, and 25 others presumably admitted because of other factors in their applications making them attractive candidates despite their relatively low averages.

It is reasonable to conclude from the above facts that while other factors were considered by the Committee, and were on occasion crucial, the Average was for the most applicants a heavily weighted factor, and was at the extremes virtually dispositive. A different balance was apparently struck, however, with regard to the minority applicants. Indeed, at oral argument, the Law School advised us that were the minority applicants considered

under the same procedure as was generally used, none of those who eventually enrolled at the Law School would have been admitted.

The educational policy choices confronting a university admissions committee are not ordinarily a subject for judicial oversight; clearly it is not for us but for the law school to decide which tests to employ, how heavily to weigh recommendations from professors or undergraduate grades, and what level of achievement on the chosen criteria are sufficient to demonstrate that the candidate is qualified for admission. What places this case in a special category is the fact that the school did not choose one set of criteria but two, and then determined which to apply to a given applicant on the basis of his race. The Committee adopted this policy in order to achieve "a reasonable representation" of minority groups in the Law School. 82 Wash. 2d, at 20, 507 P. 2d, at 1175. Although it may be speculated that the Committee sought to rectify what it perceived to be cultural or racial biases in the LSAT or in the candidates' undergraduate records, the record in this case is devoid of any evidence of such bias, and the school has not sought to justify its procedures on this basis.

Although testifying that "(w)e do not have a quota..." the Law School dean explained that "(w)e want a reasonable representation. We will go down to reach it if we can," without "taking people who are unqualified in an absolute sense...." (Statement of Facts 420.) By "unqualified in an absolute sense" the dean meant candidates who "have no reasonable probably likelihood of having a chance of succeeding in the study of law...." But the dean conceded that in "reaching," the school does take "some minority who at least, viewed as a group, have a less such likelihood than the majority student group taken as a whole."

> "Q. Of those who have made application to go to the law school, I am saying you are not taking the best qualified?
>
> "A. In total?
>
> "Q. In total.
>
> "A. In using that definition, yes."

It thus appears that by the Committee's own assessment, it admitted minority students who, by the tests given, seemed less qualified than some white students who were not accepted, in order to achieve a "reasonable representation." In this regard it may be pointed out that for the year 1969-1970--the year before the class to which De Funis was seeking admission--the Law School reported an enrollment of eight Black students out of a total of 356. (Defendents' Ex. 7.) That percentage, approximately 2.2%, compares to a percentage of Blacks in the population of Washington of approximately 2.1%.

II

There was a time when law schools could follow the advice of Wigmore, who believed that "the way to find out whether a boy has the makings of a competent lawyer is to see what he can do in a first year of law studies." Wigmore, Juristic Psychopoyemetrology--Or, How to Find Out Whether a Boy Has the Makings of a Lawyer, 24 Ill. L. Rev. 454, 463-464 (1929). In those days there were enough spaces to admit every applicant who met minimal credentials, and they all could be given the opportunity to prove themselves at law school. But by the 1920's many law schools found that they could not admit all minimally qualified applicants, and some selection process began. The pressure to use some kind of admissions test mounted, and a number of schools instituted them. One early precursor to the modern day LSAT was the Ferson-Stoddard Law Aptitude examination. Wigmore conducted his own study of that test with 50 student volunteers, concluded that it "had no substantial practical value." But his conclusions were not accepted, and the harried law schools still sought some kind of admissions test which would simplify the process of judging applicants, and in 1948 the LSAT was born. It has been with us ever since."

The test purports to predict how successful the applicant will be in his first year of law school, and consists of a few hours' worth of multiple-choice questions. But the answers the student can give to a multiple-choice question are limited by the creativity and intelligence of the test-maker; the student with a better or more original understanding of the problem than the test-maker may realize that none of the alternative answers are any good, but there is no way for him to demonstrate his understanding. "It is

obvious from the nature of the tests that they do not give the candidate a significant opportunity to express himself. If he is subtle in his choice of answers it will go atainst him; and yet there is no other way for him to show any individuality. If he is strong-minded, nonconformist, unusual, original, or creative--as so many of the truly important people are--he must stifle his impulses and conform as best he can to the norms that the multiple-choice testers set up in their unimaginative, scientific way. The more profoundly gifted the candidate is, the more his resentment will rise against the mental strait jacket into which the testers would force his mind." B. Hoffmann, The Tyranny of Testing 91-92 (1962).

Those who make the tests and the law schools which use them point, of course, to the high correlations between the test scores and the grades at law school the first year. E.g., Winterbottom, Comments on "A Study of the Criteria for Legal Education and Admission to the Bar," An Article by Dr. Thomas M. Goolsby, Jr., 21 J. Legal Ed. 75 (1968). Certainly the tests do seem to do better than chance. But they do not have the value that their deceptively precise scoring system suggests. The proponents' own data show that, for example, most of those scoring in the bottom 20% on the test do better than that in law school--indeed six of every 100 of them will be in the top 20% of their law school class. And no one knows how many of those who were not admitted becuase of their test scores would in fact have done well were they given the chance. There are many relevent factors, such as motivation, cultural backgrounds of specific minorities that the test cannot measure, and they inevitably must impair its value as a predictor. Of course, the law school that admits only those with the highest test scores finds that on the average they do much better, and thus the test is a convenient tool for the admissions committee. The price is paid by the able student who for unknown reasons did not achieve that high score--perhaps even the minority with a different cultural background. Some tests, at least in the past, have been aimed at eliminating Jews.

The school can safely conclude that the applicant with a score of 750 should be admitted before one with a score of 500. The problem is that in many cases the choice will be between 643 and 602 or 574 and 528. The numbers creat an illusion of difference tending to overwhelm other factors.

"The wiser testers are well aware of the defects of the multiple-choice format and the danger of placing reliance on any one method of assessment to the exclusion of all others. What is distressing is how little their caveats have impressed the people who succumb to the propaganda of the test-makers and use these tests mechanically as though they were a valid substitute for judgment." Hoffmann, supra, at 215.

Of course, the tests are not the only thing considered; here they were combined with the prelaw grades to produce a new number called the Average. The grades have their own problems, one school's A is another school's C. And even to the extent that this formula predicts law school grades, its value is limited. The law student with lower grades may in the long pull of a legal career surpass those at the tope of the class. "(L)aw school admissions criteria have operated within a hermetically sealed system; it is now beginning to leak. The traditional combination of LSAT and GPA (undergraduate grade point average) may have provided acceptable predictors of likely performance in law school in the past....(But) (t)here is no clear evidence that the LSAT and GPA provide particularly good evaluators of the intrinsic or enriched ability of an individual to perform as a law student or lawyer in a functioning society undergoing change. Nor is there any clear evidence that grades and other evaluators of law school performance, and the bar examination, are particularly good predicators of competence or success as a lawyer." Rosen, Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria, 1970 U. Tol. L. Rev. 321, 332-333.

But, by whatever techniques, the law school must make choices. Neither party has challenged the validity of the Average employed here as an admissions tool, and therefore consideration of its possible deficiencies is not presented as an issue. The Law School presented no evidence to show that adjustments in the process employed were used in order validily to compare applicants of different races; instead, it chose to avoid making such comparisons. Finally, although the Committee did consider other information in the files of all applicants, the Law School has made no effort to show that it was because of these additional factors that it admitted minority applicants who would otherwise have been rejected. To the contrary, the school system appears to

have conceded that by its own assessment--taking all factors into account--it admitted minority applicants who would have been rejected had they been white. We have no choice but to evaluate the Law School's case as it has been made.

III

The Equal Protection Clause did not enact a requirement that Law Schools employ as the sole criterion for admissions a formula based upon the LSAT and undergraduate grades, nor does it prohibit law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome. A Black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance and ability that would lead a fairminded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would not be offered admission because he is Black, but because as an individual he has shown he has the potential, which the Harvard man may have taken less advantage of the vastly superior opportunities offered him. Because of the weight of the prior handicaps, that Black applicant may not realize his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career his achievements may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria. There is currently no test available to the Admissions Committee that can predict such possibilities with assurance, but the Committee may nevertheless seek to guage it as best it can, and weigh this factor in its decisions. Such a policy would not be limited to Blacks, or Chicanos or Filipinos, or American Indians, although undoubtedly groups such as these may in practice be the principal beneficiaries of it. But a poor Appalachian white, or a second generation Chinese in San Francisco, or some other American whose lineage is so diverse as to defy ethnic labels, may demonstrate similar potential and thus be accorded favorable consideration by the committee.

The difference between such a policy and the one presented by this case is that the Committee would be making decisions on the basis of individual attributes, rather than according a preference solely on the basis of race. To be sure, the racial preference here was not

absolute--the Committee did not admit all applicants from the four favored groups. But it did accord all such applicants a preference by applying, to an extent not precisely ascertainable from the record, different standards by which to judge their applications, with the result that the Committee admitted minority applicants who, in the school's own judgment, were less promising than other applicants who were rejected. Furthermore, it is apparent that because the Admissions Committee compared minority applicants only with one another, it was necessary to reserve some proportion of the class for them, even if at the outset a precise number of places were not set aside. That proportion, apparently 15% to 20%, was chosen because the school determined it to be "reasonable," although no explanation is provided as to how that number rather than some other was found appropriate. Without becoming embroiled in a semantic debate over whether this practice constitutes a "quota," it is clear that, given the limitation on the total number of applicants who could be accepted, this policy did reduce the total number of places for which De Funis could compete--solely on account of his race. Thus, as the Washington Supreme Court concluded, whatever label one wishes to apply to it, "the minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it." 82 Wash. 2d, at 32, 507 P. 2d, at 1182. A finding that the state school employed a racial classification in selecting its students subjects it to the strictest scrutiny under the Equal Protection Clause.

The consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination, Anderson v. Martin, 375 U.S. 399, 402; Loving v. Virginia, 388 U.S. 1, 10, Harper v. Virginia Board of Elections, 383 U.S. 663, 668. Once race is a starting point educators and courts are immediately embroiled in competing claims of different racial and ethnic groups that would make difficult, manageable standards consistent with the Equal Protection Clause. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." Loving, supra, at 10. The Law School's admissions policy cannot be reconciled with that purpose, unless cultural standards of a diverse rather than a homogeneous society are taken into account. The reason is that professional

persons, particularly lawyers, are not selected for life in a computerized society. The Indian who walks to the beat of Chief Seattle of the Muckleshoot Tribe in Washington has a different culture from examiners at law schools.

The key to the problem is the consideration of each application in a racially neutral way. Since LSAT reflects questions touching on cultural backgrounds, the Admissions Committee acted properly in my view in setting minority applications apart for separate processing. These minorities have cultural backgrounds that are vastly different from the dominant Caucasian. Many Eskimos, American Indians, Filipinos, Chicanos, Asian Indians, Burmese, and Africans come from such disparate backgrounds that a test sensitivity tuned for most applicants would be wide of the mark for many minorities.

The melting pot is not designed to homogenize people, making them uniform in consistency. The melting pot as I understand it is a figure of speech that depicts the wide diversities tolerated by the First Amendment under one flag. See 2 S. Morison & H. Commager, The Growth of the American Republic, c. VIII (4th ed. 1950). Minorities in our midst who are to serve actively in our public affairs should be chosen on talent and character alone, not on cultural orientation or leanings.

I do know, coming as I do from Indian country in Washington, that many of the young Indians know little about Adam Smith or Karl Marx but are deeply imbued with the spirit and philosophy of Chief Robert B. Jim of the Yakimas, Chief Seattle of the Muckleshoots, and Chief Joseph of the Nez Perce which offer competitive attitudes towards life, fellow man, and nature.

I do not know the extent to which Blacks in this country are imbued with ideas of African Socialism. Leopold Senghor and Sekou Toure, most articulate of African leaders, have held that modern African political philosophy is not oriented either to Marxism or to capitalism. How far the reintroduction into educational curricula of ancient African art and history has reached the minds of young Afro-Americans I do not know. But at least as respects Indians, Blacks, and Chicanos--as well

as those from Asian cultures--I think a separate classification of these applicants is warranted, lest race be a subtle force in eliminating minority members because of cultural differences.

Insofar as LSAT tests reflect the dimensions and orientation of the Organization Man they do a disservice to minorities. I personally know that admissions tests were once used to eliminate Jews. How many other minorities they aim at I do not know. My reaction is that the presence of an LSAT test is sufficient warrant for a school to put racial minorities into a separate class in order better to probe their capacities and potentials.

The merits of the present controversy cannot in my view be resolved on this record. A trial would involve the disclosure of hidden prejudices, if any, against certain minorities and the manner in which substitute measurements of one's talents and character were employed in the conventional tests. I could agree with the majority of the Washington Supreme Court only if, on the record, it could be said that the Law School's selection was racially neutral. The case, in my view, should be remanded for a new trial to consider, inter alia, whether the established LSAT tests should be eliminated so far as racial minorities are concerned.

This does not mean that a separate LSAT test must be designed for minority racial groups, although that might be a possibility. The reason for the separate treatment of minorities as a class is to make more certain that racial factors do not militate against an applicant or on his behalf.

There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of Blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A De Funis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

The slate is not entirely clean. First, we have held that pro rata representation of the races is not required either on juries, see Cassell v. Texas, U.S. 282, 286-287, or in public schools, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24. Moreover, in Hughes v. Superior Court, 339 U.S. 460, we reviewed the contempt convictions of pickets who sought by their demonstration to force an employer to prefer Negroes to whites in his hiring of clerks, in order to ensure that 50% of the employees were Negro. In finding that California could constitutionally enjoin the picketing there involved we quoted from the opinion of the California Supreme Court, which noted that the pickets would "'make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis.'" We then noted that

> "(t)o deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities."

The reservation of a proportion of the law school class for members of selected minority groups is fraught with similar dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to Blacks, or to Blacks and Chicanos. Once the Court sanctioned racial preferences such as these,

it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled Sweatt v. Painter, 339 U.S. 629, and allowed imposition of a "zero" allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would not constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356; Terrace v. Thompson, 263 U.S. 197; Oyama v. California, 332 U.S. 633. This Court has not sustained a racial classification since the wartime cases of Korematsu v. United States, 323 U.S. 214 (1944), and Hirabayashi v. United States, 320 U.S. 81 (1943), involving curfews and relocations imposed upon Japanese-Americans.

Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints.

The key to the problem is consideration of such applications in a racially neutral way. Abolition of the LSAT would be a start. The invention of substitute tests might be made to get a measure of an applicant's cultural background, perception, ability to analyze, and his or her relation to groups. They are highly subjective, but unlike the LSAT they are not concealed, but in the open. A law school is not bound by any legal principle to admit students by mechanical criteria which are insensitive to the potential of such an applicant which may be realized in a more hospitable environment. It will be necessary under such an approach to put more effort into assessing each individual than is required when LSAT scores and undergraduate grades dominate the selection process.

Interviews with the applicant and others who know him is a time-honored test. Some schools currently run summer programs in which potential students who likely would be bypassed under conventional admissions criteria are given the opportunity to try their hand at law courses, and certainly their performance in such programs could be weighed heavily. There is, moreover, no bar to considering an individual's prior achievements in light of the racial discrimination that barred his way, as a factor in attempting to assess his true potential for a successful legal career. Nor is there any bar to considering on an individual basis, rather than according to racial classifications, the likelihood that a particular candidate will more likely employ his legal skills to service communities that are not now adequately represented than will competing candidates. Not every student benefited by such an expanded admissions program would fall into one of the four racial groups involved here, but it is no drawback that other deserving applicants will also get an opportunity they would otherwise have been denied. Certainly such a program would substantially fulfill the Law School's interest in giving a more diverse group access to the legal profession. Such a program might be less convenient administratively than simply sorting students by race, but we have never held administrative convenience to justify racial discrimination.

The argument is that a "compelling" state interest can easily justify the racial discrimination that is practiced here. To many, "compelling" would give members of one race even more than pro rata representation. The public payrolls might then be deluged say with Chicanos because they are as a group the poorest of the poor and need work more than others, leaving desperately poor individual Blacks and whites without employment. By the same token large quotas of blacks or browns could be added to the Bar, waiving examinations required of other groups, so that it would be better racially balanced. The State, however, may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our

theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce Black lawyers for Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans and not to place First Amendment barriers against anyone. That is the point at the heart of all our school desegregation cases, from Brown v. Board of Education, 347 U.S. 483, through Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1. A segregated admissions process creates suggestions of stigma and caste no less than a secregated class-room, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved, that Blacks or Browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.

If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality. Speech is closely brigaded with action when it triggers a fight, Chaplinsky v. New Hampshire, 315 U.S. 568, as shouting "fire" in a crowded theater triggers a riot. It may well be that racial strains, racial susceptibility to certain diseases, racial sensitiveness to environmental conditions that other races do not experience, may in an extreme situation justify differences in racial treatment that no fairminded person would call "invidious" discrimination. Mental ability is not in that category. All races can compete fairly at all professional levels. So far as race is concerned, any state-sponsored preference to one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.

The problem tendered by this case is important and crucial to the operation of our constitutional system; and educators must be given leeway. It may well be that a whole congeries of applicants in the marginal group defy known methods of selection. Conceivably, an admissions committee might conclude that a selection by lot of, say, the last 20 seats is the only fair solution. Courts are not educators; their expertise is limited; and and our task ends with the inquiry whether, judged by the

main purpose of the Equal Protection Clause--the protection against racial discrimination--there has been an "invidious discrimination."

We would have a different case if the suit were one to displace the applicant who was chosen in lieu of De Funis. What the record would show concerning his potentials would have to be considered and weighed. The educational decision, provided proper guidelines were used, would reflect an expertise that course should honor. The problem is not tendered here because the physical facilities were apparently adequate to take De Funis in addition to the others. My view is only that I cannot say by the tests used and applied he was invidiously discriminated against because of his race.

I cannot conclude that the admissions procedure of the Law School of the University of Washington that excluded De Funis is violative of the Equal Protection Clause of the Fourteenth Amendment. The judgement of the Washington Supreme Court should be vacated and the case remanded for a new trial.