PREFERENTIAL REMEDIES AND AFFIRMATIVE ACTION IN EMPLOYMENT IN THE WAKE OF *BAKKE**

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I. THE *BAKKE* DECISION

From September 1976, when the California Supreme Court decided *Regents of University of California v. Bakke*,[1] until June 1978, when the United States Supreme Court ruled in the matter,[2] untold numbers of groups and individuals wrote and debated at length about what many assumed might be one of the most important Supreme Court decisions in this century.[3] Unfortunately, the scholarly writings done in anticipation of *Bakke* were plainly more illuminating than the *Bakke* decision itself; the foreplay of intellectual debate was clearly more satisfying than the digestion of the Court's badly split decision comprising six different opinions; and the arguments pro and con made by the proponents on each side of the case before the decision were clearly more

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 A lecture delivered at Washington University on January 17, 1979, as the fourth in a series on *The Quest for Equality*.

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1. Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *aff'd in part and rev'd in part*, 438 U.S. 265 (1978).

2. 438 U.S. 265 (1978).

3. *See, e.g.*, Morris, *Constitutional Alternatives to Racial Preferences in Higher Education Admissions*, 17 SANTA CLARA L. REV. 279 (1977); Vieira, *Permissible Classification by Race and the Bakke Case*, 14 IDAHO L. REV. 1 (1977). For discussions of the preferential remedy concept, see B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973); Black & Dworkin, *IQ: Heritability and Inequality* (pts. 1 & 2), 3 & 4 PHILOSOPHY & PUB. AFF. 331 & 40 (1974); Brest, *The Supreme Court, 1975 Term—Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Cohen, *The DeFunis Case: Race and the Constitution*, 220 NATION 135 (1975); *DeFunis "Symposium,"* 75 COLUM. L. REV. 483 (1975); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Paulsen, *"DeFunis": The Road Not Taken*, 60 VA. L. REV. 917 (1974); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; Sanalow, *Racial Preferences in Higher Education: Political Responsibility and the Judical Role*, 42 U. CHI. L. REV. 653 (1975).

spirited and convincing than the muted claims of victory voiced by the combatants following the decision.

In point of fact, no one really "won" in *Bakke*. As a judicial result viewed by students of the law, the Court's work in *Bakke* gets poor marks. But if *Bakke* is analyzed as a case containing mostly sensitive social and political problems, then the judgment of the Court appears less troublesome, and the result, which leaves a number of important questions unanswered, may be a highly salutory one.

In *Bakke*,[4] the Medical School of the University of California at Davis developed two admissions programs to fill its 100 openings—a regular admissions program under which eighty-four students were admitted, and a special admissions program for economically or educationally disadvantaged minorities under which sixteen students were admitted. A California trial court found that the special admissions program operated as a racial quota because it foreclosed whites from competition for the sixteen spaces. Minority applicants considered under the special program were rated only against one another. The trial court concluded that the consideration of race as a factor in making admissions decisions violated the California state constitution, the equal protection clause of the fourteenth amendment,[5] and Title VI of the Civil Rights Act of 1964.[6]

On review the California Supreme Court affirmed the determination that the Davis special admissions program violated the equal protection clause.[7] The court also ordered Alan Bakke's admission to Davis because the University of California failed to demonstrate that Bakke, absent the special program, would not have been admitted to medical school.[8]

When the case reached the United States Supreme Court,[9] the princi-

4. An excellent summary of the *Bakke* opinion may be found in THE BAKKE DECISION: IMPLICATIONS FOR HIGHER ADMISSIONS (W. McCormack ed. 1978) [hereinafter cited as THE BAKKE DECISION].

5. U.S. CONST. amend. XIV, § 1 provides: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

6. Pub. L. No. 88-352, § 601, 78 Stat. 252 (codified at 42 U.S.C. §§ 2000d to 2000d-4 (1976)). Section 2000d provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

7. Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976), *aff'd in part and rev'd in part*, 438 U.S. 265 (1978).

8. 18 Cal. 3d 34, 64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976).

9. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

pal issue was whether an institution of higher education, using selective admissions criteria, could adjust its admissions program to give explicit preference to qualified members of identified racial or ethnic groups who would otherwise be denied admission. In a five-to-four decision, the United States Supreme Court held that the Davis special admissions program was unlawful.[10] The Court, however, reversed the judgment of the California Supreme Court insofar as it prohibited Davis from taking race into account as a factor in future admissions decisions.[11]

Because *Bakke* involves six different opinions and nearly 200 pages of judicial writing, it is difficult to find a unifying thread in the Court's judgment. Nevertheless, as noted in *A Report of the ACE-AALS Committee on Bakke*,[12] two points seem relatively clear from the decision:

(1) In public institutions subject to Title VI, a two-track admission program in which a specific number of seats is reserved exclusively for applicants from designated minority groups is impermissible in the absence of appropriate legislative, judicial or administrative findings; and

(2) A properly constructed race-conscious admission program is legally permissible under certain circumstances.[13]

In reaching these results, Justice Powell provided the swing vote for the Court. Justice Powell sided with Justices Stevens, Stewart, Rehnquist, and Burger in declaring the Davis special admissions program to be illegal and in upholding the order requiring Davis to admit Mr. Bakke to medical school.[14] Justice Powell, however, sided with Justices Brennan, Marshall, White, and Blackmun in reversing the California Supreme Court judgment that race could not be used as a factor in university admissions.[15] It is highly significant that the Brennan group, representing four somewhat diverse voices on the Court, voted to uphold the Davis special admissions plan as a reasonable means of remedying societal discrimination.

Although the opinion of Justice Powell may be only the bottom line and not the final word on questions having to do with the legality of affirmative action and preferential remedies, for now his is still the

10. *Id.* at 319-20.
11. *Id.*
12. THE BAKKE DECISION, *supra* note 4.
13. *Id.* at 2.
14. 438 U.S. at 319-20.
15. *Id.*

swing vote. As such, the Powell opinion in *Bakke* is worthy of more than just a passing note.

According to Justice Powell, race-conscious admissions programs are permissible in at least two circumstances: (1) to ameliorate the effects of identified past discrimination;[16] and (2) to achieve racial or ethnic diversity on campus.[17]

Under the first category of cases, Powell says that a racial quota of the kind employed by Davis can be constitutionally justified only if it satisfies a compelling governmental purpose such as the eradication of proven discrimination within an institution. Powell cautions, however, that racial classifications that "aid persons perceived as members of relatively victimized groups at the expense of other innocent individuals" will be found to violate the equal protection clause "in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."[18]

Under the second category of cases, however, Justice Powell makes it clear that at least in the academic context, universities may, in the name of academic freedom, "take race into account in achieving the educational diversity valued by the First Amendment."[19] Thus, Powell says that "in . . . an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file"[20] so long as persons who benefit from race-as-a-plus are not insulated from comparison with all other candidates.

Applying this reasoning to the facts in *Bakke*, Powell concluded that the Davis special admissions program could not be upheld as a remedial measure.[21] No finding of unlawful discrimination by Davis had been made to justify the racial preference employed by the school in the program. Further, Powell rejected the University's contention that the program was justifiable because it sought to remedy the effects of societal discrimination. He concluded that Davis lacked authority to unilaterally implement a racial preference designed to cure the effects

16. "The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." *Id.* at 307.

17. "The fourth goal . . . is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education." *Id.* at 311-12.

18. *Id.* at 307.

19. *Id.* at 316.

20. *Id.*

21. *Id.* at 307-11.

of generalized societal discrimination.[22] He stressed that only a legislative group possessed the power to establish rights other than preexisting statutory or constitutional entitlements.[23]

On the diversity side of the Powell equation, he concluded that the Davis program was unlawful primarily because it appeared to fix a racial quota that insulated minority applicants from comparison with nonminority applicants.[24]

From the perspective of one who favors affirmative action, there are at least three noteworthy aspects of the *Bakke* decision. First, at least five Justices, including Powell, indicated that preferential remedies, given pursuant to appropriate legislative, judicial, or administrative findings, are constitutionally permissible to eradicate the effects of existing discrimination.

Second, under Justice Powell's alternative "diversity" (race-as-a-plus) model, race-conscious programs will be permissible without regard to whether there is a showing of past discrimination. In addition, Powell ignores the problem of test scores (*i.e.*, the so-called objective data used in university admissions), and he says nothing to suggest that his race-as-a-plus model must be limited to only "disadvantaged" minorities. According to Powell, racial diversity in and of itself is a worthy goal that may be pursued by universities so long as the means used are legitimate.

Finally, it is significant that the *four* Justices in the Brennan group—only one short of a majority—indicated that racial quotas and voluntary efforts at affirmative action are constitutionally permissible to eradicate past societal discrimination. If even one of the Justices from the Stevens group, which declined to deal with the constitutional questions posed in *Bakke*, lines up with the Brennan group in future cases, the bottom line for affirmative action will move up significantly.

II. The Impact of *Bakke* on Affirmative Action and Preferential Remedies in Employment

Although *Bakke* concerns only one form of affirmative action, it is clear that the decision reaches much more than just university admissions programs. One area in particular that will now take on height-

22. *Id.* at 310.
23. *Id.* at 308-10.
24. *Id.* at 315-20.

ened importance because of *Bakke* is the future status of preferential remedies and affirmative action designed to remedy employment discrimination.[25]

For almost a decade now, federal courts have issued preferential remedies for blacks and women under Title VII of the Civil Rights Act of 1964[26] and sections 1981[27] and 1983[28] of the Civil Rights Acts of 1866 and 1971.[29] During much of this same period, the Office of Federal Contract Compliance has, under Executive Order 11246,[30] required federal contractors to implement affirmative action programs to increase and improve the quality of job opportunities for minorities and women. The court-ordered preferential remedies have always been given pursuant to judicial findings of past discrimination. In most instances, however, affirmative action under Executive Order 11246 has been taken pursuant to general administrative directives without any specific findings of past discrimination within the employing institutions.

Unfortunately, current signs appear to indicate that there may be a diminishing concern in all branches of government over the problem of discrimination in employment against minorities and women.[31] The momentum set in motion by the civil rights movement of the 1950's and early 1960's brought on a panoply of congressional, executive, and judicial efforts to eradicate the worst evils of racial discrimination. Many of these efforts were highly successful in enforcing the principle of equal opportunity in employment in certain major industries. However, the idealism and good hopes of a decade ago seemingly have begun to fade into the defensive pragmatism of recessionary times. Many of the tools designed in the 1960's to fight racial and gender discrimination are seemingly being used in the 1970's to protect institutionalized bias that works to the disadvantage of minorities and women.

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25. *See generally* Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905 (1978); Jones, *Title VII, Seniority, and the Supreme Court: Clarification or Retreat?*, 26 KAN. L. REV. 1 (1977).

26. 42 U.S.C. §§ 2000e to 2000e-15 (1976).

27. 42 U.S.C. § 1981 (1976).

28. 42 U.S.C. § 1983 (1976).

29. *See generally* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225 (1976); Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975).

30. 3 C.F.R. § 339 (1965).

31. *See* note 15 *supra*.

Even before the judgment in *Bakke*, a number of significant court decisions issued during the past few years appeared to confine and narrow the relief available under the Civil Rights Acts. For example, in 1976 in *Washington v. Davis*,[32] the Supreme Court ruled that a public employer is not guilty of unlawful employment discrimination under the equal protection standard absent a showing of discriminatory intent. It is nearly impossible for plaintiffs to prove unlawful "motive" in most cases, especially when the challenged employment practice is facially neutral, but has a greater adverse effect on minority persons. Therefore, the Davis ruling will significantly limit the availability of meaningful remedies for employment discrimination under section 1983.

In 1977 the Supreme Court in *International Brotherhood of Teamsters v. United States*[33] ruled that a facially neutral seniority system was lawful under Title VII even though it perpetuated the effects of prior discrimination against blacks. The opinion in *Teamsters*, which overturned contrary opinions that had been issued in eight circuit courts of appeals,[34] was a devastating setback for civil rights advocates. Upon reflection, the decision in *Teamsters* is not surprising when read in the light of the Supreme Court's 1976 opinion in *Franks v. Bowman Transportation Co.*[35] In that case, while awarding retroactive seniority for identified victims of discrimination, the Court explained that the thrust of section 703(h)[36] "is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act."[37] The Court in *Franks* emphasized that "[t]he underlying legal wrong affecting [plaintiffs] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system."[38] In *Teamsters* the Court simply followed this distinction to the conclusion that facially neutral seniority systems, per se, are insulated from attack. Nevertheless, *Teamsters* was still a startling setback because it served to overturn an unbroken line of favorable precedent

32. 426 U.S. 229 (1976).
33. 431 U.S. 324 (1977).
34. The circuits and cases affected are collected at 431 U.S. 378 n.2, 379 n.3.
35. 424 U.S. 747 (1976).
36. 42 U.S.C. § 2000e-3(h) (1976).
37. 424 U.S. at 761.
38. *Id.* at 758.

from the lower federal courts that had been relied upon for years by well-meaning union and employer advocates to justify modifications of discriminatory seniority systems.

Teamsters, especially when read along with *Franks*, is also troubling because it seems to offer some dicta to suggest that Title VII remedies may be available for only "identified victims" of discrimination, as distinguished from persons in a "group" affected by discriminatory practices.[39] If this suggestion is indeed adopted by the courts, then precedents like *Carter v. Gallagher*[40] are likely to be called into question.

In a 1978 post-*Bakke* opinion, the Supreme Court issued yet another disappointing decision in *Board of Trustees v. Sweeney*.[41] In a per curiam opinion the Court reversed a lower court holding that defendant unlawfully failed to promote plaintiff because of her gender. The majority reasoned that the court of appeals incorrectly required the college to "prove absence of discriminatory motive" to dispel a prima facie case of discrimination.[42] *Sweeney* cites an earlier 1978 case, *Furnco Construction Co. v. Waters*,[43] for the proposition that defendants need only "articulate" a legitimate, nondiscriminatory reason for their conduct to successfully rebut a prima facie case of discrimination.[44] The four dissenting Justices in *Sweeney*, however, properly charge the majority with reading words out of context.[45] On this point, the dissenting opinion appears to be on the mark because the court of appeals opinion, when read in its entirety, is plainly a correct statement of the law and a proper assignment of the burden of proof. The dissenters in *Sweeney* also assert that the "imaginative distinction" between having to prove a nondiscriminatory motive and having to "articulate" a legitimate one is illusory.[46] In fact, they charge the majority with having used the words "prove" and "articulate" interchangeably in *Furnco* itself.[47]

39. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 357-62, 371-72 (1977).
40. 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).
41. 99 S. Ct. 295 (1978).
42. *Id.*
43. 98 S. Ct. 2943 (1978).
44. 99 S. Ct. at 295.
45. *Id.* at 297.
46. *Id.*
47. *Id.*

Sweeney is troubling not merely because it reversed a lower court's decision on seemingly specious grounds, but also because of its possible significance for future employment discrimination cases in the professions and other higher level occupations. Higher education cases have been among the few, and certainly the most significant, employment discrimination claims involving professional employment arising under Title VII and other Civil Rights Acts. The plaintiffs in these cases, however, have rarely succeeded. As one court noted: "[M]any [judicial opinions] . . . have [accepted] . . . the broad proposition that courts should exercise minimal scrutiny of college and university employment practices . . . . This anti-interventionist policy has rendered universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly."[48] *Sweeney* not only does nothing to cure the problem of judicial deference to employer judgments in cases of professional employment, but, even worse, it seems to lighten the burden of proof on defendants once a prima facie case has been made out by plaintiffs.

It is because of these pre- and post-*Bakke* decisions, and a few others that I have yet to mention, that the importance of *Bakke* in the employment area cannot be overstated. If *Bakke* is seen as a further sign of retrenchment, then the net result may be to sap force from Title VII and other laws designed to deal with the problem of employment discrimination. But if *Bakke* is seen as a clear statement from the Court in favor of race-conscious remedies, then it may serve to quiet the cries of "reverse discrimination" heard from those objecting to preferential remedies and affirmative action in favor of minorities and women.

In considering the impact of *Bakke* in the area of employment discrimination, it is important to recall that two themes run through many of the judicial rulings and administrative schemes designed to remedy discrimination.[49] The first is that of "make-whole" relief, which has the goal of returning identified victims of discrimination to the place they would have been but for the discrimination. The second is that of alleviating the continuing effects of past discrimination, which entails the awarding of preferential treatment to members of a harmed class

48. Powell v. Syracuse Univ., 580 F.2d 1150, 1153 (2d Cir.), *cert. denied*, 99 S. Ct. 576 (1978). *See also* cases cited in Sweeney v. Board of Trustees, 569 F.2d 169 (1st Cir.), *vacated and remanded*, 99 S. Ct. 295 (1978).

49. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976); Belton, *supra* note 25.

who themselves were not direct victims of discriminatory acts. The remedies that are available to identified victims of discrimination include back pay and retroactive seniority. *Bakke* has no effect on these, and there is little dispute over their continued acceptability.

The remainder of this paper, therefore, will focus on those preferential remedies imposed by the courts and those affirmative action plans voluntarily created or adopted pursuant to administrative directives to favor a particular class that does not necessarily include identified victims. (For example, if an employer has discriminated against blacks in the past, a court might order that a specified number of blacks be hired in the future, even though none of the future hires may have been actual victims of past discrimination.) Remedies of this sort may include ratios and quotas for hiring and promotion, "fictional seniority," and front pay.

A. *Fixed Preferences After a Judicial Determination of Discrimination*

Hiring quotas imposed after judicial findings of discrimination have long been accepted as a proper remedy under Title VII, sections 1981 and 1983.[50] Although section 703(j) in Title VII[51] forbids the use of preferential treatment to remedy an imbalance between minority and nonminority employees, a number of courts have reasoned that Congress did not intend the section to prohibit the use of a preferential remedy where an imbalance results from past unlawful discrimination.[52] Racial quotas have also often survived constitutional attack in the public school cases.[53]

Preferential quotas receive more publicity than the extent of their use warrants.[54] The judiciary views hiring quotas and ratios as an extreme remedy and thus orders them used only sparingly. They are temporary and are set at a level commensurate with the available work force. An employer is never put in the position of having to hire less than fully qualified applicants. The purpose behind the remedy is to counteract, for at least a limited period of time, the built-in preference for white

50. *See generally* Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974).

51. 42 U.S.C. § 2000e-2(j) (1976).

52. *See* Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).

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

54. *See* Edwards & Zaretsky, *supra* note 29.

males. It is hoped that the quota will act as a catalyst to break down the discriminatory preference. Quotas are not intended, by themselves, to bring a racial imbalance into par with the geographic area. Finally, because most quotas operate at the hiring stage, they do not displace white male workers or interfere with seniority systems.

Bakke does not foreclose this avenue of relief. The Powell decision in *Bakke* expressly approves of preferential quotas when predicated upon judicial findings of identified discrimination.[55] Powell cites *Carter v. Gallagher*,[56] a 1971 Eighth Circuit case, as an acceptable example of this kind of remedy.[57] In *Carter* the court found that the employment practices of the Minneapolis Fire Department discriminated against racial minorities and, therefore, violated the equal protection clause. The court ordered the fire department to implement a hiring ratio of one minority to two nonminority hirings until twenty minority persons were hired. The Eighth Circuit concluded that a "reasonable ratio for hiring minority persons who qualify" was necessary in this case to make "meaningful in the immediate future the constitutional guarantees against racial discrimination."[58]

The circuit courts have been nearly unanimous in approving the kind of ratio applied by the Eighth Circuit in *Carter*.[59] The continued acceptability of this remedy after *Bakke* seems certain, at least under Title VII, in cases involving proved and egregious patterns of past discrimination.

B. *Remedies Compelling Fictional Seniority Following a Judicial Determination of Discrimination*

A second kind of court-ordered remedy uses some form of fictional seniority. This alternative awards minorities extra seniority either by replacing a departmental seniority system with plantwide seniority, or by individual grants of seniority points. Fictional seniority of this sort should be distinguished from the retroactive seniority awarded to identified discriminatees as part of the "make-whole" relief approved by

55. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

56. Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

57. 438 U.S. at 301.

58. 452 F.2d at 330-31.

59. *See* cases cited in dissenting opinion in Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 233 (5th Cir. 1977), *cert. granted*, 99 S. Ct. 720 (1978) (No. 78-435). *See also* Edwards & Zaretsky, *supra* note 29.

the Supreme Court in its 1976 decision in *Franks v. Bowman Transportation Co.*[60] Retroactive seniority places discriminatees in the position they would have been but for the identified discrimination and, therefore, theoretically at least, does not directly interfere with the vested seniority rights of nonminority persons. The courts in these cases have uniformly ruled that nonminority persons should not be entitled to gain an advantage over specific victims of discrimination even though the nonminority persons were not directly responsible for the unlawful discrimination.

Most courts, however, have been unwilling to take the next step and award fictional seniority to minority persons who are not identified victims, either to give them some preference for future promotions or some special protection against layoffs.[61] In such cases the courts require the newly hired minority person to follow job progression rules established pursuant to existing facially neutral seniority systems. And the courts impose this requirement even though it may be shown that the seniority system operates to perpetuate past discrimination by favoring nonminority persons who have the most service and thus have the first right to bid on higher jobs and the greatest protection against layoffs.

Nothing in *Bakke* can be seen to alter the existing trend of the case law in this area. Indeed, whatever questions remained open were virtually sealed by the Court's 1977 opinion in *Teamsters*.[62]

As an alternative to fictional seniority, or to retroactive seniority that might lead to the direct displacement of whites by blacks, some courts have approved the concept of "front pay."[63] This concept recognizes that when victims of unlawful discrimination have been denied promotions that have been awarded instead to nonminority persons, it may take years for the identified victims to achieve the place that they would have achieved absent the discrimination. This occurs because the courts rarely permit a discriminatee to bump or displace a nonminority person; as a consequence, even when plaintiffs have successfully proved unlawful discrimination, it still may be a number of years

60. 424 U.S. 727 (1976).

61. *See, e.g.*, Watkins v. United Steelworkers, 516 F.2d 41 (5th Cir. 1975); Jersey Cent. Power & Light Co. v. Local Union 327, IBEW, 508 F.2d 687 (3rd Cir. 1975), *vacated and remanded*, 425 U.S. 987 (1976).

62. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

63. *See* Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976). *See also* the discussion in B. SCHLEI & P. GROSSMAN, *supra* note 49, at 1241-43.

before vacancies occur into which the discriminatees can move. To overcome this problem, some courts have awarded discriminatees not only back pay, but front pay at an appropriate higher job rate until the discriminatee actually achieves his "rightful place" in the job from which he was unlawfully excluded.[64] So long as the front pay remedy is limited to "identified victims" and is given in lieu of lost promotions attributable to unlawful discrimination, it does not appear to run afoul of *Bakke*.

The most difficult problems in the so-called fictional seniority cases arise when a company with a long history of discrimination finally starts hiring minority persons and none of the new hires are specific discriminatees. In such cases, if the employer subsequently finds it necessary to cut back the work force, and grants fictional seniority to the recently hired minority persons, white employees who had an expectation of continued employment based on their seniority will be denied their expectations because of their race. Since the courts have uniformly rejected such fictional seniority remedies,[65] some persons have proposed that front pay should be used instead to give some measure of protection to newly hired minority persons affected by layoff.[66]

In this last cited situation, however, the use of front pay may be questionable under *Bakke*. Front pay in these cases results in some displacement of nonminority employees because if a company must pay minority workers who have been laid off, it will very likely lay off more senior nonminority workers than otherwise would have been necessary to achieve the dollar savings contemplated by the layoff. The more that the case involves a remedy for unidentified victims and causes displacements of nonminority persons pursuant to race-conscious remedies, the less likely it is to pass muster under the Powell standard in *Bakke*.

As a footnote to the fictional seniority and front pay cases, it should be noted that court-ordered preferential promotions have been much more readily accepted when promotions are left to management discretion and are based on general merit as well as seniority. In *EEOC v.*

64 White v. Carolina Paperboard Corp., 564 F.2d 1073, 1091 (4th Cir. 1977); Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976).

65. *See, e.g.*, Watkins v. United Steelworkers, 516 F.2d 41 (5th Cir. 1975).

66. *See* Edwards, *Race Discrimination in Employment: What Price Equality?*, 1976 U. ILL. L.F. 572, 612-15.

A.T.&T.,[67] a 1977 case, the Third Circuit upheld a consent decree that included an "affirmative action override"[68] for promotion decisions. A.T.&T.'s bargained-for promotional system was a merit selection system in which management determined the best qualified employee and only used seniority to decide between two equally qualified candidates. The "override" provided that whenever a Bell Company was unable to achieve a target quota by applying normal selection standards, it had to pass over candidates with greater seniority or better qualifications in favor of members of the underrepresented group who were at least "basically qualified."[69] It is noteworthy that the Supreme Court denied certiorari in *A.T.&T.* Since the decision not to review the judgment in *A.T.&T.* came just after the issuance of the Court's opinion in *Bakke*, it gives at least some implicit support to preferential remedies issued pursuant to court-approved "consent decrees," and even some support for preferential promotional schemes in which seniority is a factor. But it must be recognized that the Supreme Court's denial of certiorari in *A.T.&T.* came at about the same time that the consent decree order was about to expire; therefore it may be that the issues presented by the case were seen to raise only moot questions that the Court was unwilling to consider. In any event, there certainly is no obvious inconsistency between the judgment in *Bakke* and the decree in *A.T.&T.*; therefore the consent decree should continue to be a useful weapon against proved discrimination in future cases.

C. *Preferential Remedies or Goals Required Pursuant to Findings of "Industry" Discrimination Under Executive Order 11246*

In addition to the preferential remedies prefaced by judicial findings of discrimination, *Bakke* would also appear to allow for preferential remedies imposed pursuant to administrative "findings" under Executive Order 11246. The Secretary of Labor has issued regulations that effectively make preferential "goals" an aspect of the Executive Order affirmative action obligation.[70] These regulations require federal contractors to undertake comprehensive "utilization" analyses of their work forces that compare the participation of women and minorities in

67. 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 3145 (1978).

68. *Id.* at 172.

69. *Id.* at 171.

70. For a history of Executive Order 11246, see Comment, *The Philadelphia Plan: A Study on the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972).

the contractor's various job groups with the representation of qualified women and minorities in the relevant job market. If a disparity exists in the use of minorities or females in any job group, the regulations may require the employer to implement race-conscious or sex-conscious goals and timetables to rectify the underutilization. The Executive Order does not require a finding of past discrimination by specific employers as a prerequisite to the attachment of affirmative action obligations. If a contractor fails to meet an established goal, the Office of Federal Contract Compliance Programs (OFCCP) may seek to terminate the contract.

Contractor's Association of Eastern Pennsylvania v. Schultz[71] was the first major case to explore the relative powers of Executive Order 11246 and Title VII. *Contractor's Association*, a 1971 decision by the Third Circuit, upheld the controversial "Philadelphia Plan." The plan, promulgated by the Department of Labor under the authority of Executive Order 11246, required bidders for any federal contracts or federally assisted construction projects in a five-county area around Philadelphia to submit "acceptable affirmative action" programs for "minority manpower utilization."[72] Having concluded that exclusionary practices existed in six craft trades, the Department of Labor gathered statistics on the current extent of minority participation, the availability of minority group persons for employment in the trade, and the demand for new workers in relation to the size of the existing training programs.[73] After holding public hearings in Philadelphia, the Assistant Secretary issued affirmative action goals for each of the designated trades. To be considered for a federal contract or assistance, the bidder had to adopt the Assistant Secretary's goals.[74]

The Contractor's Association challenged the plan on the grounds that it exceeded Presidential authority and violated both Pennsylvania law and Title VII.[75] The Third Circuit upheld the plan, concluding that Executive Order 11246 was authorized through the procurement authority granted to the Executive by Congress in the appropriations statutes. Since the federal government "has a vital interest in assuring that the largest possible pool of qualified manpower be available for

71. 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).
72. 442 F.2d at 163.
73. *Id.* at 163-64.
74. *Id.* at 164.
75. *Id.* at 165.

the accomplishment of [federal] projects,"[76] the court ruled that the "Philadelphia Plan" was justified as an exercise of the Executive's procurement powers. As to the Title VII claim, the court held that Title VII "cannot be construed as limiting Executive authority in defining appropriate affirmative action on the part of a contractor."[77] The court concluded that the goals were not inconsistent with Title VII's mandate of nondiscrimination because:

> The findings in the September 23, 1969 order disclose that the specific goals may be met, considering normal employee attrition and anticipated growth in industry, without adverse effects on the existing labor force. According to the order the construction industry has an essentially transitory labor force and is often in short supply in key trades.[78]

Thus, Executive Order 11246 and Title VII were found to be complementary, independently authorized remedies.

In *Associated General Contractors of Massachusetts, Inc. v. Altshuler*[79] the First Circuit also approved preferential ratios under the Executive Order, observing that:

> Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities.[80]

The courts in these cases have thus made it clear that minority goals may be imposed on employers contracting with the federal government to eliminate the effects of past societal discrimination in education and previous employment.[81] This broad statement has been carefully lim-

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76. *Id.* at 171.

77. *Id.* at 177.

78. *Id.* at 176.

79. 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

80. 490 F.2d at 16.

81. As noted in the dissenting opinion in Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977), *cert. granted*, 99 S. Ct. 720 (1978) (No. 78-435):

> [T]he legal situation has changed significantly since [*Contractors Association*]. . . . Congress has implicitly exempted the Executive Order from the constraints of Title VII. . . . The most telling action [by Congress during the debates leading to the 1972 amendments to Title VII] . . . was rejection by the Senate on a amendment to § 703(j) of Title VII, offered by Senator Ervin. The Ervin amendment would have extended that section to read: Nothing contained in this title or in Executive Order No. 11246, or in any other law or Executive Order, shall be interpreted to require any employer . . . to grant preferential treatment to any individual. . . . [Emphasis added], 118 Cong. Rec. 1676 (1972). This amendment was viewed and debated as an attack on Philadelphia-type plans. *See* 118 Cong. Rec. 1664-65 (1972) (Sen. Javits).

563 F.2d at 237-38 (Wisdom, J., dissenting).

ited, however, by the requirement that hiring goals may not be unreasonable; that is, an affirmative action plan may not include "a racial preference that could not be fulfilled, or could be fulfilled only by taking on workers who are unqualified for the trainee, apprentice, or journeyman status for which they were hired."[82] Therefore, if poor education renders a minority person incapable of performing the job, the federal contractor may reject him even though his inadequate schooling was the consequence of what might be broadly termed "societal discrimination."

In 1977 two important circuit court decisions reopened the question of the legality of the affirmative action obligation under Executive Order 11246. In *Weber v. Kaiser Aluminum & Chemical Corp.*[83] and *United States v. East Texas Motor Freight*,[84] the Fifth Circuit rejected the notion that the remedies under Title VII and Executive Order 11246 are of equal authority.[85] Rather, the court ruled that before it would allow the Department of Labor to mandate a hiring or promotion goal, it would require proof of prior discrimination.[86] If a contractor was not guilty of past discrimination, the Executive Order would provide him with no defense to a suit for "reverse discrimination" under Title VII. Thus, in *Weber* the court declared that if an administrative agency acting pursuant to Executive Order 11246 "mandates a racial quota . . . in the absence of any prior hiring or promotion discrimination, the executive order must fall before [the] . . . prohibition [expressed in Title VII]."[87]

It would appear that the *Bakke* decision stands midway between the Third Circuit's opinion in *Contractor's Association* and the Fifth Circuit's opinion in *Weber* on the question of the legality of affirmative action under the Executive Order. Justice Powell plainly refused to prune the relief available under the Executive Order as far back as the Fifth Circuit would have it, but he also declined to go as far as dictum suggests in the Third Circuit's opinion in *Contractor's Association*. Powell suggests that preferential classifications promulgated by administrative agencies will be found acceptable as long as a "legislative or

82. 490 F.2d at 18.
83. 563 F.2d 216 (5th Cir. 1977), *cert. granted*, 99 S. Ct. 720 (1978) (No. 78-435).
84. 564 F.2d 179 (5th Cir. 1977).
85. *Id.* at 185; 563 F.2d at 226-27.
86. 563 F.2d at 224.
87. *Id.* at 227.

administrative body charged with the responsibility [has] made determinations of past discrimination *by the industries* affected."[88] Powell, therefore, goes further than the Fifth Circuit, in that he would allow the imposition of preferential remedies upon findings of general "industry" discrimination. But Powell, nonetheless, does require administrative "findings" as a predicate to agency action. He cites *Contractor's Association* as a key to the kind of "findings" necessary.[89]

There is little doubt that the four Justices in the Brennan group would uphold such affirmative action to remedy past discrimination in an industry. The Brennan group, however, would not require "findings" of the sort achieved in *Contractor's Association*. Neither Powell nor the Brennan group would require discrimination against specific victims as is suggested by the Fifth Circuit in *Weber*. Therefore, at least a majority of the Court would likely uphold some program of affirmative action under the Executive Order.

D. *Voluntary Affirmative Action Adopted Pursuant to the Executive Order, but Without Specific Administrative Findings*

The final remedy to be discussed is that of voluntary affirmative action adopted pursuant to the Executive Order, but unaccompanied by administrative findings. *Weber* illustrates this type of situation.

Weber concerned the legality of a one-to-one minority ratio for selection to an on-the-job training program. The company developed dual seniority lists—one for whites and one for minorities—to govern the selection process. The plan was contained in the collective bargaining agreement between Kaiser and the union, and it was adopted by the parties in an effort to comply with the Executive Order. The Fifth Circuit ruled that the affirmative action plan violated Title VII because it discriminated against whites and because Kaiser had not been shown to be guilty of past discrimination.[90]

The Supreme Court recently granted certiorari in *Weber*[91] and will probably decide the case by the end of the 1978-79 term. The decision will likely prove to be as important as *Bakke* and certainly among the two or three most significant decisions by the Court construing Title VII.

88. 438 U.S. at 301 (emphasis added).
89. *Id.* at 301.
90. 563 F.2d at 224.
91. Kaiser Aluminum & Chem. Corp. v. Weber, 99 S. Ct. 720 (1978) (No. 78-435).

Weber raises at least two issues of crucial significance: (1) the legitimacy of affirmative action remedies—in the form of "goals," "quotas," or the like—in the absence of positive proof of *past discrimination*; and (2) the legitimacy of affirmative action remedies given to members of an affected class who are not themselves identified *victims* of past discrimination.

Although the second of these issues is clearly raised in *Weber*, the Fifth Circuit decision says much more than necessary to resolve the question posed by the facts in the case. As already mentioned, it is possible to have a case involving egregious past discrimination and a remedy designed to eradicate the pattern of discrimination by affording relief to members of the excluded group and not just to identified victims. This is precisely what *Carter v. Gallagher*[92] and like decisions were designed to do. The court of appeals decision in *Weber*, however, seems to suggest that no such remedy may be given, either by a court or by private parties, without a showing of past discrimination suffered by identified victims.[93] Curiously, the Fifth Circuit in *Weber* cites the panel decision from *Carter* to support this suggestion; however, the panel decision in *Carter* on this point was explicitly overturned by the entire circuit after a rehearing en banc. The *Weber* opinion is not only wrong on this point, but is also patently blind to the reality that when Congress enacted the Civil Rights Acts, it intended to achieve not just a simple purpose of righting individual wrongs, but also a broad social goal of eradicating discrimination. It may be that the court in *Weber* is primarily troubled by the fact that the remedy was given by private parties and not pursuant to a court order as in *Carter*; unfortunately, the opinion can be read to say much more than this. The main point, however, is that the kind of remedy approved in *Carter* is both appropriate and necessary, and the *Weber* case should not be viewed as a legitimate challenge to the *Carter* line of judicial authority.

The more difficult issue raised by *Weber* concerns the legitimacy of voluntary affirmative action taken without any specific judicial or administrative findings of past discrimination. The decision in *Weber* forces employers and unions to walk a tightrope. It pressures employers to prove that they discriminated in the past to justify their present voluntary affirmative action program. Clearly, employers will be re-

92. 452 F.2d 315 (8th Cir. 1972) (en banc).
93. 563 F.2d at 224-26.

luctant to admit past bias, let alone prove it in court, for fear of opening the door to private actions by minorities, federal pattern and practice suits, and sanctions under Executive Order 11246. If past discrimination is not proved, an employer faces the threat of private suits by white employees. Professor James Jones has made the astute observation that one of the most distressing things about the *Weber* decision is that it puts "the law in the curious posture of permitting seniority alterations by the collective bargaining process for almost any objective or reason *except* equal employment purposes."[94]

A problem similar to the one posed in *Weber* was seen in *Detroit Police Officers Association v. Young*,[95] in which the Detroit Police Department, acting pursuant to instructions from the Mayor and a Board of Police Commissioners, developed an affirmative action plan that included a preferential quota for the promotion of minorities to the rank of sergeant. A suit was brought claiming reverse discrimination. Following the *Weber* decision, the district court concluded that the preferential promotion plan was in clear violation of Title VII. Particularly noteworthy is that the court in *Detroit Police* refused to accept the department's claim that it was guilty of prior discrimination.

While Justice Powell's opinion in *Bakke* does not restrict the Executive Order powers as much as is suggested in *Weber*, Powell nevertheless might still vote to uphold the result in *Weber*. But he might vote to sustain the city action in *Detroit Police* since that affirmative action plan was adopted pursuant to action taken by local governmental officers for the purpose of remedying past discrimination. In light of his dissenting opinion in the *Franks* case, the one problem that Powell might have with *Detroit Police* is the absence of identified discriminatees. But this may no longer be an issue for him because the remedy in *Contractor's Association* was given without regard to the existence of "identified victims," and Powell cites *Contractor's Association* with approval in *Bakke*.[96]

Powell seemingly only approves of voluntary action taken pursuant to the Executive Order when it is predicated upon *Contractor's Association*-type findings of pervasive industry bias. According to Powell, then, the duty to implement affirmative action programs should shift from private individuals to governmental institutions. But if the duty

94. Jones, *supra* note 25, at 54-55.
95. 446 F. Supp. 979 (E.D. Mich. 1978).
96. 438 U.S. at 301.

to act is placed on the government, as Powell would have it, the net result may be the destruction of affirmative action. The enforcement of the Executive Order is already too cumbersome a process, and to require complete "findings" in every case would add a burden that might prove insurmountable. The administrative "findings" requirement seems particularly unnecessary in a situation like *Weber*, in which the employer and the union have agreed to the plan and federal administrative oversight under the Executive Order is ever-present.

III. CONCLUSION

Before anyone signs the death certificate for voluntary affirmative action programs, it must be remembered that much reliance has been placed on Justice Powell's opinion in *Bakke*. It is not at all clear that Powell speaks for a Court majority. Justices Stewart and Stevens, for example, have previously approved the use of a race-conscious plan for the reapportionment of voter districts in New York in the 1977 decision of *United Jewish Organizations v. Carey*.[97] It is therefore possible that in future decisions they would allow race-conscious voluntary affirmative action programs in employment. In his footnote number nineteen in *Bakke*, however, Justice Stevens emphasizes that the basic policy of Title VII "requires that we focus on fairness to individuals rather than fairness to classes."[98] It is not clear whether this can be taken to mean that Stevens will always oppose race-conscious preferential remedies designed to overcome the effects of past discrimination.

Bakke thus leaves a number of unanswered questions in the employment area and the full ramifications of the decision remain to be seen. But answers will come in short order because *Weber* gives the Court a perfect vehicle to deal with the problem of affirmative action in the context of employment.

The need for strong remedies to eradicate employment discrimination against minorities and women is no less great now than it was a decade ago. The overall income gap between black and white families actually widened during the first half of the 1970's. In 1970 the income of black families was 61% of that of white families. By 1976 the gap had increased so that the income of black families was only 59% of that

97. 430 U.S. 144 (1977).

98. 438 U.S. at 416-17 n.19 (Stevens, J., concurring in the judgment in part and dissenting in part) (quoting City of Los Angeles v. Manhart, 435 U.S. 702 (1978)).

of white families. The unemployment figures are equally disheartening. For example, the seasonally adjusted unemployment rate for all workers in August 1977 was 7.1%; for black workers the unemployment rate was 15.5%, the highest rate since 1954.

Women have fared no better. In 1976 the incomes of white women were only about 59% of those of white men and 82% of those of black men. Black women, with a double burden of discrimination, had incomes of only about 55% of those of white men and 77% of those of black men.[99]

It is also clear that preferential remedies do work. In *NAACP v. Allen*,[100] the Fifth Circuit used statistics to demonstrate that a neutral remedy alone was not sufficient to end discrimination. The court noted that an injunction against further race discrimination issued to the Alabama Department of Public Safety had not resulted in the hiring of a single black state trooper; indeed, the court found that it was not until the district court ordered preferential relief, some eighteen months after

99. For further and more comprehensive data concerning the effects of employment discrimination, *see generally* G. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971); Edwards, *Race Discrimination in Employment: What Price Equality?* in CIVIL LIBERTIES AND CIVIL RIGHTS (V. Stone ed. 1977) (see in particular the extensive bibilography and statistical charts at 126-44); Oaxaca, *Theory and Measurement in the Economics of Discrimination,* in EQUAL RIGHTS AND INDUSTRIAL RELATIONS (IRRA 1977); Thurow, *The Economic Progress of Minority Groups,* CHALLENGE 20 (Mar.-Apr. 1976); NATIONAL URBAN LEAGUE, RESEARCH DEP'T, BLACK FAMILIES IN THE 1974-75 DEPRESSION (1975); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, NO. 105, MONEY INCOME IN 1975 OF FAMILIES AND PERSONS IN THE UNITED STATES (June 1977); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, NO. 106, CHARACTERISTICS OF THE POPULATION BELOW THE POVERTY LEVEL: 1975 (June 1977); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, NO. 107, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1976 (Advance Report) (Sept. 1977); U.S. COMMISSION ON CIVIL RIGHTS, TO ELIMINATE EMPLOYMENT DISCRIMINATION, THE FEDERAL CIVIL RIGHTS ENFORCEMENT—1974, VOL. 5 (July 1975); U.S. DEP'T OF COMMERCE, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES 1974, SPECIAL STUDIES SERIES P-23, NO. 54 (July 1975); U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE DEVELOPMENTS: 3d QUARTER 1977 (Oct. 17, 1977); U.S. DEP'T OF LABOR, WHY WOMEN WORK (July 1976); U.S. DEP'T OF LABOR WOMEN'S BUREAU, THE EARNINGS GAP BETWEEN WOMEN AND MEN (Oct. 1976); U.S. DEP'T OF LABOR WOMEN'S BUREAU, MINORITY WOMEN WORKERS: A STATISTICAL OVERVIEW (1977); U.S. DEP'T OF LABOR WOMEN'S BUREAU, UNEMPLOYMENT IN RECESSIONS: WOMEN AND BLACK WORKERS (Apr. 1977); U.S. DEP'T OF LABOR WOMEN'S BUREAU, WOMEN IN THE LABOR-FORCE—ANNUAL AVERAGES 1975-1976 (Feb. 1977); U.S. DEP'T OF LABOR WOMEN'S BUREAU, WOMEN IN THE LABOR FORCE—JULY 1976-1977 (Aug. 1977); U.S. DEP'T OF LABOR WOMEN'S BUREAU, WOMEN AND BLACK WORKERS (Apr. 1977).

100. 493 F.2d 614, 620-21 (5th Cir. 1974).

the original injunction, that blacks were finally hired.[101] The court also noted that aside from the obvious effect on providing jobs for black applicants, the preferential remedy "promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices."[102] The court thus recognized that breaking the "habit" of racial discrimination of both those who discriminate and those who expect to be discriminated against is an integral part of the task of ending employment discrimination, and that some form of preferential remedy is necessary to break the discrimination cycle.

In a detailed study of the effects of the consent decree in *A.T.&T.*, the January 1979 edition of *Fortune* magazine reported that:

> [I]n status . . . women did gain. In the two top job classifications—which embrace second-level management and up—they hold 12,057 positions today, or 17 percent of the total versus 9 percent in 1972. There are even four women at the sixth level of management. Women have also become much more visible in craft jobs . . . .[103]

The *Fortune* article is particularly noteworthy because it can hardly be viewed as a statement in favor of affirmative action.

The *Allen* and *A.T.&T.* cases are but two of many examples to prove the point that preferential remedies are necessary and that they do work.

Although the Court's opinion in *Bakke* is inconclusive on a number of important issues and does not purport to give definitive answers on questions pertaining to employment discrimination, it has at least caused a surprisingly large number of people of good will to rethink their commitments to affirmative action and to express a more ready willingness to be forthright and open about efforts taken to cure problems associated with race and sex bias in this nation. Unfortunately, expressions of good will will not cure discrimination and, more unfortunately, virtually nothing is being done by Congress to give relief on the employment front. The badly watered-down version of the Humphrey-Hawkins full employment law recently enacted by Congress is a good example of the lack of serious commitment at the federal level.

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101. *Id.* at 621.

102. *Id.*

103 Loomis, *AT&T in the Throes of "Equal Employment,"* FORTUNE, Jan. 15, 1979, at 50.

The decision in *Bakke* may not be a reason for rejoicing, but it surely is not a cause for mourning. For many, the fight for equal opportunities in education and employment will simply continue, with *Bakke* as a constant reminder that the stakes remain high. One can only hope that the Court's decision in *Weber* does not make the effort to achieve equality in employment an impossible dream.