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Affirmative Action after Bakke

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AFFIRMATIVE ACTION AFTER BAKKE

I. INTRODUCTION

Racial minorities have long been subjected to oppression and discrimination in this country. Two glaring examples of this inequity can be found in America's treatment of Native Americans and blacks. Native Americans were forced to watch helplessly the brutalization of their families and land at the hands of those who had come to "civilize" America.[1] Contemporaneously blacks were systematically snatched from their homelands and subjected to the inhuman conditions of slavery.[2]

Early cases indicate that the judicial system was either unwilling or unable to provide an adequate forum for the redress of such injustices. An early example of the judicial system's "sensitivity" to the problems faced by minorities was evidenced in an 1857 United States Supreme Court decision[3] which reconciled the apparent conflict of the principle of equality of all men[4] with the continued existence of slavery by asserting simply

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[1] *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, INDIAN TRIBES, A CONTINUING QUEST FOR SURVIVAL (June, 1981).

[2] The inhuman conditions included compulsory service of the slave for the benefit of his master, restraint of his movements subject only to his master's will and the inability to hold property or to make contracts. *See* Civil Rights Cases, 109 U.S. 3 (1883).

[3] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). This case is commonly referred to as the Dred Scott decision.

[4] It is ironic that the principle of "equality for all men" was first utilized when this country's forefathers sought their freedom from what they considered the oppressive English regime. The irony lies in the fact that those who placed such a high value on equality

that blacks were not citizens.[5]

The judicial system's "sensitivity" did not increase after slavery was abolished.[6] The system labored under the expectation that blacks would have little difficulty adjusting to emancipation and entering the mainstream of American life.[7] This expectation was elucidated in the *Civil Rights Cases*,[8] where Justice Bradley, writing for the Court, stated:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his evaluation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.[9]

It has proved to be more difficult than the Court envisioned in the *Civil Rights Cases* for blacks to rise and attain the rank of "mere citizens" without judicial intervention. A brief examination of the history of the United States reveals that legislative and judicial intervention was needed to ensure blacks the opportunity to exercise the basic rights of serving on juries,[10] voting without hindrance,[11] marrying without legal sanctions[12] and, more recently, attending the school of their choice.[13]

Current employment,[14] education,[15] and housing[16] statistics indicate

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could so callously deny it to others.

[5] 60 U.S. at 404.

[6] Slavery was officially abolished in 1863 by the Emancipation Proclamation. 12 Stat. 1268 (1863). However, the Emancipation Proclamation freed only those who were slaves in Arkansas, Texas, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina and Virginia. In fact, several areas of Louisiana and Virginia were not affected by the Proclamation. *Id.*

[7] It is rather difficult to imagine how blacks could be expected to adjust to the newfound "freedom" when they were still subjected to subtle modes of discrimination. *See* Plessy v. Ferguson, 163 U.S. 537 (1896), where the Supreme Court permitted the maintenance of separate facilities under what proved to be the mistaken notion that "separate" could be "equal." *But see* Brown v. Board of Education, 347 U.S. 483 (1954) (separate educational facilities are inherently unequal).

[8] 109 U.S. 3 (1883).

[9] *Id.* at 25. It is interesting to note that the beneficial legislation Justice Bradley spoke of consisted of the thirteenth and fourteenth amendments, the constitutional provisions under which the plaintiffs sought relief. The Court, per Justice Bradley, held that while these amendments operated to protect blacks from deprivation of the freedoms accorded others, the freedom to patronize public facilities (which incidentally was accorded all others except blacks) was not considered constitutionally protected by the Court.

[10] Strauder v. West Virginia, 100 U.S. 303 (1879).

[11] *See* Voting Rights Act of 1965, P.L. 89-110, 79 Stat. 437, 42 U.S.C. §§ 1971, 1973 codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976).

[12] Loving v. Virginia, 388 U.S. 1 (1967).

[13] Swann v. Board of Education, 402 U.S. 1, *reh'g denied*, 403 U.S. 912 (1971).

[14] According to the United States Bureau of Labor Statistics, blacks comprise 12% of the unemployment rate. UNITED STATES BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83 (103d ed. 1982).

[15] Statistics show that 15.4% of high-school dropouts are black. Comparable statistics show that whites comprise 11.3% of the dropouts. *Id.* at 158.

[16] Approximately 19% of American blacks live in substandard housing. UNITED STATES PRESIDENT'S COMMISSION ON HOUSING, THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 8 (1982).

that blacks are still subjected to subtle modes of discrimination. These statistics demonstrate that in order to have racial equality, more is needed than the mere prohibition of discrimination. Unfortunately, the *Civil Rights Cases* set the stage for what has proved to be a continuous resistance by both the public sector and, to a lesser extent, the judicial system to any affirmative efforts to remedy the effects of past racial discrimination. America has been slow in realizing that the mere prohibition of discrimination results in substituting for laws which are discriminatory on their face laws which are discriminatory in effect, although they appear to adopt a passive neutrality. A passive neutrality in the law may be desirable in some areas, but in the area of discrimination, such neutrality is inappropriate if minorities are to overcome the centuries of discrimination they have been forced to endure.[17]

Many institutions, as a response to the realization that racially neutral laws will not rectify past and present discrimination, have adopted and have begun to utilize the concept of affirmative action[18] in an attempt to

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[17] *See generally* Rios v. Enterprise Assoc. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974) (discusses the broad power of district courts to remedy the vestiges of past discrimination); Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531 (1981).

The Commission on Civil Rights has observed:

> The short history of affirmative action programs has shown such to be promising instruments in obtaining equality of opportunity. Many thousands of people have been afforded opportunities to develop their talents fully—opportunities that would not have been available without affirmative action. The emerging cadre of able minority and women lawyers, doctors, construction workers and office managers is testimony to the fact that when opportunities are provided they will be used to the fullest.
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> While the effort often poses hard choices, courts and public agencies have shown themselves to be sensitive to the need to protect the legitimate interests and expectations of white workers and students and the interests of employers and universities in preserving systems based on merit. While all problems have not been resolved, the means are at hand to create employment and education systems that are fair to all people.
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> It would be a tragedy if this nation repeated the error that was made a century ago. If we do not lose our nerve and commitment and if we call upon the reservoir of good will that exists in this nation, affirmative action programs will help us to reach the day when our society is truly colorblind and non-sexist because all people will have an equal opportunity to develop their full potential and to share in the effort and the rewards that such development brings.

UNITED STATES COMMISSION ON CIVIL RIGHTS, STATEMENT ON AFFIRMATIVE ACTION 12 (1977).

[18]

> The affirmative action concept embodies a policy decision that some forms of race-conscious remedies are necessary to improve the social and economic status of blacks in our society . . . [Affirmative action] goes beyond the mere adoption of

rectify past injustices. These affirmative efforts have provoked opposition from both the public sector and the courts. At least one legal scholar has attributed this opposition in part to the attempts of affirmative action to reconcile two seemingly diametrically opposed concepts.[19] These two concepts—one of allowing an individual to be judged on merit alone and the other, of providing special assistance to an individual on account of race—appear juxtaposed only because of the failure to realize that the concept of being judged on merit alone has rarely, if ever, been a reality for minorities.[20]

This Note will examine *Regents of the University of California v. Bakke*[21] and subsequent Supreme Court decisions dealing with affirmative action[22] to determine what effect, if any, these decisions have had on lower court determinations of the validity of affirmative-action programs. This Note will also discuss the problems inherent in judicial review of such programs and the direction that affirmative action has taken as a result of lower court decisions. Affirmative action as it relates to women and to seniority plans is beyond the scope of this Note. However, reference to these types of cases will be made for purposes of illustration.

II. BACKGROUND

A. Regents of the University of California v. Bakke

Bakke, the first Supreme Court case which addressed the concept of affirmative action,[23] is the focal point of this Note. This decision was anxiously awaited because *Bakke* and its consequences could have resulted in defeat or victory for affirmative action. In fact, the case had been hailed by some as being as significant to education as *Brown v. Board of Education*,[24] the 1954 ruling which signalled the end of de jure segregation of public schools.[25]

Bakke involved a challenge to the special admissions program of the medical school at the University of California at Davis. This program,

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a passive, prospective, nondiscriminatory principle and focuses on active implementation of specific race-conscious remedies.

Belton, *supra* note 17, at 534-35.

[19] Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 218 (1980).

[20] *Id.*

[21] 438 U.S. 265 (1978).

[22] The two Supreme Court decisions on affirmative action which followed *Bakke* are United Steelworkers of America v. Weber, 443 U.S. 193, *reh'g denied*, 444 U.S. 889 (1979), and Fullilove v. Klutznick, 448 U.S. 448 (1980).

[23] Prior to *Bakke*, the issue of affirmative action was presented to the Court in DeFunis v. Odegaard, 416 U.S. 312 (1974). However, because the plaintiff had already been admitted to law school before the case reached the Supreme Court, the case was rendered moot.

[24] 347 U.S. 483 (1953).

[25] *See, e.g.*, L.A. Times, June 28, 1979, part 1 at 12, col. 4.

designed to ensure minority representation in each entering class,[26] involved a multi-step application process which began with the applicant's indication as to whether he or she wished to be considered as culturally or economically disadvantaged, or a member of a minority group. If one of these questions was answered in the affirmative, the application was then routed to the special admissions committee, which screened each application to determine if it reflected economic or educational deprivation.[27] After this process, the potential candidate to the special admissions program was subjected to the requirements of the general admission program[28] with the exception that those with an overall grade-point average below 2.5 were not summarily rejected from the applicant pool.

The special admissions program was challenged by a white applicant to the medical school, Allan Bakke, who claimed he had been denied admission solely because of his race. While there is no clear consensus in the opinion,[29] it appears that the special admissions program was declared unconstitutional because it allowed race to be the sole factor used in determining admission into the program. As the majority opinion, delivered by Justice Powell, noted: "When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect."[30] "Preferring members of any one group for no reason other than race or ethnic origin is discrim-

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[26] The admissions procedure challenged by *Bakke* was designed to ensure minorities 16 seats in each entering class of 100. This procedure attempted to reduce the shortage of minorities in medical schools and the medical profession, increase the number of doctors who would serve in traditionally underserved areas, counter the effects of discrimination and obtain the benefits which result from a diversified student body. 438 U.S. at 306.

[27] Although there was never a formal definition of "disadvantage," applications were screened to determine if they reflected economic or educational deprivation. *Id.* at 274-75. The screening process required the chairperson of the admissions program to review applications to ascertain whether the application fee had been waived, whether the applicant had worked during college and whether the applicant was a member of a minority group. *Id.* at 275 n.4.

[28] The applicant was invited for an interview. After the interview the applicant was assigned a benchmark score which included the interviewer's summaries, the applicant's overall grade-point average, grade-point average in science courses, scores on the Medical College Admissions Test, letters of recommendation, extracurricular activities and other biographical data. *Id.* at 274.

[29] Justice Powell announced the opinion of the Court. Justices Brennan, White, Marshall and Blackmun, in concurring, concluded that race may be considered in a remedial program designed to remedy past discrimination. *Id.* at 328. Justice Powell agreed with the aforementioned Justices insofar as they determined that race may be a factor in an admissions program. *Id.* at 296 n.36. However, Justice Powell's narrower view was that the use of the racial factor may not force innocent persons to carry the burden of redressing grievances not of their own making. *Id.* at 310. Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, concluded that race may not be used as a means of denying one the opportunity to participate in a federally funded program. *Id.* at 418.

[30] *Id.* at 307.

ination for its own sake."[31]

The Court found that the school had neither the competency nor the capacity to make a finding that it had practiced racial discrimination. It held that a finding of discrimination must be made by the judiciary, the legislature, or the responsible administrative agency so that political consideration of the person or persons to be preferred could be avoided.[32]

The effect that *Bakke* has had on affirmative action is not easily determined. It has been suggested that *Bakke* offers no guidance concerning permissible affirmative-action programs.[33] This suggestion may lead one to assume that affirmative action maintains the status it held before the *Bakke* decision. This assumption is not totally accurate. Four months after the Supreme Court ordered Allan Bakke admitted to the Davis medical school, the school revised its admissions policy.[34] At the same time, the National Association for the Advancement of Colored People (NAACP) charged that the *Bakke* ruling was being utilized to justify the elimination or reduction of affirmative-action hiring and promotion programs.[35] *Bakke* also motivated a revision of the admissions procedures of some law schools.[36] Thus, while *Bakke* did not signal the end of affirmative action, as some had feared, the proposition for which it stands—race may not be the sole determinant of admission—has affected affirmative action if only by virtue of the number of challenges to affirmative-action programs.[37]

B. Supreme Court Cases After Bakke

1. *United Steelworkers of America v. Weber*[38]

The Court was afforded an opportunity to expound upon *Bakke* in *United Steelworkers of America v. Weber*, in which the Court sustained a private-sector voluntary affirmative-action program. The *Weber* program was included in a collective bargaining agreement between Kaiser Aluminum Company and the United Steelworkers of America, providing for the establishment of a training program to fill craft openings. Selection for the program was to be based on seniority. A minimum of fifty percent of the new trainees were to be black. This percentage was to remain in effect

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[31] *Id.* at 305.

[32] *Id.* at 299.

[33] Lavensky, *The Affirmative Action Trilogy and Benign Classification—Evolving Law in Need of Standards*, 27 WAYNE L. REV. 1 (1980).

[34] The Chronicle of Higher Education, Oct. 30, 1978, at 13.

[35] N.Y. Times, Jan. 9, 1979, at 16, col. 2.

[36] Yale Law School and the University of Pennsylvania Law School issued statements to the effect that they had modified their admissions procedures to comply with *Bakke*. *Id.*

[37] Of all the cases reviewed in this Note, none challenged the *absence* of an affirmative-action program.

[38] 443 U.S. 193 (1979).

until the percentage of skilled black craftsworkers approximated the percentage of blacks in the local labor force.[39]

In upholding the program, the Court rejected the plaintiffs' argument that Title VII of the Civil Rights Act of 1964[40] should be read to prohibit all race-conscious affirmative-action programs. The Court explained that while the argument was not without validity, the Act was intended, where private-sector parties enter into voluntary agreements, to leave employers and unions free to take race-conscious steps to end racial imbalances in job categories which have been traditionally segregated.[41] The Court insisted:

> It would be ironic indeed if a law triggered by a nation's concern over centuries of racial injustice and intended to improve the lot of those who "had been excluded from the American dream for so long" . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[42]

The Court in *Weber* did not profess to define permissible and impermissible affirmative-action plans; nevertheless, it did develop certain guidelines which could be utilized in determining the outlines of a permissible affirmative-action plan. Such guidelines include the following traits: 1) the plan's design dissipates patterns of racial segregation and hierarchy; 2) the plan opens new opportunities traditionally closed to minorities; 3) the plan does not unnecessarily trammel the interests of white employees nor serve as a bar to their advancement; and 4) the plan may be maintained only as a temporary measure.[43]

Both *Bakke* and *Weber* involved white applicants who challenged affirmative-action programs on the basis of discrimination against whites. In one case the affirmative-action plan was upheld; in the other it was not. Several theories can be advanced to explain the different results.[44]

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[39] *Id.* at 199.

[40] Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a) provides in part:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[41] 443 U.S. at 201-02.

[42] *Id.* at 204. *See* 110 CONG. REC. 6552 (1964) (Remarks of Senator Humphrey).

[43] *Id.* at 208.

[44] One theory suggests that the difference between the judgments lies in the fact that the university, as a recipient of federal funds, was specifically prohibited by Title VI from discriminating on the basis of race. This theory suggests that private professional schools,

A feasible explanation of the differences between the two cases would incorporate two of the Court's concerns. First, the Court deemed it imperative to encourage the *private sector* to develop voluntary programs to remedy the effects of past employment discrimination, absent judicial determination that discrimination had occurred. This first concern would account for the program's being upheld in *Weber*, where the Court noted that because this was a voluntarily adopted affirmative-action plan, the Court would not review whether the plan met the requirements of Title VII.[45] The Court stated that Congress did not intend wholly to prohibit private and voluntary affirmative-action programs.[46] Second, the Court expressed concern that a *publicly funded entity* not take on the task of affirmatively remedying discrimination without a judicial determination that such an effort was needed. "We have never approved preferential classifications in the absence of proved constitutional or statutory violations."[47] This in turn would account for the fact that the program in *Bakke* not not upheld.

Although *Weber* has been interpreted as sustaining the use of voluntary affirmative-action plans in the private sector,[48] *Weber* left unresolved the issue of the extent, if any, to which Congress may impose goals to remedy the effects of past racial and ethnic discrimination. This issue was faced by the Court in *Fullilove v. Klutznick*.[49]

2. *Fullilove v. Klutznick*

Fullilove v. Klutznick has been viewed as the first case in which the

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and arguably private industries, receiving no governmental assistance would be free of such a restriction. Wisotsky, *What Is the Law of the Land on Reverse Discrimination?*, 54 FLA. B.J. 196 (1980).

Another theory suggests that Weber's contention that he was victimized by racial discrimination was not as compelling as Bakke's. According to this theory, Bakke was successful in his challenge because of the belief that one should be advanced on the basis of merit. Weber, by contrast, was unsuccessful in his challenge because he contended that he should have been admitted into a training program which would never have begun had it not been for the company's desire to advance groups that might otherwise file discrimination suits against the company. Accordingly, this theory asserts that the differences in the decisions lie in the fact that while Bakke had been denied admission into a program in which he was qualified to participate, Weber, by contrast, had been denied admission to a program because he did not possess the attributes which the program required for participation: namely, being a member of a group which had been discriminated against. *See* Wright, *supra* note 19.

[45] 443 U.S. at 200.

[46] *Id.*

[47] 438 U.S. at 302.

[48] *See generally* Duncan, *The Future of Affirmative Action: A Jurisprudential Legal Critique*, 17 HARV. C.R.-C.L.L. REV. 503, 505 (1982), and Note, *Insights on* Weber: *Its Implications and Applications in Public and Private Affirmative Action Programs, Labor Unions and Educational Institutions*, 23 How. L.J. 521 (1980).

[49] 448 U.S. 448 (1980).

entire Court addressed the constitutionality of an affirmative-action plan.[50] *Fullilove* involved a challenge to provisions of the Public Works Employment Act of 1977,[51] which required that ten percent of the public works project grants awarded under the Act be allocated to minority businesses.[52] The high Court, in affirming the ten percent "set aside,"[53] noted that Congress had the authority to employ racial or ethnic classifications to accomplish the objective of remedying the present effects of past discrimination.[54] It stated: "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may . . . . authorize and induce state action to avoid such conduct."[55] The Court found the program constitutional despite the fact that it deprived nonminority firms access to some of the funds generated by the Act. This finding was based on the fact that the amount of funds to which the nonminorities were denied access was relatively small.[56]

Fullilove resolved many questions which had remained after *Bakke* and *Weber*. Upon reviewing *Fullilove* the following become apparent: racial quotas may be imposed by Congress, past societal discrimination may be the basis for utilizing these quotas and there need be no showing that those affected by the affirmative-action plan were in any way responsible

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[50] Kilgore, *Racial Preference in the Federal Grant Program: Is There a Basis for Challenge After* Fullilove v. Klutznick?, 32 LAB. L.J. 306, 314 (1981).

[51] P.L. 95-28, 91 Stat. 116, 42 U.S.C. §§ 6701-6710, 6721-6735 (1976).

[52] The program was challenged by contractors and a firm that alleged that they had suffered economic injury due to the enforcement of the "set aside" provision of the Act. Petitioners alleged that this "set aside" provision violated the Constitution and antidiscrimination statutes, and sought declaratory and injunctive relief to enjoin its enforcement. 448 U.S. at 455.

[53] The pertinent part of the minority "set aside" provision states:

> Except to the extent that the Secretary of Commerce determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 percentum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph the term "minority business enterprise" means a business at least 50 percentum of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.

42 U.S.C. § 6705(f)(2) (Supp. II 1978).

[54] 448 U.S. at 486.

[55] *Id.* at 483-84.

[56] *Id.* at 484-85. The Court found that the "set asides" would account for only .25% of the annual expenditure for construction work in the United States. *Id.* at 485 n.72. The Court also noted that the failure of a company to achieve the 10% goal did not result in an automatic denial of the funds, in that total and partial waivers of the requirement were permissible under the program. *Id.* at 488.

for the discrimination.[57] In reaching these conclusions the Court balanced the government's interest in overcoming the disadvantages of past minority employment discrimination against the effect of preferring members of the injured group at the expense of others. The *Fullilove* Court determined that the government's interest outweighed the injured group's interest when the resulting harm would be relatively minor.

Both *Weber* and *Fullilove* were decided on statutory grounds; consequently, it has been argued that there still may be no Supreme Court determination of a test for the constitutional validity of an affirmative-action program.[58] This argument is not without merit, yet it is also possible that the Supreme Court decisions do provide some guidance,[59] although the Court has yet to deliver a definitive opinion on affirmative action.[60] While *Bakke* does state that race may not be the sole determi-

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[57] 448 U.S. 448 (1980).

[58] Kilgore, *supra* note 50, at 314.

[59] *See infra* text accompanying notes 174-176.

[60] The Supreme Court dismissed certiorari in Minnick v. California Department of Corrections, 452 U.S. 105 (1981), in which two white male correctional officers claimed that the affirmative-action program utilized by the corrections department had denied them promotions because of their race.

The trial court had enjoined the department from giving any preference on the basis of race or sex in hiring or promoting any employee, but had allowed the use of such criteria as a factor in making job assignments. The court of appeals reversed the trial court's decision on the grounds that *Bakke* invalidated the trial court opinion, and concluded that race or sex could be used as a factor in personnel decisions that promoted a compelling state interest. 95 Cal. App. 3d 506, 157 Cal. Rptr. 160 (1979).

The Supreme Court dismissed certiorari on the grounds that in view of recent developments in the area and the ambiguities in the record, neither the trial court proceedings nor the state appellate court review of the record was complete.

Justice Stewart was the only justice to reach the merits of the case. In a dissenting opinion, he asserted that a state may not consider race in making promotion decisions. Quoting his dissent in *Fullilove*, 448 U.S. at 532, Justice Stewart asserted a compelling reason why race should not be considered:

> Most importantly, by making race a relevant criterion . . . the Government implicitly teaches the public that the apportiontment of remedies and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics.

Minnick, 452 U.S. at 129.

A second case in which the Court had an opportunity to clarify its position on affirmative action was County of Los Angeles v. Davis, 440 U.S. 625 (1979), in which the respondents, representing black and Mexican-American present and future applicants to that county's fire department, alleged that the county's use of arbitrary employment criteria was discriminatory. Respondents had asserted that the hiring procedures violated 42 U.S.C. § 1981 in that they denied minorities full and equal protection of the laws. The district court, in an unreported decision, had held that the employment procedure violated § 1981 because the examination which the employment procedure utilized had not been validated. The court had enjoined all future discrimination and mandated that the county make good-faith affirmative-action efforts. *Id.* at 629.

The case also presented the issue of whether imposition of minimum hiring quotas for

nant for admission into a program, this proposition provides little guidance to lower courts attempting to determine the validity of affirmative-action programs. *Fullilove* also provides little direction to lower courts, since the Supreme Court determined the validity of the set-aside program based on Congress' broad spending powers. Thus, it could be argued that a set-aside program established by local legislatures would not come under a *Fullilove* analysis. Hence, would appear that the only Supreme Court case which provides some type of direction for the lower courts would be the *Weber* decision. *Weber* devised what appears to be easily identifiable criteria for the lower courts to utilize when determining the validity of an affirmative-action program. However, the Court in *Weber* did not profess to define the permissible criteria for an affirmative-action program. Consequently, presence of the criteria set forth in *Weber* should not mean automatic validation of the program.

The remainder of this Note will discuss affirmative action and the lower courts and, when applicable, the lower courts' interpretations of Supreme Court decisions. The Note will also discuss the effect of these interpretations on affirmative action.

III. Affirmative Action and the Lower Courts

There is no clear consensus among the lower courts as to the criteria for determining the validity of an affirmative-action program. Although the Supreme Court decisions may provide guidance in cases with similar facts, most courts have refused to recognize such similarities.[61] Recognition, when it does occur, does not always involve application of the most relevant Supreme Court decision. In fact, these Supreme Court decisions are partially responsible for the confusion of affirmative action in the lower courts. This confusion is the result of the lower courts' struggle to determine the definitive test by which affirmative-action programs should

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qualified minority applicants was an appropriate remedy to correct a finding of discrimination.

The Supreme Court held the issues moot because there was no indication that the alleged violation would recur. The interim relief of the department in recruiting more minority members had completely eradicated the effects of the alleged violation. *Id.* at 632-33.

Justice Stewart filed a dissenting opinion in which Justice Rehnquist joined. The justices concluded that the case should have been remanded to the district court with directions to narrow the scope of the remedy substantially, limiting it to enjoining the illegal use of the 1972 test. *Id.* at 364, 636. Justice Powell, with whom Chief Justice Burger joined, also filed a dissenting opinion in which he concluded that the case should be decided on the issues. *Id.* at 636, 647.

[61] It is interesting to note that none of the post-*Bakke* lower-court decisions utilized *Bakke* as the sole determinant of the validity of an affirmative-action program. Thus, a decision which marked the beginning of judicial recognition of affirmative action has been relegated to a status below that of later Supreme Court decisions in this area. This relegation may be due in part to the lower courts' uncertainty concerning the boundaries of *Bakke*.

be reviewed. The struggle has produced methods of assessing affirmative-action programs which range from the application of the criteria set forth in *Weber*[62] to the comparison of affirmative action to a card game.[63] These "tests" do not comprise the gamut. The lower courts have applied numerous other tests which fall somewhere between the aforementioned extremes.[64]

A. Lower Courts Applying the Weber *Criteria*

The criteria set forth in *United Steelworkers of America v. Weber* have been utilized by some lower courts to assess the validity of affirmative-action programs. As previously noted, *Weber* upheld as constitutionally valid an affirmative action program which possessed the following characteristics: 1) the program's design dissipated patterns of racial segregation and hierarchy; 2) the program opened new opportunities traditionally closed to minorities; 3) the program did not unnecessarily trammel the interests of white employees nor serve as a bar to their advancement; and, 4) the program was maintained as a temporary measure.[65]

1. Cases from the Ninth Circuit

La Riviere v. Equal Employment Opportunity Commission[66] involved a challenge to an affirmative-action program implemented by a state agency. The program was the result of negotiations between the California Highway Patrol and a plaintiff class which had challenged the state's exclusion of women from California Highway Patrol traffic-office positions. As a result of these negotiations, the California Highway Patrol agreed to hire and train forty women to participate in a pilot program in order to study the feasibility of employing women as traffic officers. The women participating in the program were selected through an examina-

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[62] *See* Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981).

[63] *See* Associated Gen. Contractors v. San Francisco Unified School Dist., 616 F.2d 1381 (9th Cir. 1980). In that case the court distinguished "reshuffle" from "stacked deck" programs as the two major types of positive governmental action taken on behalf of minorities. *Id.* at 1386.

[64] *E.g.*, what appears to be the "but for" test was applied in Setser v. Novack Inv. Co., 657 F.2d 962 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981). It has also been stated that the Supreme Court has issued no precedent for affirmative action. *See generally*, Lehman v. Yellow Freight System, 165 F.2d 520 (7th Cir. 1981).

[65] 443 U.S. at 208.

[66] 682 F.2d 1275 (9th Cir. 1982). Although the *La Riviere* program involved a claim of gender-based discrimination rather than racial discrimination, the case is important to this Note because of its proposition that affirmative-action programs created by state agencies must meet the *Weber* criteria in order to be valid. It is doubtful that the court would alter this proposition in order to accommodate a challenge to an affirmative-action program based on a claim of racial discrimination.

tion process.[67] La Riviere, a male who was not permitted to take the women-only exam, challenged the program on the ground that it violated Title VII of the Civil Rights Act.

The Court of Appeals for the Ninth Circuit addressed the issue of whether *Weber* reached voluntary affirmative-action programs initiated by public employers. In answering this issue in the affirmative, the court stated that a public employer's voluntary affirmative-action program would not violate Title VII if it was valid under *Weber*. The court reasoned that "allowing a governmental entity to take remedial steps to redress or eliminate past discrimination does substantially no greater violence to the concept of neutrality expressed in title VII than does permitting private employers to take such steps."[68] The court found the program valid because it met the *Weber* criteria.[69]

The Ninth Circuit also applied the *Weber* criteria to determine the validity of an affirmative-action program adopted by a company having no prior history of racial discrimination. The program involved in *Tangren v. Wackenhut Services, Inc.*,[70] consisted of an affirmative-action clause in a union contract which overrode the seniority system when female and minority representation decreased below certain percentages.[71] The plaintiff challenged the clause on the ground that it unfairly favored minorities over nonminorities. In upholding the program, the court stressed that *Weber* did not invalidate an affirmative-action program unilaterally imposed by an employer provided that the program was carefully contoured to accomplish its objectives and did not unnecessarily trammel the interests of nonminorities.[72]

Weber has not been the only test which the Ninth Circuit has applied to assess affirmative-action programs. The plaintiffs in *Associated Gen-*

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[67] The exam was conducted pursuant to a state statute which authorized a special class of female officers. *Id.* at 1276. The eligibility requirements appeared to be lowered to allow more women to qualify. *Id.* at 1277.

[68] *Id.* at 1279.

[69] Specifically, the court found: 1) the program was designed to break down old patterns of occupational segregation; 2) the program did not unnecessarily trammel the interests of the male employees since it did not require the discharge of any men and their replacement by women; 3) the program did not absolutely bar the hiring or advancement of men in that men were allowed to participate in the program; and 4) the program, which was to last for only two years, was of a temporary nature. *Id.* at 1280.

[70] 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916, (1982). Although the validity of affirmative-action programs based on the effects they have on seniority is beyond the scope of this Note, this case is cited to indicate that the Ninth Circuit has with some consistency applied the *Weber* criteria in assessing affirmative-action programs.

[71] *Id.* at 706. The union initially opposed the inclusion of the clause in the agreement but eventually succumbed to the company's insistence that the clause be included. The court concluded that despite the union's initial objection, the agreement was voluntarily entered into. The court also noted that the use of economic coercion to obtain the union's consent was not a Title VII violation. *Id.* at 706, 707 n.2.

[72] *Id.* at 707.

eral Contractors v. San Francisco Unified School District[73] challenged an affirmative-action plan requiring school-construction contract bidders to be either minority contractors or to utilize minority sub-contractors for twenty-five percent of the dollar volume of the contract work granted. The plan allowed for exceptions to this requirement[74] and merely deemed those not in compliance with the requirement or those not granted an exception "not responsible" contractors.[75]

The court began its discussion by analogizing the concept of affirmative action to a card game. On one side there are "reshuffle" programs, where the state neither gives nor withholds benefits from anyone but only ensures that everyone enjoys the same benefits. The court held that a state has a constitutional duty to use these types of programs to cure the effects of past or present de jure segregation.[76] On the other side there are "stacked deck" programs, where the state specifically favors minorities. The court asserted that a state has no constitutional duty to engage in "stacked deck" programs since such programs may discriminate or allow scarce benefits to go to one group while they are denied to others.[77] "Stacked deck" programs also may deprive some citizens of their right to contract.[78]

The court held that absent a showing of past discrimination the school board did not have a duty to adopt a "stacked deck" program, and thus the affirmative-action program was invalid.[79] The court also noted that it was constitutionally permissible for state legislation to foreclose the school board from voluntarily adopting an affirmative-action plan.[80] In making this decision, the court chose to ignore the proposition for which *Weber* is commonly understood to stand: voluntary affirmative-action plans may be adopted without a showing of past discrimination by a particular employer.[81] The court instead relied on *Bakke* and based its decision on the lack of a finding by a competent authority of past discrimination.

Although the *Associated General Contractors* court appeared to follow the spirit of *Bakke*, its reasoning is nonetheless disturbing. It appears that the court's major concern was with the ability of the school board to label firms "not responsible" merely because of the firms' refusal to hire

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[73] 616 F.2d 1381 (9th Cir. 1980).

[74] Non-compliance was permitted when a contractor had proven to the board that he "had taken 'every possible measure to comply' with the policy, or that it was 'not practicable in the best interests of the District to require compliance in the specific case.' " *Id.* at 1383.

[75] *Id.*

[76] *Id.* at 1386.

[77] *Id.* at 1386-87

[78] *Id.* at 1388.

[79] *Id.* at 1390.

[80] *Id.* at 1389.

[81] *See generally* Duncan, *supra* note 48, at 505.

minority contractors. A better solution would have been for the court to bar the school board from attaching such a label to the firms. The court took issue with the fact that the school board was attempting to force the contractors' association to accept the board's promotion of minority contractors and sub-contractors.[82] However, the court's refusal to allow the board any discretion to determine responsible bidders forced the board to accept its view that such race-conscious promotion was not within its power.

The Ninth Circuit decisions indicate that the *Weber* criteria will be used to evaluate all affirmative-action programs except those involving public-projects contractors. Affirmative-action programs involving public-projects contractors will be subject to the state's low-bid statute, which will be strictly interpreted to prohibit race-conscious programs.[83] The reason for this distinction is difficult to determine but may lie in the concern that where a school board has the authority to determine the fate of a contractor by applying a label to it, extreme caution should be followed to ensure that a contractor is not needlessly injured. This would account for the court's reliance on strict interpretations of both *Bakke* and the low-bid statute when the trend has rather been to widen the scope of remedies available to minorities.[84]

2. Cases from the Eighth Circuit

Arkansas State University's affirmative-action program was the subject of litigation in *Valentine v. Smith*.[85] The plan, mandated by the federal government and the district court,[86] set the goal[87] of raising the percent-

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[82] 616 F.2d 1381 at 1390.

[83] *See* Associated Gen. Contractors v. San Francisco Unified School Dist., 616 F.2d 1381 (9th Cir. 1980).

[84] *See generally Equal Protection—"Stacked Deck" Affirmative Action*, 11 GOLDEN GATE U.L. REV. 94 (1981). The Ninth Circuit was again confronted with a challenge to an affirmative-action plan as it applied to contractors in Schmidt v. Oakland Unified School Dist., 662 F.2d 550 (9th Cir. 1981). The court in *Schmidt* upheld the plan on the ground that it did not violate the equal-protection standard. One of the factors which led the court to this holding was its view that other California courts would approve the plan. The *Schmidt* case was vacated and remanded to the court of appeals by the Supreme Court. The apparent inconsistency between *Schmidt* and *Associated General Contractors* has yet to be resolved by the California courts.

[85] 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981).

[86] The HEW Office for Civil Rights had notified the governor of Arkansas that the state's colleges and universities violated Title VI. In reviewing the plan, the court of appeals noted that HEW and the lower court were competent to make findings of a state's past discrimination. *Id.* at 506. This is significant because of the court's determination that a finding by a competent authority of past discrimination would justify the use of race-conscious remedies to alleviate the effects of discrimination. *Id.* at 509.

[87] The court noted:

> The validity of a state's affirmative action program should depend on a determination of the relation of the preference to the purpose of remedying past discrimi-

age of black faculty to five percent by 1979. To reach this goal, the university decided that twenty-five percent of the faculty hired between 1976 and 1979 would be black. Bonnie Valentine, a white college instructor, alleged that the university failed to rehire her because of her race.[88] She claimed that the failure to rehire was an intended discrimination in violation of the equal-protection clause of the fourteenth amendment.[89]

The *Valentine* court utilized the *Weber* criteria and additional factors, one of which was the determination of whether the program had a constitutionally permissible purpose, in its assessment of the validity of the university's affirmative-action program.[90] The court held that the test for determining the constitutionality of an affirmative-action plan involved first the determination of whether the program was "substantially related" to the objective of remedying past discrimination.[91] This objective could be accomplished permissibly, the court continued, if the plan possessed the following qualities: the achievement of a racial balance between the work force of the employer and the local minority labor force; a definite termination date; the assurances that only qualified applicants would be hired and that the plan would not unnecessarily trammel the interests of nonminorities.[92] The court found that the university's plan complied with all of the abovementioned criteria and held the plan valid insofar as it met the *Weber* criteria.[93]

The *Valentine* court next addressed the issue of whether the affirmative-action program denied plaintiff her right to equal protection under the law. Answering this issue in the negative, the court held that the fourteenth amendment does not prohibit states from taking appropriate measures to remedy the effects of past discrimination. The court concluded that the university's adoption of an affirmative-action program, in view of past discrimination in the field of education,[94] qualified as an appropriate

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nation and not on whether a state is able to conceal its action in subtle language.

Any discrimination between goals, quotas and targets is primarily semantic.

Id. at 510 n.15 [citations omitted].

[88] Valentine had worked for the university from 1967 until her resignation in 1974. In 1976, her replacement, a black, resigned and Valentine applied for her former position. Valentine's application for rehire was made during the time the university was attempting to desegregate. *Id.* at 506-07.

[89] The court concluded that Valentine had been discriminated against when it noted that the decision not to hire Valentine "was substantially motivated by a race-conscious choice" by Arkansas State University to implement its affirmative action plan. *Id.* at 507.

[90] *Id.* at 510.

[91] *Id.*

[92] The court allowed that the percentage of minority workers employed by the university did not have to equal the percentage the university might have employed had discrimination in education not been practiced. *Id.*

[93] *Id.* at 511.

[94] The court found that the history of Arkansas State University indicated that the university had excluded blacks for most of its history and had made virtually no progress toward desegregation until the federal government had intervened. *Id.* at 505-06.

measure.

The court applied a balancing test to determine the validity of the program. This test involved the weighing of the university's need to correct racial discrimination against the possibility that people innocent of any wrongdoing would suffer harm as a result of the correction. The court held that a plan designed to eliminate the effects of past discrimination would not be invalidated merely because innocent persons might bear the strain of the racial preference. In this case the university's interest far outweighed the innocent individuals' interest since the affirmative-action program had built-in mechanisms to ensure that those innocent of any wrongdoing would not be unduly injured.[95]

The court also addressed the issue of whether the plan was invalid because of the possibility that the program might unduly stigmatize those affected by it. In rejecting this argument, the court noted:

> So long as a plan does not result in the hiring of unqualified persons, we conclude that any stigma caused by the plan is constitutionally acceptable. Members of the majority group are rarely, if ever, stigmatized by operation of a racial preference; . . . The absence—not the presence—of affirmative action stigmatizes minority groups, by perpetuating the disadvantages of minorities.[96]

The *Weber* criteria were applied in a different manner by the Eighth Circuit in *Setser v. Novack Investment Co.*[97] In *Setser*, an affirmative-action program[98] was challenged by a white male who claimed that he had been refused employment because of his race. Although the court remanded the case to the trial court for consideration of the employer's affirmative-action plan, the court noted that an employer had to carry a two-part burden to establish the validity of its affirmative-action program.

In meeting its burden of proof, the employer must first produce evidence of a statistical disparity between the local minority work force and the employer's work force.[99] Such a disparity could be shown via an em-

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[95] *Id.*

[96] *Id.*

[97] 657 F.2d 962 (8th Cir. 1981).

[98] Defendants had adopted an affirmative-action plan based on the guidelines of Executive Order 11246, which required that federal contractors adopt affirmative-action policies to prevent discrimination. *See* 3 C.F.R. 339; 638 F.2d 1137, 1139 n.3.

The court of appeals reheard a portion of the *Setser* case en banc to consider the permissibility of a race-conscious affirmative-action program under 42 U.S.C. § 1981. Originally, the court had held that the appellant had established a cause of action under § 1981 since it appeared that but for his race, the job would have been available to him. *Id.* at 1143. On rehearing, the court held that § 1981 permitted race-conscious affirmative-action plans. 657 F.2d at 969.

[99] *Id.* at 970.

ployer's internal investigation and analysis of its own work force.[100]

The second part of the employer's burden of proof requires that it produce some evidence that the company's affirmative-action program is reasonably related to a remedial purpose.[101] This part of the burden necessitates a showing that the plan is remedial in nature and that the goals of the program reasonably relate to the imbalance of the work force, the number of available qualified applicants and the number of available employment opportunities. Once the employer has succeeded in this showing, it must also produce evidence that the plan does not unnecessarily trammel the interests nor bar the advancement of white employees.[102]

Once the employer has produced evidence that the treatment of the plaintiff was a direct consequence of a valid affirmative-action program, the burden shifts to the plaintiff to prove: 1) the employer adopted the plan for other-than-remedial reasons or 2) the plan unreasonably exceeded its remedial purpose. The court also noted that the determination of the validity of an affirmative-action program was to be made by the court and not the jury.[103]

A review of the Eighth Circuit decisions indicates that an affirmative-action program will be judged on the basis of the *Weber* criteria. Additionally, an affirmative-action program adopted by a private-sector employer must result from a statistical disparity between the local minority work force and the employer's work force. This latter criterion was specifically rejected by the Supreme Court in *Weber*.[104]

3. Cases from the Fifth Circuit

The Fifth Circuit also appears to utilize the *Weber* criteria to assess affirmative-action programs. In 1980 the Court of Appeals for the Fifth Circuit decided *United States v. City of Miami*[105] and its companion case, *United States v. City of Alexandria*.[106] Both cases involved substantially similar factual patterns and presented essentially the same issue.[107] The difference between them lies in the trial court's refusal in *Alexandria*

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[100] The court permitted the employer to make its own determination of the existence of a racial imbalance in its work force. This was in accord with *Weber*, which allowed a private employer to determine whether it needed an affirmative-action program. 443 U.S. at 200.

[101] 657 F.2d at 968.

[102] *Id.* at 968-69.

[103] *Id.*

[104] 443 U.S. 193 at 200.

[105] 614 F.2d 1322 (5th Cir. 1980).

[106] 614 F.2d 1358 (5th Cir. 1980).

[107] The similarities between the cases are as follows: each case involved a charge of discrimination against the respective municipality on behalf of minorities and women. In each case the municipality signed a consent decree agreeing not to discriminate against minorities and women in the future, while neither admitted that it had discriminated against minorities or women in the past.

to sign the consent decree which the city had entered and which included an affirmative-action plan, because of its uncertainty as to whether the plan was lawful, reasonable, or equitable.[108]

Although the court of appeals indicated that it did not know how to interpret the Supreme Court's decision in *Bakke*,[109] the court upheld the affirmative-action program of each municipality.[110] Expressing a firm belief that affirmative action is consistent with national public policy,[111] the court held that goals for hiring minorities were not unconstitutional per se.[112]

In *Miami*, the court allowed the use of statistics to present an overwhelming prima facie case of discrimination in the employment area.[113] Although the court did not cite any precedent, it is apparent that it relied on the *Weber* criteria to determine the validity of the programs. Factors considered by the court included: the program's temporary nature, the fact that it did not necessarily trammel the interests of whites nor require the hiring or promotion of the unqualified, and the program's substantial relationship to the legitimate goal of limiting discrimination.[114] These factors were all present in *Weber* also.

The court addressed the contention that those innocent of any wrongdoing would be forced to suffer as a consequence of the affirmative-action program. "As we see it, the best hope is provided by negotiation and compromise among all affected persons and parties. Where minorities and women have been underrepresented in the past . . . even those innocent of any wrongdoings, must temporarily bear some of the burden."[115]

United States v. City of Alexandria[116] set forth the elements of a prima facie case of racial discrimination in violation of Title VII.[117] The

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[108] 614 F.2d at 1360.

[109] "We frankly admit that we are not entirely sure what to make of the various *Bakke* opinions. In over 150 pages . . . the Justices have told us mainly that they have agreed to disagree." 614 F.2d at 1337.

[110] 614 F.2d at 1342; 614 F.2d at 1366.

[111] 614 F.2d at 1341.

[112] *Id.* at 1338.

[113] These statistics showed that of 911 black males employed by the city at the time of this suit, approximately 75% were employed as maintenance workers. For white males, the corresponding figure was 10%. The professional job categories employed only 15% of the black workers. More than 64% of the black males earned less than $13,000 per year while only 17.2% of the white males earned salaries in this range.

The statistics were similar for females and Spanish-surnamed employees. The labor force in the city was 46.9% Spanish-surnamed but this group comprised only 11% of the city employees. For women, the corresponding figures were 44% and 16%. 614 F.2d at 1339.

[114] *Id.* at 1339-40.

[115] *Id.* at 1342.

[116] 614 F.2d 1358 (5th Cir. 1980).

[117] This case involved a consent decree filed by the government to insure that blacks and women would not be discriminated against in hiring by the Louisiana municipal and parish fire and police departments.

court concluded that to succeed, a plaintiff must show a "significant statistical disparity between the racial, sexual or ethnic balance and the composition of an employer's work force and that of the community from which the workers are hired."[118] Once the plaintiff has made this showing, the burden shifts to the employer to rebut the inference raised by the statistics. In this action, the employer was unable to rebut the inference that it had discriminated against racial or ethnic groups. Based on the statistical information and documents presented, the *Alexandria* court determined that the consent decree rejected by the district court was valid. The appeals court stressed the temporary nature of the plan and its function: alleviating the effects of past discrimination.[119]

4. Cases from the District Courts

An affirmative-action program was upheld on the basis of the *Weber* criteria in *Baker v. Davis*.[120] In this case, consolidated actions were brought by white police officers who alleged that they had been discriminated against by the city's affirmative-action program. This program consisted of a promotional scheme whereby an equal number of top-ranking white and black sergeants were promoted to the rank of lieutenant.[121]

The court held that *Weber* should apply to affirmative-action programs of public-sector employers, and reasoned:

> A public employer which contemplates voluntary affirmative action faces the same dilemma which a private employer faced before *Weber*: risk of suit by one side or the other no matter what it does. The same zone of reasonableness should apply. Moreover, as the school desegregation cases demonstrate, lingering effects of past intentional discrimination can haunt a public employer many years after the intentional discrimination has ended. A finding by a public employer that racial imbalance exists in a traditionally segregated job category should be equated with a finding that the employer had failed in his duty to remedy the pre-

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[118] 614 F.2d at 1364.

[119] The court noted that the defendants faced liability for past discrimination against blacks but "[could not] attempt to rectify past wrongs without fearing liability to whites." *Id.* at 2366.

[120] 483 F. Supp. 930 (E.D. Mich. 1959). The court analyzed the plaintiffs' claims in four areas: Title VII, 42 U.S.C. § 1981, and the federal and state constitutions. The court found that for Title VII purposes the case was indistinguishable from *Weber* in that the city's plan was temporary and did not have a disparate impact on nonminorities. *Id.* at 988. It held that the same criteria used to assess a Title VII claim would be applicable to a § 1981 claim. *Id.* The court found that the city's plan was constitutional because an entity guilty of discrimination had an affirmative duty to eliminate the effects of discrimination. *Id.*

[121] *Id.* at 936. Previously, candidates for lieutenant had been selected from an eligibility list. The ranking of this list was determined by a written examination score, the length of service with the department, ratings by superiors, and the amount of college education. *Id.*

sent effects of past discrimination.[122]

The court found the case indistinguishable from *Weber* for Title VII purposes, in that the city's plan was temporary and did not unnecessarily trammel the interests of whites. The court also found that the city, in admitting its past misconduct, went beyond *Weber*'s minimal requirements by showing a past exclusion of blacks from the police department and a statistical disparity between the number of blacks employed within the department and the number of blacks who lived in the city.[123] In consideration of these factors, the court held that the city's affirmative-action program, which was needed to offset the present effects of past discrimination, did not operate to favor blacks out of malice or capriciousness. "It acted to favor blacks because as a class, they had been subject to debilitating discrimination for years on end."[124]

The court's opinion reflects the idea that an otherwise valid affirmative-action program will not be overturned merely because it affects the interests of innocent persons. This message was also made clear in *Valentine v. Smith*,[125] *United States v. City of Miami*[126] and *United States v. City of Alexandria*.[127]

The validity of Detroit's affirmative action program for police hiring was also challenged in *Van Aken v. Young*.[128] The district court upheld the program as constitutionally valid, holding that it was permissible for a city to structure an affirmative-action program which favored minorities and women as long as the program was remedial in nature and justified by past discriminatory conduct.[129]

In *Bratton v. City of Detroit*,[130] the affirmative action program of Detroit's police was again upheld by the Sixth Circuit as constitutionally permissible.[131] The court analyzed the program using the *Weber* criteria

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[122] *Id.* at 991.

[123] The court outlined the city's history of discrimination and the shortage of blacks on the police force. The court noted that from 1944 until 1953, only 2.5% of the department was composed of blacks, while blacks comprised 16% of the city's population. *Id.* at 941. In the 60s, 6% of the police force was black; blacks comprised approximately 40% of the city's population. *Id.* at 946.

[124] *Id.* at 980. The court continued, "It is true that identified whites were passed over by the affirmative action plan. That, however, is not 'stigmatizing' . . . The white officers were not stamped inferior; rather the black officers were compensated for the past discrimination they had undergone." *Id.* at 993.

[125] 654 F.2d at 503 (8th Cir. 1981).

[126] 614 F.2d 1322 (5th Cir. 1980).

[127] 614 F.2d at 1358 (5th Cir. 1980).

[128] 541 F. Supp. 448 (E.D. Mich. 1982).

[129] *Id.* at 460.

[130] 704 F.2d 878 (6th Cir. 1983).

[131] This decision was the result of appeals taken from earlier judgments of the district court. *See* Baker v. City of Detroit, 458 F. Supp. 379 (E.D. Mich. 1978) (denying jury trial); 483 F. Supp. 919 (E.D. Mich. 1979) (granting defendants' motion for partial summary judg-

and the fourteenth amendment, and found that the utilization of the *Weber* criteria was appropriate for an affirmative-action program created in the public sector.[132] The program in *Bratton* satisfied the *Weber* criteria in that it was temporary in nature, it did not unnecessarily trammel the interests of non-minorities and the objective of the program was to ameliorate patterns of racial segregation.

An affirmative-action program is permissible under the fourteenth amendment if it satisfies two tests according to the *Bratton* decision. The first test requires a governmental interest in the remedial action. The court held that this test had been met in that the city had a strong interest in ridding the police department of the effects of discrimination. The second test imposed by the court requires that the measure utilized be reasonable. In determining reasonableness, the court looked for evidence of stigmatization[133] and the reasonableness of the racial classification. The court found the program met both tests and was thus valid.

In *Harmon v. San Diego County*,[134] the plaintiff, a white male, claimed he had been denied employment by the county because of his race and sex. Harmon alleged that the county's refusal to hire him was in violation of Title VII. San Diego County admitted that it had denied employment to Harmon because of his race and sex but defended its actions as an attempt to effectuate a previous consent decree.

In holding that the consent decree did not serve to validate the county's actions, the court discussed the purpose of Title VII. The court concluded that Title VII was intended to apply to *all* individuals and not just minorities. "The legislative history of Title VII amply demonstrates that Congress meant for hiring decisions to be made on the basis of abil-

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ment and dismissing plaintiffs' claims as to monetary damages other than back pay); 483 F. Supp. 930 (E.D. Mich. 1979) (upholding validity of affirmative-action plan) and 504 F. Supp. 841 (E.D. Mich. 1980) (entering final judgment which ordered city to maintain its affirmative-action program).

[132] The court stated: "Where a public employer adopts a voluntary affirmative action measure which satisfies bounds of permissibility gleaned from *Weber*, that employer will be insulated from Title VII liability." 704 F.2d at 884.

[133] The court found that a stigma did not attach to any individual or group and noted:

> We are dealing with a white majority which has traditionally benefited from the prior systematic discriminatory practices which have given rise to the need for the kind of affirmative action program the Detroit Police Board implemented. The self-esteem of whites as a group is not generally endangered by attempting to remedy past acts militating in their favor, the situation only arises in the first instance because of their social dominance. The purpose of this program is to aid blacks, it is not aimed at excluding whites—the fact that whites have equal access to the lieutenant ranks and that the plan is only temporary clearly support this conclusion. In such instances, the white majority is simply not being subjected to what amounts to a constitutionally invidious stigma.

Id. at 891 (footnotes omitted).

[134] 447 F. Supp. 1084 (S.D. Calif. 1979).

ity and qualifications, not on the basis of race or sex."[135]

The decision in *Harmon* may be interpreted as a warning to other employers of how *not* to handle affirmative-action programs. In *Harmon*, the plaintiff was given a provisional appointment prior to taking the necessary examination. The plaintiff's score on this examination placed him in the top ranking for eligibility to fill the position permanently. The second-highest score was earned by a black.[136] Shortly after the examination, the county entered a consent decree with the federal government in which it agreed not to discriminate. Although the appointing authority[137] considered both candidates qualified to fill the position, his understanding of the consent decree led him to offer the position to the black candidate. When the black candidate waived his appointment, the plaintiff was told that his provisional appointment would become permanent. However, due to a misinterpretation of the decree, he was later informed that a woman had to be hired rather than a man.[138] It can be argued that the county, through its misinterpretation of the decree, was not undertaking a concerted, reasoned program of preferential employment. Instead, the county's acts were isolated events based on a misunderstanding of the consent decree's requirements.[139]

The county attempted to defend its actions by arguing that the consent decree permitted preferential treatment in hiring decisions. In rejecting this argument, the court held that the decree made no provision for any type of affirmative-action plan which would permit preferential treatment. The court also appeared to overrule the county's action by distinguishing these actions from *Weber*. While the *Weber* program had as its purpose the breakdown of patterns of racial segregation and hierarchy, the *Harmon* court noted that the county's actions had as their purpose the compliance with the requirements of a consent decree entered without consideration of any patterns of racial or sexual hierarchy in the county's employment practices.[140] Although the first element of *Weber* was present in *Harmon*—that is, the temporary nature of the pro-

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[135] *Id.* at 1089.

[136] The difference in the scoring of the two men was slight; Harmon's score totalled 98 while the black applicant's score totalled 96. *Id.* at 1086.

[137] The appointing authority was the person with whom the applicant would eventually work. The county charter provided that when a position became vacant, the departments of civil service and personnel, in consultation with the appointing authority, would establish the skills and knowledge required for the job. The departments would then send a list of eligible applicants to the appointing authority, who would then fill the vacancy with an applicant whose name had been drawn from the list. *Id.* at 1085.

[138] The plaintiff was told this despite the fact that the female applicant had scored lower than the plaintiff and did not possess the background that the appointing authority and personnel department had deemed necessary for the position. *Id.* at 1087.

[139] *Id.* at 1089.

[140] 477 F. Supp. at 1090.

gram[141]—the other elements of *Weber* were absent from this case. As noted earlier, the county's actions were not based on a reasoned affirmative-action program. Even if such a program had in fact existed, it is doubtful that it would have withstood judicial scrutiny. It would appear that the county's conduct in hiring an applicant who scored considerably lower than the plaintiff[142] and in twice denying the plaintiff a position violated the mandate of *Weber* in two ways. First, the county's implementation of the decree seemed to foster the hiring of unqualified applicants. Second, the decree seemed to trammel unnecessarily the interests of white males.

Two basic elements arise from this case. The first concern is that before an entity attempts to fashion an effective affirmative-action plan, it must 1) make sure that it has the authority to create such a plan and 2) specify the exact nature of the program to all personnel responsible for the plan's implementation. The second element is that courts will not tolerate a program placing too heavy a burden on innocent individuals.

The nonminority plaintiffs in *Cohen v. Community College*[143] alleged that an affirmative-action plan[144] utilized by the college served to deny them employment because of their race. The court determined that this case involved disparate-treatment,[145] since the plaintiffs claimed the defendants had granted preferential treatment to blacks. To be successful in a disparate treatment case, the court required the plaintiffs to show that there was an implicit discriminatory motive for the defendant's action. The court adopted the four-pronged test of *McDonnell-Douglas Corp. v. Green*,[146] which, if met, establishes discriminatory motive. The *McDonnell-Douglas* test required the plaintiffs to show: 1) that they were members of a racial minority; 2) that they had applied for and were qualified for positions for which the employer was seeking applicants; 3) that they were rejected for the positions despite their qualifications and; 4) that after such rejections, the positions remained open and the employer continued to seek applicants from persons with similar creden-

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[141] It appears that the program was to be maintained only until the city deemed it had complied sufficiently with the decree. *Id.*

[142] The applicant's score totalled 92.5 and placed her sixth on the original eligibility list. Harmon's score totalled 98 and placed him first on the eligibility list. *Id.* at 1086.

[143] 484 F. Supp. 411 (E.D. Pa. 1980).

[144] The president of the college deemed it essential to the affirmative-action program to seek minority candidates for potential openings. The president also requested information from hiring officials regarding the methods used to identify minority candidates. *Id.* at 430.

[145] A disparate-treatment case is one in which the employer treats one person or group less favorably than others on the basis of race or other unpermitted basis. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1972). Significantly, cases so labelled are adjudged under a distinct and different standard. It appears that most disparate-treatment cases are subject to the test set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

[146] 411 U.S. 792 (1973).

tials.[147] The court noted that these factors could be applied flexibly.[148]

Once these factors have been established, the burden shifts to the defendant to articulate legitimate non-discriminatory reasons for its rejection of the applicants.[149] If this burden is met, the plaintiffs are then required to show that the defendant's reasons for rejecting the applicants were a pretext for discrimination. The plaintiffs in this action attempted to meet this burden by producing evidence which purported to show that the defendant's real plan was to have a one hundred percent preference for minorities.[150]

The *Cohen* court deviated from *Bakke* in two ways. First, the *Cohen* court accorded great deference to the college's hiring decisions. In citing with approval *Faro v. New York University*,[151] the court stated: "[o]f all the fields, which the federal courts should hesistate [sic] to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."[152] The court explained that deference did not mean that universities and colleges were free to practice racial discrimination "under guise of academic expertise."[153] The deference the court accorded the college appointments indi-

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[147] *Id.* at 802 (1973).

[148] 484 F. Supp. at 421. Although the plaintiffs were white females and not members of a racial minority, the court did not invalidate their claim because of the absence of this characteristic. The court noted that strict adherence to the aforementioned criteria would result in the dismissal of possible valid claims simply because of the failure of the aggrieved person to possess a particular trait.

[149] *Id.* at 420. The court held that the defendant had met this burden by showing that the plaintiffs were not as qualified to fill the vacancies as were the eventual hirees. *Id.* at 423.

[150] *Id.* at 431. The plaintiff attempted to produce a newsletter as evidence of the college's real intent. The newsletter stated, "The President of the College will not sign a contract for any individual recommended by a department unless the individual is a minority candidate or unless the department can demonstrate that it has thoroughly searched and has not been able to find a qualified minority applicant." *Id.* at 430-31.

The court discounted the reliability of the newsletter because the president had categorically denied making such statements and because statistical evidence regarding the college faculty indicated that hiring of faculty members was not based on an absolute minority preference. *Id.* at 432.

[151] 502 F.2d 1229 (2d Cir. 1974). *Faro* involved an action under the Civil Rights Act. The plaintiff's employment with a university had been terminated after she refused to accept an appointment which she deemed menial. Faro then instituted an action alleging that she had been discriminated against because of her sex. The court concluded that the plaintiff had failed to show that she had been discriminated against.

[152] 484 F. Supp. at 420. The court further noted,

> The qualifications necessary to teach at the college level are necessarily subjective, as well as objective, and thus the criteria by which an applicant for such a position is judged must include a subjective element. A number of other courts have expressed their reluctance to intrude in the area, noting that substantial deference must be accorded to the judgment of experts in the various academic disciplines.

Id. at 420-21.

[153] *Id.* at 421.

cated its awareness of its task, which was to evaluate the evidence according to the appropriate legal standard without substituting the court's judgment for the university's judgment in evaluating suitable applicants.[154]

Second, the court read *Weber* to stand for the proposition that an employer's affirmative-action program can be justified by the existence of a history of racial discrimination in the relevant occupation or profession. This made it unnecessary to show that the individual institution had practiced racial discrimination in the past.[155] The court realized that this proposition contradicted *Bakke*, but concluded that "considerably more guidance on this subject is to be found in the . . . *Weber* decision . . . I chose to follow *Weber*."[156]

The court upheld the plan as valid, as it complied with the *Weber* criteria. Specifically, the court found that although the plan had no express time limitation, such a limitation was unnecessary in the absence of numerical goals.[157] The court also found that the plan did not unnecessarily trammel the interests of whites since it neither barred whites from advancement nor required the discharge of anyone. Additionally, the court found that the plan was valid because it did not violate the *Weber* mandate that only qualified applicants be hired.[158] Although there was no finding that the college affirmative-action plan established a quota for minorities, the court held that the use of a quota system in voluntary affirmative-action programs was not illegal per se.[159]

Although *Weber* appears to set forth the most clearcut standard for determining the validity of an affirmative-action program, these criteria are not followed by all lower courts. A review of the courts which do not

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[154] *Id.*

[155] In interpreting *Weber* the court noted:

> It is clear, however, that the Supreme Court in *Weber* was less concerned with past discrimination by the particular employer involved than it was with 'traditional patterns of racial segregation.' Therefore, I do not read *Weber* as requiring an employer to establish a history of actual discrimination on his own part before he is permitted to adopt an affirmative action plan designed to eliminate that discrimination . . . . [U]nder *Weber*, an employer's affirmative action plan can be justified by the existence of a history of racial discrimination in the relevant occupation or profession at large."

Id. at 434.

[156] *Id.*

[157] *Id.* at 435.

[158] *Id.* at 434-35. The court went into considerable detail in outlining the skills possessed by the minority applicants hired instead of the plaintiffs. The court stated that the fact that one of the minority applicants did not remain with the college was not sufficient to imply that she was not qualified to fill the position. *Id.* at 426.

[159] The court reasoned that if *Weber* allowed the court to approve a plan which allowed for over half the available positions to be reserved for blacks, surely the case could not stand for the proposition that the use of a quota system in a voluntary affirmative-action plan was illegal. *Id.* at 433.

follow the *Weber* criteria in affirmative-action cases is in order.

B. Cases Which Apply No Discernible Criteria

The issue of whether the defendant's refusal to hire a white applicant violated Title VII was addressed in *Lehman v. Yellow Freight System.*[160] This case involved two applicants, one black and one white, who competed for a position in the defendant's company. The manager in charge of hiring offered the position to the black applicant. The white applicant brought the action, alleging that he had been denied the position because of his race. The manager admitted that race played a role in the determination of the recipient of the position; however, he denied that the black applicant was hired solely because of his race.[161]

Although this case involved an individual claim of discrimination, the court took the opportunity to rule on the concept of affirmative action. The court determined, apparently without considering that the black applicant may have been hired because of his qualifications, that the hiring of a black was an attempt by the manager to implement an informal affirmative-action program.[162] It conceded that the majority opinion in *Bakke* could be interpreted as allowing race to be considered in the defendant's hiring practices. However, the court asserted that it would be extraordinary to conclude that *Bakke* allowed a manager to make an informal determination of which group had been discriminated against and to remedy this alleged discrimination on his own.[163] The court concluded that the manager should have utilized some type of data detailing the statistical disparity between the local minority labor force and the minority composition of the firm before hiring the black applicant. It reasoned

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[160] 651 F.2d 520 (7th Cir. 1981).

[161] The testimony of the manager was as follows:

> Q. Isn't it a fact because (Tidwell) was black and you had a quota to hire blacks?
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> A. I wouldn't agree with that statement . . .
>
> Q. You did have a quota at the time? Didn't you?
>
> A. I don't recall.
>
> . . .
>
> Q. Was race a factor (in the hiring of the black applicant)?
>
> A. In Mr. Tidwell's case I would suspect, . . . the color of his skin might be in his favor . . .

Id. at 523, 525.

[162] *Id.*

[163] The court based this conclusion on the fact that it believed that if any Supreme Court case was controlling, *Weber* provided the most definite standard for the permissible bounds of an affirmative-action program. The court stated that *Weber* required that the person making the hiring decision be aware of the statistical disparity before he made the decision to hire a member of a minority. Thus, in this case the attempt by the manager to implement an affirmative-action program had to fail as contrary to the mandate of *Weber*, since the manager had no knowledge of the goal of such a program. 651 F.2d at 520, 527-28.

that such data were necessary to ensure that the manager would not unfairly discriminate against nonminority employees.[164]

Several problems arise with this decision. First, the court unnecessarily dealt with the affirmative-action program when the case could have been decided on narrower grounds. As was noted in *Jamison v. Storer Broadcasting Co.*:[165]

> [T]he existence of an affirmative action program has minimal probative force in a case involving a claim of individual discrimination . . . . General admissibility of affirmative action material also has a high potential for misleading and confusing the fact finder . . . [A] defendant . . . [must] not only . . . defend the . . . action taken against the plaintiff but also . . . the affirmative action plan, even though [it] is not directly attacked.[166]

A second problem arising from the *Lehman* decision is the court's determination that the black applicant was hired solely because of his race. There was no showing that the black applicant did not possess the skills or knowledge to qualify for the available position.[167] Thus the court's decision seems to send the message that blacks can be hired pursuant only to a formal affirmative-action program designed to hire the unqualified. Surely, this is not the intent of either the Supreme Court cases or affirmative-action programs. The court also determined that the manager's decision to hire a black was an attempt to follow an informal affirmative-action plan. Although *Weber* prohibits a plan which trammels unnecessarily the interests of whites, there was no showing that the plan employed by the *Lehman* manager operated in this manner. The available data indicated that after the black applicant was hired, the company had only

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[164] *Id.*

[165] 511 F. Supp. 1286 (E.D. Mich. 1981). *Jamison* involved a suit brought to recover damages for the allegedly discriminatory discharge of the plaintiff's decedent, a white male television sportscaster, as well as for his wrongful death by suicide which was allegedly precipitated by the discriminatory discharge.

[166] *Id.* at 1295. The court noted:

> At best, a proponent of admissibility may claim that the existence of a plan is an acknowledgement that race may be a factor in an employment decision or that an inference is permitted that the employer has a motive to discriminate. Either contention logically advances the claim of discrimination in a discrete act of hiring or discharge only marginally while simultaneously creating great potential for prejudice.

Id.

[167] It is interesting to note that although the firm had developed statistics as to the disparity between the composition of the local work force and the firm's minority composition and had in fact circulated memoranda concerning its attempt to alleviate the disparity, the court held that because the manager was only vaguely aware of the affirmative-action program implemented by the firm, the manager could not have acted pursuant to such a plan. *Id.* at 527.

two black employees in a labor force of thirty.[168]

Interestingly, the court denied that its decision was a setback for affirmative action. The court defended its decision on the basis of the "unique" factors of the case and the need to protect nonminorities from bearing an unfair burden.[169] This attempt by the court to disclaim responsibility for the effect its decision may have on affirmative action must fail as contrary to reality. In actuality, the court did unwarrantably attack affirmative action. The court's decision invalidated the use of an affirmative-action program without providing any guidance as to when, if ever, such a program would be permissible.

The concept of affirmative action was dealt with in an interesting manner in *Talbert v. City of Richmond*,[170] where the claimant, a white police officer, alleged that he had been illegally denied a promotion because of his race. The court held that *Bakke* was not dispositive because: 1) although the city admitted to using race as a consideration in promotions, this consideration was not in pursuance of an affirmative-action program;[171] 2) there was no showing that vacancies were exclusively reserved for blacks; and 3) there was no showing that the city was motivated to make the appointments by the decision to rectify past discrimination.[172]

The court held that whether individualized consideration of race passed constitutional muster should be determined by application of the principles used to determine invidious discrimination.[173] Upon applying these principles, the court held for the government because the plaintiff had failed to prove invidious discrimination.[174]

IV. Conclusion

The Supreme Court decisions can be utilized most effectively by placing the challenged affirmative-action program in a category of public, private or legislatively created. If a program was initiated by a public institution, *Bakke* should be applied; first, because that case dealt with a public-sector affirmative-action program and second, because the Court

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[168] *Id.* The court noted, however, that the actual number of applicants hired was irrelevant. For Title VII purposes, the intent of the person making the hiring decisions was the focal point of concern. *Id.* at 527-28, 528 n.16.

[169] *Id.* at 528.

[170] 648 F.2d 925 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982).

[171] The city had no affirmative-action plan but instead had an "equal opportunity plan." *Id.* at 927.

[172] *Id.* at 928.

[173] These principles were set forth in the cases of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); and Swain v. Alabama, 380 U.S. 202 (1965). The cases set forth criteria for determining whether a state's asserted reason for its action is a cloak for invidious discrimination that is violative of the equal-protection clause.

[174] 648 F.2d 925 at 932.

considered it imperative that a judicial finding of discrimination precede any attempt to create an affirmative-action program of this type. Application of *Bakke* to affirmative-action programs created by public institutions is not without problems. *Bakke* provides no clear criteria for determining what makes an affirmative-action program constitutionally valid. Although the Court does state that race may not be the sole determinant for admission into a program such as the one conducted by the University of California, there is no indication of other factors suitable for use as admissions criteria in an affirmative-action plan. Further, some courts[175] and legal scholars[176] candidly admit that they do not understand *Bakke*. Despite these problems, *Bakke* can be used as a starting point for lower courts faced with challenges to affirmative-action programs created by public institutions. A lower court faced with such a challenge should seek to ensure that the program meets the threshold requirements of *Bakke*—namely, that the program is based upon the finding by a competent authority that the institution has practiced discrimination and that race is not the sole determinant for admission.

Weber should provide some guidance to lower courts ruling on the validity of an affirmative-action program created in the private sector. *Weber* upheld an affirmative-action program which reserved fifty percent of the openings in a training program for blacks. When ruling on the validity of such a program, a lower court should be mindful of the Supreme Court's intention to allow the private sector to alleviate discrimination voluntarily. *Weber*'s precedential value is hindered by the fact that it presents a type of checklist which can be utilized without much discussion. This becomes a problem when one considers that automatic application of *Weber* could easily ignore the public/private distinction which played a crucial role in the *Weber* decision.

The validity of an affirmative-action program created by the legislature should be subjected to the *Fullilove* analysis. A court reviewing a program on the basis of that case should be aware that *Fullilove* would seem to allow the government wide latitude to develop affirmative-action programs. This does not mean that every program created by the government is subject to automatic validation. Rather, the government is given latitude in alleviating discrimination problems because of its special position.

Most lower courts refuse to recognize the public-private-legislative distinction. Recognition, when it does occur, does not always involve application of the most relevant Supreme Court decision. Whether this non-recognition is judicially correct awaits determination by the Supreme Court.

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[175] *See* United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980).

[176] Lavensky, *The Affirmative Action Trilogy and Benign Classifications—Evolving Law in Need of Standards*, 27 WAYNE L. REV. 1 (1980).

Until then, the fate of affirmative action rests with the ability of the lower courts to formulate reasoned, consistent opinions.

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