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Beyond Defunis: Disproportionate Impact Analysis and Mandated Preferences in Law School Admissions

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BEYOND DEFUNIS: DISPROPORTIONATE IMPACT ANALYSIS AND MANDATED "PREFERENCES" IN LAW SCHOOL ADMISSIONS

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DeFunis v. Odegaard[1] involved an unsuccessful challenge by a white law school applicant to a program for the "preferential"[2] admis-

† Associate Professor, Wayne State Law School. This article would never have been finished without the sharp-to-blunt pencil of my friend and former colleague, Donald J. Weidner. My notions of discrimination analysis could not have developed without Charles A. Sullivan. I must also thank Kent Greenawalt, Ruth Bader Ginsburg and Al Rosenthal for their helpful comments and careful reading of this paper.

1. 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974). Already considerable scholarship has emerged. See Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions*, 49 WASH. L. REV. 1 (1973); Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 U.C.L.A.L. REV. 343 (1974); *DeFunis Symposium*, 75 COLUM. L. REV. 483 (1975); *Symposium, DeFunis: The Road Not Taken*, 60 VA. L. REV. 917 (1974). See also the three volume edition of the record in the case, Record, DeFunis v. Odegaard (A. Ginger ed. 1974) [hereinafter cited as Record].

2. The best description of what preferential admissions is all about comes from O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 700 n.3 (1971):

> The central term which will be used throughout—"preferential admissions policies"—may mean many things. At one extreme, a preference may mean no more than tipping the balance in favor of one student rather than another when all other factors are roughly equal. Some choice must be made, and it is technically accurate to classify as a preference the criterion by which the tie is broken. This is, of course, the mildest form of preference. At the opposite extreme is the fixed quota—a guarantee that a certain percentage of the freshman class will consist of residents of the state, children of alumni, veterans, Catholics, pre-meds, or others. Such a preference may admit members of the preferred group whose objective abilities fall far below those of non-quota applicants thereby excluded. Conversely, of course, if the quota imposes a ceiling as well as a floor, it may serve to exclude members of the quota group who are actually superior to applicants outside the quota simply because the percentage has already been filled.
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> There is a wide range of options between the fixed quota and the factor that merely tips the balance when others are equal. Preference may sometimes be given by adding points to a standardized test score in a manner of a handicap when the raw score unfairly reflects the examinee's ability or potential. Or a test score may be disregarded altogether in appraising the performance of an individual or members of a group. Sometimes applicants will be admitted on the basis of a certain qualification that others do not share—graduate work in a particular field, military service, or business experience. In other cases an applicant who would otherwise be rejected may be preferred by conditional admission—that is, by acceptance contingent on satisfactory completion of a special preparatory program or course. Finally, the school may unconditionally admit students who are below usual standards in particular respects and expect to supplement the regular curriculum with offerings designed to remedy the deficiency. Through these and perhaps other methods may the benefits of an explicitly preferential policy be conferred upon persons who do

sion of members of certain minority groups. The thesis of this article is that such programs are not only constitutionally permissible when operated to promote racial integration, but that they may well be constitutionally mandated when minority groups can show that law schools have failed properly to promote racial integration in the operation of their admissions practices.[3]

Discrimination, or disproportionate impact, analysis as a litigation technique for challenges that institutions have failed to promote integration has exhibited three strands of development, each pointing to a similar, if not identical, structure of litigation. One rapidly developing area is characterized by the application of discrimination analysis to employment discrimination by Title VII of the Civil Rights Act of 1964.[4] Plaintiffs make out a prima facie case by showing that defendant's employment policies have a "disparate effect" or "differential impact" on members of groups protected by the Act. That prima facie case may be rebutted if the defendant can carry the burden of showing business justification. Only when defendant fails to carry its burden are the challenged employment practices found to be illegal discrimination. This two-step, burden-shifting definition of discrimination is the model that can be applied to the law school admission process.

A second strand of discrimination analysis development builds a bridge between Title VII and equal protection analysis. Before Title VII was extended to cover public employees,[5] plaintiffs challenging public employment practices argued successfully that the concepts of

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not meet the standard criteria for admission but who possess other qualities which the admitting institution seeks.

3. The typical system of admission to law school these days relies on a numerical formula, the Predicted First Year Average (PFYA). While each school has its own system, the formula combines the applicant's undergraduate average, Law School Admission Test (LSAT) score, LSAT writing ability score and, most recently, a factor that takes into account qualitative differences among undergraduate schools. The relationship between the various factors is determined for each law school by the Educational Testing Service, based on prior experience at that school. Naturally, the higher the PFYA the better; some schools automatically accept all applicants above some point and reject those below some cutoff point. Most PFYA's, however, fall within a range of discretion between the two cutoffs. Typically, considerations beyond the PFYA enter in the discretion exercised in most admissions decisions. Most law schools also employ some sort of program that modifies this process for members of protected minority groups. *See generally* ASSOCIATION OF AMERICAN LAW SCHOOLS & THE LAW SCHOOL ADMISSION COUNCIL, PRELAW HANDBOOK (1973).

4. 42 U.S.C. §§ 2000e to e-15 (1970).

5. Act of Mar. 24, 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C.A. § 2000e(a) (1974)).

discrimination as developed in private employment situations under Title VII ought to be applicable to public employment under the equal protection clause of the fourteenth amendment. The result has been the incorporation of disproportionate impact analysis as at least one wing of general equal protection analysis.

The third strand of development traces general equal protection analysis as applied to cases involving racial discrimination. Particular emphasis is placed on the recent school cases, out of which emerges a positive duty on the part of state authorities to promote racial integration, as well as a model for litigating whether the authorities have satisfied that duty. Plaintiffs challenging the way school authorities carry out their duty to integrate can make out a prima facie case by showing that most students attend largely segregated schools. Once a prima facie case has been established, defendants carry the rebuttal burden of establishing that such segregation occurred despite the best efforts of the school authorities to promote integration.

I. PREFERENTIAL ADMISSIONS PROGRAMS ARE CONSTITUTIONALLY PERMISSIBLE

A. DeFunis v. Odegaard

Plaintiff Marco DeFunis, Jr. applied unsuccessfully to the University of Washington Law School in 1970, and again in 1971. When he was denied admission the second time, he brought a lawsuit claiming that many admittees to the law school had credentials "much below the credentials and qualifications of the plaintiff."[6] The issue of racial discrimination was not raised in the complaint; it entered the case only when the defendant university introduced testimony that some of the admittees whose paper credentials were less impressive than plaintiff's were minority group members admitted under the program for preferential admission. In fact, plaintiff's counsel resisted raising the racial discrimination issue.[7] Nevertheless, the trial judge overruled objections to the testimony of university officials describing minority admission procedures.

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6. Single Appendix in the Supreme Court of the United States at 14, DeFunis v. Odegaard, 416 U.S. 312 (1974), *reprinted in* 1 Record, *supra* note 1, at 14.

7. Trial Transcript, DeFunis v. Odegaard, No. 741727 (Wash. Super. Ct. 1971) 230-31, *partially reprinted in* 1 Record, *supra* note 1, at 78. The failure of a true adversarial focus on the issue of racial discrimination was one basis for an argument that certiorari had been improvidently granted. See Pollak, *DeFunis Non Est Disputandum*, 75 COLUM. L. REV. 495, 505-06 (1975).

The basic admission procedures of the law school relied heavily, but not exclusively, on the applicant's junior-senior college grade point average and Law School Admission Test (LSAT) score, which were computed into a Predicted First Year Average (PFYA).[8] Applicants with PFYA's below a cutoff point were summarily rejected.[9] Those applicants who indicated that their dominant ethnic origin was a minority included within the scope of the preferential admissions program[10] were treated separately, and somewhat differently. The automatic cutoff was not used, minority applicants were compared only to other minority applicants, and less weight was given the PFYA. [11] Thirty-six of the thirty-seven minority group admittees had PFYA's lower than DeFunis.

The trial court, relying on *Brown v. Board of Education*,[12] held that the statement of the first Justice Harlan in dissent in *Plessy v. Ferguson*, that "[o]ur Constitution is color blind,"[13] is now the applicable equal protection standard. Because the law school treated minority applicants differently from majority applicants, the trial judge found the system to be one using racial classifications which, in his view, were per se unconstitutional.[14]

On appeal the Washington Supreme Court reversed. The basic issue was "whether the law school may, in consonance with the equal protection provisions of the state and federal constitutions, consider the racial or ethnic background of applicants as one factor in the selection of students."[15] Within that broad issue the court recognized three subordinate questions:

> (A) whether race can ever be considered as one factor in the admissions policy of a state law school or whether racial classifications are *per se* unconstitutional because the equal protection of the laws requires that law school admissions be "color-blind"; (B) if consideration of race is not *per se* unconstitutional, what is the appropriate standard of review to be applied in determining the constitutionality of such a classification; and (C) when the appropriate standard is applied does the specific minority admissions policy employed by the law school pass constitutional muster?[16]

8. DeFunis v. Odegaard, 82 Wash. 2d 11, 16-19, 507 P.2d 1169, 1173-74 (1973).
9. *Id.* at 17-18, 507 P.2d at 1173-74.
10. The minority applicants included were Afro-Americans, Chicanos and American Indians.
11. 82 Wash. 2d at 21, 507 P.2d at 1175-76.
12. 347 U.S. 483 (1954).
13. 163 U.S. 537, 559 (1896).
14. 82 Wash. 2d at 26, 507 P.2d at 1178.
15. *Id.* at 13, 507 P.2d at 1171.
16. *Id.* at 25, 507 P.2d at 1178. The Court finally added another question concerning the tightness of fit between the ends and means. See note 21 *infra*.

The first question—whether a racial classification is per se unconstitutional—was answered, after a rather careful discussion of the school desegregation cases, in the negative. The crucial inquiry for the court on the invalidation of racial classifications is whether the classification is "invidious." Only racial classifications that are found to be invidious are to be struck down. The preferential admissions program was found not to be invidious since its purpose was to "bring together, rather than separate, the races" and this purpose was achieved by "insuring a reasonable representation of minority persons in the student body."[17]

Even though the use of minority group membership as a factor favoring admission was not an invidious classification which would be per se unconstitutional, the court found that it was a racial classification, so the state had to defend it by showing a compelling interest: "[t]he burden is upon the law school to show that its consideration of race in admitting students is necessary to the accomplishment of a compelling state interest."[18] The black letter statement of "new" equal protection theory requires the state interest advanced for the use of a racial classification to be of some nonracial character.[19] Yet the Washington court looked to what must be a racial purpose, the promotion of racial integration, and held that the law school had carried its burden. The state had an overriding interest in promoting racial integration in public education generally, and more particularly in legal education:

> The legal profession plays a critical role in the policy making sector of our society, whether decisions be public or private, state or local. That lawyers, in making and influencing these decisions, should be cognizant of the views, needs and demands of all segments of society is a principle beyond dispute. The educational interest of the state in producing a racially balanced student body at the law school is compelling.
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> . . . .
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> Finally, the shortage of minority attorneys—and consequently, minority prosecutors, judges and public officials—constitutes an undeniably compelling state interest. If minorities are to live

17. 82 Wash. 2d at 30, 507 P.2d at 1181.

18. *Id.* at 32, 507 P.2d at 1182.

19. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (miscegenation law struck down). In *Loving* the Court indicated that racial classifications must be subjected to the most rigid scrutiny: "[I]f they are ever to be upheld, they must be shown to be necessary to the accomplishment of *some permissible state objective, independent of the racial discrimination* which it was the object of the Fourteenth Amendment to eliminate." *Id.* at 11 (emphasis added). *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

> within the rule of law, they must enjoy equal representation within our legal system.[20]

The court then added a fourth consideration, the "tightness of fit" of the classification to the justifying purpose. Since the purpose was to increase the number of minority law students and to promote education, the court, of course, found the use of a racial classification in the admissions policy to be connected immediately and directly to the state interest advanced and to be neither under nor overinclusive.[21]

The discussion of the Washington court indicates that if a racial classification is found to be invidious, it follows summarily that the classification is per se unconstitutional. While this might be justified as a straightforward rejection of the trial judge's analysis, still, in the normal equal protection case, the finding of invidiousness follows, rather than precedes, the entire analysis. Such a finding is made only when the state has failed to carry its burden of justifying the racial classification as advancing a compelling state interest. However, the court did go on to apply a compelling state interest analysis to the admissions preference. The use of race as a factor favoring admission was justified by the interest of the state in promoting integration, an interest the court found compelling. The problem is that both the original finding of non-invidiousness and the finding of compelling state interest focus on the same thing—the purpose of the admissions program. No reason was given for considering the same subject matter twice. Perhaps it is best to view this type of analysis as a two-step process: some racial classifications are so clearly bad that no justification could be advanced to dispel a finding of invidiousness. But a racial classification somewhat less odious might still be struck down because the justifications advanced for it were not compelling enough, even though the classification is not facially invidious. The court did not develop the distinction between a per se invidious classification and one that might finally be found invidious for want of a sufficiently compelling justification. The Washington court may have come close to circumventing the whole "new" equal protection analysis because, without regard to the niceties of that analysis, it found the use of

20. 82 Wash. 2d at 35, 507 P.2d at 1183-84. Reliance was placed on Sweatt v. Painter, 339 U.S. 629 (1950).

21. 82 Wash. 2d at 35-36, 507 P.2d at 1183-84. However, Professor Morris's only criticism is that the law school's program was slightly underinclusive in that Orientals were not given preference. Further, the class might have been overinclusive by allowing applicants to choose their class designation since there was no definition of minorities. Morris, *supra* note 1, at 47-50.

race as a factor favoring minority admissions to law school to be beneficial.

The United States Supreme Court granted certiorari, but then, in a per curiam opinion, vacated the case as moot.[22] Justice Brennan, joined by Justices Douglas, White and Marshall, dissented on the mootness issue. In a separate dissent, Justice Douglas alone reached the merits and, in a troubled and troubling opinion, urged that the case be reversed and remanded. He started with the proposition that the present system of law school admissions, relying heavily, if not exclusively, on numerical formulas derived from grade points and test scores, is by no means constitutionally mandated:

> The Equal Protection clause did not enact a requirement that Law Schools employ as a sole criterion for admissions a formula based upon the LSAT and undergraduate grades, nor does it proscribe law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome.[23]

While acknowledging that there is no current test to predict barriers that have been overcome and those that will be overcome in individual cases, Justice Douglas would find such a test preferable since law schools "would be making decisions on the basis of individual attributes, rather than according a preference solely on the basis of race."[24] The focus should be on "the consideration of each application *in a racially neutral way* but because the LSAT reflects questions touching on cultural backgrounds,"[25] he would accept the separate processing for minority applications. Justice Douglas would accept a separate LSAT for minorities or, more preferably, its abolition in favor of some "substitute tests . . . to get a measure of an applicant's cultural background, perception, ability to analyze, and his or her relation to groups."[26] Quotas are out, however:

> The state . . . may not proceed by racial classifications to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized.[27]

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22. 416 U.S. 312 (1974). For the subsequent history of the case see DeFunis v. Odegaard, 84 Wash. 2d 617, 529 P.2d 438 (1974), discussed in Pollak, *supra* note 7, at 506-11.

23. 416 U.S. at 331.

24. *Id.* at 332.

25. *See id.* at 334 (emphasis in original).

26. *Id.* at 340.

27. *Id.* at 342.

From all of this it is hard to see what the University of Washington Law School did wrong. It simply treated minority applications separately, as Justice Douglas would allow because of the cultural bias of the LSAT. It also had a common, though minimal, standard for both applicant pools: to be considered, each applicant, minority or majority, had to have a Predicted First Year Average (PFYA) that was passing. Since most were projected to pass, that standard did not screen out many applicants. Also, some majority applicants below a cutoff were summarily turned down, while all minority applicants were considered by the full committee. What apparently upset Justice Douglas was that, despite the common standard of a passing PFYA, the minority applicants were only judged in comparison with other minority applicants and, likewise, the majority applicants were only compared with each other. Thus, sufficient minority applicants were taken to make for reasonable representation in the class.[28] And while presumably the "best qualified" minority applicants were accepted, the law school made no comparison with the rejected majority applicants who, despite majority status, might be able to show they had overcome, and were in the future likely to overcome, greater barriers than minority applicants who were accepted. The hard questions under Justice Douglas' approach are how does one evaluate these barriers he speaks of and, more directly, what is the "value" in the admissions formula of membership in a minority group as a barrier? If the value is an added number to the formula that is the same for every minority applicant, is that "individualized" treatment? If this value is determined for each individual minority applicant, what factors go into making the determination? It might be suggested that economic status be a factor. While low economic status no doubt has a high correlation with minority group status, they are obviously not identical. Even a black person of relatively high economic status presumably has some claim that, without the handicap of racial discrimination, his or her economic position would be much better.[29] Thus, to turn admissions preferences on economic differences may be underinclusive, since it fails to consider the noneconomic, yet real, impact of racial discrimination. Also, a program turning on economic background limited to minority applicants would be underinclusive because it fails to include many majority applicants who are also hindered by deprived economic circumstances. Should the preferential program turn exclusively on economic background, with the use of race

28. *Id.* at 332-33.
29. *See* B. BITTKER, THE CASE FOR BLACK REPARATIONS 71-104 (1973).

as a classifying factor dropping out of the picture, the relationship between the asserted purpose of integration and the implementing means would be reduced. But also the level of judicial scrutiny would be reduced to the "old" rational relation test since economic classifications have not been found to be suspect.[30]

The opinion of Justice Douglas poses a very serious dilemma. On one hand he disapproves of the present practices that dehumanize individuals by transferring their human value into "objective," quantified numbers based on LSAT scores and grades. Lumping together individuals by racial groups merely adds to his discomfort even though such treatment is to the advantage of groups that historically have been the victims of discrimination. On the other hand, his call for individualized treatment could easily lead to the kind of subjective determinations of access to education and the professions that formerly, if not now, were even more restrictive to those of lower socio-economic background.

B. Other "Benign" Racial Classifications Are Constitutionally Permissible

Despite the uproar that continues over *DeFunis*, the Supreme Court has on several occasions, without much resultant dispute, upheld racial classifications. And the Court has done so without the use of the strict scrutiny analysis employed by the Washington Supreme Court in *DeFunis*. Rather, the classifications have been upheld under the rational basis test because of their benign character.

In 1966, in the case of *Katzenbach v. Morgan*,[31] the Supreme Court upheld the constitutionality of section 4(e) of the Voting Rights Act of 1965.[32] The fifth amendment equal protection challenge[33] was that the Act discriminated on the basis of alienage because it prohibited states from denying the right to vote to any person not literate in English who had completed the sixth grade in a foreign language American-flag school,[34] but did not prohibit states from denying the

30. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

31. 384 U.S. 641 (1966). See Redish, *supra* note 1, at 358-59; *Developments*, 82 HARV. L. REV., *supra* note 19, at 1107-11.

32. 42 U.S.C. § 1973b(e) (1970).

33. Since a federal statute was challenged, the analysis proceeded under the Bolling v. Sharpe, 347 U.S. 497 (1954), wing of the fifth amendment that incorporates equal protection as a restraint on federal government action.

34. An American-flag school is defined as a "public school in, or a private school accredited by, any State or territory, the District of Columbia, or in the Commonwealth

right to vote to other citizens not literate in English who had been trained in foreign language schools beyond the territorial limits of the United States. Because section 4(e) "does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law,"[35] the Court viewed it as a "reform" measure that, under the rational basis model of equal protection,[36] need not cure all perceived evils in one stroke.[37]

In the 1973 term, the same term in which *DeFunis* was declared to be moot, the Court decided two cases that upheld the use of racial classifications. In *Lau v. Nichols*,[38] 1800 non-English speaking Chinese students challenged the San Francisco school authorities for failing to provide programs of instruction that would equalize their educational opportunity with students who did speak English. Plaintiffs claimed they had been denied equal protection and further charged the school authorities with discriminating on the basis of race in violation of Title VI of the Civil Rights Act of 1964.[39] The Supreme Court, by Justice Douglas, decided only the statutory claim and reversed the Ninth Circuit, which had dismissed the suit on the ground that the school authorities had no obligation to adopt programs to overcome the educational handicaps students bring with them when they enter school.[40] Because these Chinese-speaking students were denied meaningful participation in the school programs that operated on the assumption that all students spoke English, the Court found racial discrimination within the terms of the regulations issued by the Department of Health, Education and Welfare pursuant to Title VI.[41] Because it was not necessary to the decision, the Court did not decide plaintiffs' equal protection claim—that the failure to provide some sort of bilingual instruction to students who did not speak English violated their equal right to education. Also, the Court did not discuss defendants' equal

of Puerto Rico in which the predominant classroom language was other than English." 42 U.S.C. § 1973b(e)(2) (1970).

35. 384 U.S. at 657.

36. *Id.*, *citing* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (economic equal protection case).

37. 384 U.S. at 657-58. .

38. 414 U.S. 563 (1974).

39. 42 U.S.C. §§ 2000d to d-4 (1970).

40. The Ninth Circuit had said: "Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system." Lau v. Nichols, 483 F.2d 791, 797 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974).

41. 45 C.F.R. §§ 80.3-.13 (1973).

protection-based defense, that the use of racial classifications by school authorities violates the equal protection clause even though the purpose is to equalize educational opportunity. So at most *Lau* stands as implicit authority for the proposition that school authorities may now make use of racial classifications in educational programs to promote actual educational opportunity.[42]

More significant is *Morton v. Mancari*,[43] a case in which the Court upheld an employment preference for Indians in the Bureau of Indian Affairs. The statute under attack by non-Indians provided that "qualified Indians shall hereafter have the preference to appointments to vacancies."[44] The Court, in a unanimous opinion by Justice Blackmun, found the purpose of the preference was:

> to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect tribal life . . . .
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> . . . .
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> Congress was well aware that the proposed preference would result in employment disadvantages within the BIA for non-Indians. Not only was this displacement unavoidable if room were to be made for Indians, but it was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable feature of the entire program for self-government.[45]

In an attempt to limit the scope of the decision, Justice Blackmun first discussed the "unique legal status" of Indian tribes in the Constitution,[46] and the potential broad impact of a finding that special treatment of Indians was invidious racial discrimination:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living near or on reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were

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42. The possibility exists that a court might find no racial classification involved since some Chinese-speaking students were provided bilingual instruction while other Chinese students were not. Morton v. Mancari, 417 U.S. 535 (1974); Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974) (pregnancy versus nonpregnancy classification not by sex since women were in both classifications).

43. 417 U.S. 535 (1974).

44. 25 U.S.C. § 472 (1970) (originally enacted as Act of June 18, 1934, ch. 576, § 12, 48 Stat. 986 (1934)).

45. 417 U.S. at 541-42, 544 (citations omitted).

46. U.S. CONST. art. I, § 8, cl. 3 empowers Congress to "regulate Commerce . . . with the Indian Tribes" and *id.* art. II, § 2, cl. 2 gives the President the power, with the advice and consent of the Senate, to make treaties with such tribes.

> deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.[47]

Although it is incontrovertable that Indian tribes are given specialized constitutional treatment, that Congress has legislated in regard to Indians, and that the courts have accepted that treatment, the preference involved was not the result of any treaty or commerce with Indian tribes. Instead, it was a preference within the federal government for employment that benefited individual qualified job applicants who happened to be of Indian origin. A finding that such a preference is invidious racial discrimination would not necessarily overthrow special arrangments with Indian tribes based on treaties or commerce.[48]

More intriguing than the *sui generis* treatment of Indians, however, is Justice Blackmun's attempt to escape the confines of traditional "new" equal protection analysis by finding no racial classification at all in the preference. Thus, a footnote[49] tries to shoehorn the statute into a narrower reading tied to Indian tribe status, rather than race, by referring to a BIA regulation limiting the preference to members of "federally recognized" tribes. While this does limit the sweep of the preference to fewer than all individuals who can be classified racially as Indians, the failure of the classification to be exactly coextensive with racial lines does not make it less a racial classification.[50]

Though Justice Blackmun insists no racial classification or even a racial preference is involved, in reality he appears to be relying on the conclusion that the classification is not invidious and, therefore, should be upheld, presumably under the rational basis standard. In other words, the preference is well-intentioned and reasonably related to permissible government goals:

> [I]t is an employment criterion reasonably designed to further the

47. 417 U.S. at 552.

48. An example of the strict demarcation between the federal government and Indian tribes is Jacobson v. Forest County Potawatomi Community, 389 F. Supp. 994 (E.D. Wis. 1974). A woman tribe member sued to strike down a tribal bylaw that excluded women from holding office in the tribal council. The action was dismissed because the "United States Constitution does not apply to any Indian tribe. Talton v. Mayes, 163 U.S. 376 . . . (1896)." *Id.* at 995.

49. 417 U.S. at 553 n.24.

50. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Court found racial discrimination when 150 Chinese were denied permission to run laundries, while eighty other Chinese were not similarly treated. *But see* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974), where the Court held that pregnancy discrimination did not constitute sex discrimination because not all women became pregnant.

> cause of Indian self-government and to make the BIA more responsible to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. . . . Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.[51]

In its attempt to limit the holding as closely as possible to Indians at the Bureau of Indian Affairs, the opinion does show some discomfort with preference programs. A facet that is not discussed is the impact the preference has had on employment in the Bureau. The Court does note that "[t]he percentage of Indians employed in the Bureau rose from 34% in 1934 to 57% in 1972. This reversed the former downward trend . . . and was due, clearly, to the presence of the 1934 act."[52] With no discussion of the labor markets from which those employees were drawn, the data are not particularly meaningful. If most BIA employees are drawn from Indian reservations it would not be unexpected, even without the preference, to have a high concentration of Indians among those employees. But what if the BIA drew its employees from an area of low Indian population but, because of the preference, virtually all employees were Indians?[53] The Court failed to discuss whether this rational relation rhetoric could be used to uphold the complete segregation in employment of a government agency.

In sum, despite all the controversy surrounding the University of Washington Law School's use of race as a factor favoring admission of minority group members to the school, such preferences have been accepted in other contexts without the accompanying controversy and they have been upheld as rational means to acceptable governmental ends.

II. THE DEVELOPMENT OF DISPROPORTIONATE IMPACT ANALYSIS

A. Title VII and Employment Discrimination

This section will explore the development of discrimination analy-

51. 417 U.S. at 554.
52. *Id.* at 545.
53. The plaintiffs in *Mancari* were not employed on or near any Indian reservation. *Id.* at 539 n.4.

sis as it has evolved under Title VII of the Civil Rights Act of 1964,[54] with the ultimate purpose of determining its applicability to law school admissions under the equal protection clause of the fourteenth amendment. If that application is made, the result may well be that preferential admission programs like that found permissible in *DeFunis* will be constitutionally *mandated* as a remedy for discrimination.

Since fair employment practices legislation was first enacted, the focus of interpretation has been on the word "discrimination."[55] Title VII prohibits discrimination in employment on the basis of race, creed, color, sex, religion, or national origin. What has emerged and been accepted for Title VII analysis is a "disproportionate impact" or "differential effect" approach, that looks to employment structures in terms of their adverse consequences to minorities and women without regard to purpose or facial neutrality. Once an employment policy is found to bear more heavily on one or more groups protected by the legislation than it does on unprotected groups, *i.e.* a "disproportionate impact" is shown, the policy constitutes illegal discrimination unless the employer proves it is justified. The starting point is a statistical determination of the distribution of members of classes protected by the legislation (racial minorities, women, etc.) throughout the employer's business. This is followed by a comparison of those statistics with the distribution of the minority workforce in appropriate labor markets available to the employer. If the minority representation in employment is less than would be expected by the distribution in the labor market, the inquiry shifts to an examination of the sources of job applicants, educational prerequisites, tests and other job qualifications to determine if such requirements disproportionately exclude members of protected classes. If a differential impact exists, a prima facie case is established that must be rebutted by a showing that the policy is justified by business necessity.

The watershed case establishing this "adverse impact" definition of discrimination is *Griggs v. Duke Power Co.*[56] Prior to the passage of the Civil Rights Act of 1964, Duke Power had a typical "Southern" system of strict racial segregation in job classifications: black employees were relegated to the lowest paying, lowest status, dead end jobs

54. 42 U.S.C. 2000e to e-17 (Supp. 1972).

55. The discussion contained in this section was originally and more extensively developed in Sullivan and Zimmer, *The South Carolina Human Affairs Law: Two Steps Forward, One Step Back?*, 27 S.C.L. REV. 1 (1975).

56. 401 U.S. 424 (1971), *rev'g in part* 420 F.2d 1255 (4th Cir. 1970), *aff'g in part and rev'g in part* 292 F. Supp. 243 (M.D.N.C. 1968).

in the labor department. They were not allowed to transfer into the four all-white departments—coal handling, operations, maintenance, and laboratory and tests. Whites were never assigned to the labor department. After 1955, all employees entering the white departments were required to have high school diplomas. When Title VII became effective in 1965, the company also required all employees entering the formerly all-white departments to pass two standard industrial tests, the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Test. In order to transfer into a different department, employees were required after 1965 to have high school diplomas. This diploma requirement was dropped in response to protests by white employees without diplomas who were employed before the requirement was imposed.[57]

The *Griggs* case started as a class action[58] brought by black employees at Duke's Dan River Station who were still in the labor department by virtue of racial assignment. The district court upheld the company's transfer policy on the basis of an "evil motive" test,[59] since the company had, by the time of decision, transferred the three blacks who had met the transfer requirement.[60] Unlike the district court, the Fourth Circuit applied the second, "equal treatment,"[61] concept of discrimination, and found that Title VII had been violated. Some white employees hired before the diploma requirement was imposed in 1955 had been able over the years to transfer and be promoted to better jobs, while black employees hired before 1955 were confined to the labor department. Since both groups of employees were similarly situated, in that both lacked high school diplomas, "equal treatment" required that the blacks hired before 1955 be transferred and promoted without regard to the diploma or testing requirement.[62] However, blacks hired after 1955 without high school diplomas had not been

57. *Id.* at 427.

58. 292 F. Supp. 243, 244 (M.D.N.C. 1968).

59. *See id.* at 249-51. Note that "evil motive" can be used in two senses. The first is the connotation of saying, "I am going to mistreat you because you are black." The second establishes that intent just as clearly by adoption of a rule that on its face limits opportunities for blacks. Thus the Duke Power rule that blacks could not transfer because they were black was also indicative of evil motive.

60. *Id.* at 247. Three of fourteen blacks had high school diplomas. One was transferred to coal handling after EEOC charges had been filed. 401 U.S. at 427 n.2. The other two were promoted while the suit was pending. 420 F.2d at 1229.

61. 420 F.2d 1225, 1230-35 (4th Cir. 1970). "Equal treatment" is essentially the "color-blind" test subscribed to by the first Justice Harlan in his dissent to Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

62. 420 F.2d at 1230-31.

denied equal treatment: since all whites hired after 1955 had diplomas, they were not similarly situated to the blacks. Foreshadowing the Supreme Court's opinion, Judge Sobeloff dissented, saying that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."[63]

Neither the Fourth Circuit nor the district court found anything discriminatory about the diploma and testing requirements. The district court found them to be rational management techniques for securing the best-qualified employees.[64] Applying the "evil motive" view of discrimination, the Fourth Circuit found no violation, since the educational requirement was adopted for the legitimate business purpose of raising general qualifications "with no intention to discriminate against Negro employees who might be hired after the adoption of the educational requirement."[65] Since the tests had been professionally developed and no evidence was adduced of discrimination in administration or scoring, no violation of the "equal treatment" standard was found.[66] Thus, the testing requirement was held valid even though there was no showing that scoring well on the test related to good performance on the job.[67]

The Supreme Court, in a unanimous opinion[68] authored by Chief Justice Burger, adopted the "differential impact" or "adverse effect" view of discrimination—once it is established that an employment practice statistically disqualifies proportionately more members of a protected group than of the majority group, the employer has the burden of establishing that the practice is necessary for the business:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices . . . .
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> . . . .

63. *Id.* at 1247 (Sobeloff, J., dissenting), *quoting* Judge Butzner in Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968).
64. 292 F. Supp. at 248, 250.
65. 420 F.2d at 1232.
66. *Id.* at 1233.
67. *Id.* at 1235.
68. Justice Brennan took no part in the case. 401 U.S. at 425.

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[69]

The Court made clear that Title VII has broader scope than merely prohibiting evil motive discrimination:

> The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." 420 F.2d at 1232. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.
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> . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.[70]

The basis for the Court's decision that the testing and diploma requirements had a differential impact on blacks apparently lay in judicial notice of 1960 census figures and several decisions of the Equal Employment Opportunity Commission (EEOC). The high school diploma requirement was found to have a more substantial restrictive effect on blacks than on whites, since in North Carolina, at the time of the 1960 census, thirty-four percent of white males had completed high school while only twelve percent of black males had done so.[71] There was no evidence that the Dan River plant drew its employees from the entire geographic area of North Carolina or that applicants for Duke Power jobs reflected a cross section of North Carolina's population. Further, the EEOC, in two cases *not* involving Duke Power, relied on the general literature concerning testing and, without resort to expert witnesses, found that the Wonderlic and Bennett tests had a differential impact on blacks because fifty-eight percent of whites passed the test as compared with only six percent of blacks.[72] The Supreme Court in

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69. *Id.* at 429-31.

70. *Id.* at 432 (emphasis in original).

71. *Id.* at 430 n.6, *citing* U.S. BUREAU OF THE CENSUS, 1 U.S. CENSUS OF POPULATION: 1960, pt. 35, Table 47.

72. CCH EMPL. PRAC. GUIDE ¶ 17.304.53 (EEOC 1970); *id.* ¶ 6139 (EEOC 1966).

Griggs took judicial notice of, and accepted, these findings as a matter of law.[73]

These generalized statistics, accepted by judicial notice, were sufficient to shift the burden to the employer to justify the use of the test and diploma requirements. If justification could be established the requirements would stand, even though they posed more of a restriction to the employment opportunities of blacks than whites.[74] Since the testing and diploma requirements had been adopted to "generally improve" the qualifications of the work force, Duke Power could not show that they were related to the performance of particular jobs at the plant.[75] Although the lower courts had not required a showing of job-relatedness, it seems unlikely that the company could have produced such proof, at least for the lower level jobs. Since the next department up the ladder from the labor department was coal handling, it is probable that qualifications necessary to be a sweeper in the former would be similar to those needed to be a shoveler in the latter. Further, by requiring that employees' tests be empirically validated, the Court made clear that the "business necessity" defense will not be found merely on the basis of unsubstantiated company testimony. In *Griggs* the only empirical evidence in the record indicated that those employees hired before 1955 who had not completed high school or taken the tests had performed satisfactorily and had made progress in the departments where the testing and diploma requirements had subsequently been imposed.[76]

Several opinions rendered after *Griggs* permit further refinements of our insight into the meaning of "adverse effect" discrimination. If *Griggs* establishes that a prima facie case may be made out by comparing minority and majority disqualification rates with respect to particu-

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73. 401 U.S. at 430 n.6.

74. While Title VII was intended to remove artificial restrictions put in the path of protected groups, the Court said:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preferences for any group, minority or majority, is precisely and only what Congress has proscribed.
>
> . . . The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Id. at 430-31.

75. *Id.* at 431.

76. *Id.* at 431-32. The notion that tests must be validated, that is, have an empirical basis for concluding that a good score predicts good performance on the job, is a longstanding tenet of the testing profession that was adopted in the EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1974).

lar employment requirements, *McDonnell Douglas Corp. v. Green*[77] suggests that discrimination might be prima facie proven merely by comparing protected class representation in the general population with representation in the employer's work force.[78] The Court wrote: "The District Court may, for example, determine, after reasonable discovery that 'the [racial] composition of defendant's labor force is itself restrictive or reflective of exclusionary practices.' "[79] The Court cited Professor Blumrosen's provocative article,[80] in which the author rejects the notion that *Griggs* ought to be limited to situations where particular employment policies or practices can be pointed out as the cause of the differential impact:

> This approach would produce the ultimate frustration of piecemeal litigation concerning the employer's hiring process, and would require successive litigation over each stage in the hiring and employment process. This result would stultify the implementation of Title VII. It was carefully avoided by the Supreme Court [in *Griggs*].[81]

Green may be read as approving, or at least as holding open, prima facie proof of employment discrimination by a comparison between demographic statistics and the employer's work force.

This analysis is not undercut by the fact that the *Green* Court, immediately after citing Blumrosen with apparent approval, then writes: "We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire."[82] Presumably, the Court was limiting the use of statistics in two ways. First, in line with *Griggs*, such data is only prima facie proof, not conclusive.[83] Secondly, the *Green* Court was attempting to

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77. 411 U.S. 792 (1973).

78. See Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463 (1973).

79. 411 U.S. at 805 n.19.

80. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and The Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

81. *Id.* at 92.

82. 411 U.S. at 805 n.19.

83. Although the *Green* Court did not specifically advert to the case which presaged both *Griggs* and *Green*, Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970), it has been criticized for holding that demographic disparities in work force representation (in *Parham*, blacks constituted only two percent of the defendant's labor force in an area where they comprised twenty percent of the population) could establish discrimination conclusively. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1154 (1971). In light of that criticism even the Eighth Circuit appears to have abandoned the use of

stress that making out a differential impact case does not necessarily establish illegal discrimination with respect to particular individuals. For example, although an invalid test which disqualifies a number of blacks may be enjoined, it does not necessarily follow that every black applicant rejected for failing to pass the test should receive back pay. Some may not be qualified for the job even when assessed under legitimate, nondiscriminatory standards. In any event, it seems clear that the qualifying language used by the *Green* Court does not mark a retreat from its prior suggestion that demographic data may be used to establish a prima facie case of discrimination.

Another case that bears on the structure of a prima facie case is *Espinoza v. Farah Manufacturing Co., Inc.*[84] The Supreme Court held that failing to hire a person because she is not a United States citizen is not discrimination based on national origin where it does not have the "purpose or effect" of discrimination on that basis. In so holding, the Court looked to employment statistics which showed that persons of Mexican ancestry, all of whom were United States citizens, made up more than ninety-six percent of the employees at the company's San Antonio, Texas plant. Since there was no evidence of evil motive, the citizenship requirement did not have as its purpose national origin discrimination. And, in view of the employment data, there was no disproportionate impact. Thus, the Court wrote: "[w]hile statistics such as these do not automatically shield an employer from a charge of unlawful discrimination, the plain fact of the matter is that Farah does not discriminate against persons of Mexican national origin with respect to employment in the job Mrs. Espinoza sought."[85] While *Espinoza* might be interpreted as requiring plaintiffs to show a differential impact at the particular employer's work place, there is an alternate and better view. If a plaintiff's prima facie case has been established by showing a differential impact based on general demographic statistics, a defendant can rebut the case by showing that his particular work force differs from the general, so that the challenged practice has no differential impact.[86]

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demographic statistics per se. *See* Marquez v. Omaha Dist. Sales Office, 440 F.2d 1157 (8th Cir. 1971), where particularly incriminating statistics were held to be merely evidentiary. *See also* Penn v. Stumpf, 308 F. Supp. 1238, 1243 (N.D. Cal. 1970).

84. 414 U.S. 86 (1973).

85. *Id.* at 93.

86. While the plaintiff in *Espinoza* relied on the EEOC Guidelines to establish her case, several cases have taken the approach suggested here. See Cooper v. Philip Morris, 9 E.P.D. ¶ 9929 (D. Ky. 1974); Park v. Firestone Tire & Rubber Co., 8 E.P.D. ¶ 9732 (N.D. Ohio 1974).

The more recent cases have begun to explore the scope of defenses available to employers, which was left unclear in *Griggs*. At one point the *Griggs* Court spoke of Title VII as barring "artificial, arbitrary, and unnecessary barriers to employment,"[87] perhaps implying that barriers which do not so qualify are legal. Shortly thereafter, the opinion describes the "touchstone" of legality as "business necessity." But in the immediately following sentence, the validating justification is formulated in terms of being "related to job performance."[88]

Three Supreme Court opinions are relevant to the treatment of defenses available to an employer. First, there is the implication derived from *Espinoza* that an employer may show that no differential impact exists. Second, and more importantly, the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*,[89] suggests either that "business necessity" is a defense that can be established in more ways than by empirically demonstrating job-relatedness, or that there exist employer defenses to discrimination charges in addition to a showing of business necessity. *Green* involved McDonnell Douglas' refusal to rehire a former employee on the ground that he had been convicted of an unlawful "stall-in" and had engaged in an unlawful "lock-in," both as part of a civil rights protest against the employer. The stall-in involved the use of cars to block access to the plant during rush hour, while the lock-in involved padlocking the exits to the employer's office building.[90] Green pleaded guilty to obstructing traffic for the "stall-in." He was not arrested for the "lock-in," although he was chairman of the group that performed it and knew that it would be done.[91] Shortly after these events, the company advertised for mechanics. Green, who had been a mechanic for the company until he had been laid off allegedly for economic reasons, applied, but was rejected because of his participation in the unlawful activities.[92]

The Supreme Court, in a unanimous opinion by Mr. Justice Powell, attempted to resolve the difficulties of the lower courts by defining "the order and allocation of proof in a private, single plaintiff action challenging employment discrimination,"[93] involving individual employ-

87. 401 U.S. at 431.
88. *Id.*
89. 411 U.S. 792 (1973).
90. *Id.* at 794-96.
91. *Id.* at 795 & n.3.
92. *Id.* at 796.
93. *Id.* at 800.
The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This

ment decisions rather than general practices. Green had made out a prima facie case: he was a black who had performed satisfactorily as a McDonnell mechanic—the job that remained open after the company refused to rehire him. The burden then shifted to the employer

> to articulate some legitimate, nondiscriminatory reason for [respondent's] rejection. *We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for refusal to hire.* Here petitioner has assigned respondent's participation in unlawful conduct against it as a cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.[94]

Thus, the Court held that the reasons advanced by McDonnell for not rehiring Green—participation in unlawful civil rights tactics aimed at the company—rebutted the plaintiff's prima facie case. The Court then remanded on the ground that Green could still prevail by showing that McDonnell Douglas' decision was actually a pretext for a refusal to hire for discriminatory reasons.[95] The "pretext" notion clearly embraces evil-motive discrimination. Green, who had protested his original layoff as racially discriminatory, might show that the company's prior treatment of him was discriminatory, as by statements of management representatives that demonstrate racial prejudice. Perhaps not so obviously, Green could also show pretext by demonstrating that he had not been treated equally, as by proving that white employees who had engaged in unlawful acts against the employer of comparable seriousness were retained or rehired.[96]

Finally, and most interestingly, the Court indicated that evidence showing a *Griggs*-type case, a general pattern of disproportionate impact, would be relevant to the plaintiff's attempt to prove pretext: "statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination

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

Id. at 802.

94. *Id.* at 802-03 (emphasis added).

95. *Id.* at 807.

96. *Id.* at 804. Presumably the most likely cases would arise from treatment of employees involved in traditional union activities, including striking and picketing, in furtherance of collective bargaining.

against blacks."[97] If the Court was speaking advisedly, the result of *Green* is certainly startling: a defendant who, evenhandedly and in perfect good faith, fires an employee for an objectively legitimate reason may still be held to have acted only "pretextually" if he is guilty of disproportionate impact discrimination in his general hiring practices. It seems strange in this situation to invalidate an employer's action on the ground that it is a "pretext." But perhaps even stranger is the interaction of *Green* and *Griggs*. Suppose Green is able to make out a *Griggs* case of disproportionate impact. Would he then be entitled to relief, including rehiring, even though the employer has a reason for not rehiring him that was strong enough in the first instance to rebut plaintiff's prima facie case? Carried to its logical extreme, such a rule would mean that an employer guilty of *Griggs*-type discrimination could not fire or refuse to hire any member of a protected class for any reason whatsoever. That rule would, in turn, displace *Green* itself: no plaintiff would be foolish enough to bring a *Green* case when a *Griggs* approach is available, as it usually will be.

The *Green* Court, in a footnote, seemed to stop short of such an extreme position. While authorizing the use of statistics to support a finding that the racial "composition of defendant's labor force is itself reflective of restrictive or exclusionary practices,"[98] the opinion cautioned that "such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire."[99] Apparently, making out a *Griggs* case will not by itself counteract McDonnell's rebuttal of Green's prima facie case. Rather, a *Griggs* case may be combined with other evidence that might by itself be inconclusive in order to establish pretext.

In any event, *Green* seems to establish an employer defense to *Griggs*-type cases that is not based on empirical validation of job-relatedness. Justice Powell, in describing the scope of defense available to the company, relied on the "disloyalty" doctrine developed under the National Labor Relations Act.[100] That doctrine is not founded on

97. *Id.* at 808.
98. *Id.* at 805 n.19, *quoting* Blumrosen, *supra* note 80, at 92.
99. *Id.*
100. 29 U.S.C. §§ 151 *et seq.* (1970). NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939), set out the core concept: an employer need not continue to employ persons who had seized the employer's property in what is determined to be an illegal sitdown strike. The NLRA was not "intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with

empirical evidence but the Court accepted it, saying that once a prima facie case had been made out the "burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for employee's rejection."[101] Perhaps the best way to read *Green* is to see it as establishing a third step in a *Griggs* analysis, available to the employer only to limit the remedies against it after it has lost on the first two steps. Thus, if an employer fails to bring forth specific statistics to rebut plaintiff's prima facie case, as allowed in *Espinoza*, and is also unable to establish job-relatedness with empirical evidence according to *Griggs*, then the employer may still attempt to deny relief to individual plaintiffs based on their disloyalty or any other "legitimate, nondiscriminatory reason." In *Green* the Court may have established the foundation for such a distinction by distinguishing that case from *Griggs* as a single plaintiff action focusing on the conduct of the plaintiff rather than his status as a member of a class protected by Title VII.[102]

A hypothetical may illuminate the importance of this distinction. Assume plaintiffs represent a protected class of blacks and women in a *Griggs*-style class action against an employer, and that they establish a prima facie case of discrimination. If the employer can neither rebut the prima facie case with statistics like those in *Espinoza* nor establish empirically a business justification for the differential impact its policies have on protected groups, the class is entitled to relief. But *Green* suggests that class relief does not necessarily mean relief for every member of the class. At this level, the employer can raise the *Green* defense to determine whether particular members of the class should be denied relief because of their allegedly illegal or disloyal conduct. Even

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an immunity from discharge for acts of trespass or violence against the employer's property . . . ." *Id.* at 255. Since *Fansteel* the disloyalty doctrine has been developed to cover situations beyond physical violence aimed at the employer's property, to include participation in campaigns designed to disparage the employer's products or his status in the community. The broadest scope given the disloyalty defense is in NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953). The unionized technicians of WBTV, Charlotte, North Carolina, picketed the station in their off-duty hours to further their collective bargaining demands. They also distributed handbills which made no reference to a labor controversy, union or collective bargaining, but did attack the television station's lack of live local programming. The handbill insinuated that the company gave Charlotte second-class service because the management thought Charlotte was a second-class city. *Id.* at 468. The Supreme Court upheld the discharge meted out to the participants saying, "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer." *Id.* at 472.

101. 411 U.S. at 802.

102. The Court further emphasized the individualized nature of the case by distinguishing Green's conduct as unlawful conduct aimed at the employer rather than unlawful conduct not directed against the particular employer. *Id.* at 803 n.17.

if shown by the employer to be disloyal, individual plaintiffs can still prevail under *Green* if they can establish that the employer's conduct is a mere pretext for discrimination. It is not clear what other individualized defenses might be available to employers, but the possibilities are obvious. For example, not every black barred from employment by education or testing requirements is qualified; an employer may be able to avoid back pay liability as to individuals who are not qualified under legitimate, nondiscriminatory standards.

The final case, *Albemarle Paper Co. v. Moody*,[103] supports the notion that the scope of defenses available to employers in Title VII cases ought to be narrowly construed. Aside from placing limits on the discretion of courts to deny back pay in Title VII cases, the Court struck down an attempt to validate employment tests because the validation study failed to conform to the requirements of the EEOC Guidelines for testing. In dicta restating the basic *Griggs* structure of litigation, the Court appeared to open the way for plaintiffs to win, despite the employer's showing of job relatedness, by proving that the employer could have used hiring policies that had less drastic impact on classes protected by the statute:

> If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." . . . Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination.[104]

While the Court quotes *McDonnell Douglas Corp. v. Green*, this notion of "less drastic means" comes from the Fourth Circuit's narrow description of the business necessity defense in *Robinson v. Lorrilard Corp.*[105]

> [T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and

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103. 422 U.S. 405 (1975).

104. *Id.* at 425. *See* Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974), which proposed that the business necessity test focus on whether the employer had available alternatives with less drastic impact on protected classes.

105. 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

> there must be available no acceptable alternative policies or practice which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.[106]

Viewing the existence of "less drastic means" as establishing a "pretext" to be shown by plaintiffs to overcome an otherwise valid business necessity defense was originated by Justice Stewart in *Albemarle Paper*.[107]

While the final pattern of discrimination analysis has yet to emerge, it is presently clear that plaintiffs can establish a prima facie case of discrimination by showing a differential impact on classes of employees protected by Title VII. Employers then must carry the burden of showing a business necessity that justifies the policies causing the differential impact.

B. Disproportionate Impact Analysis in Public Employment

Before public employees were brought within the coverage of Title VII,[108] courts dealt with equal protection challenges to allegedly discriminatory public employment policies by attempting to apply traditional strict judicial scrutiny language. That having proved unsatisfactory, courts looked to Title VII discrimination analysis and incorporated it as a wing of equal protection doctrine applicable to public employment. This historical development is important to the thesis developed here, because it represents one bridge between Title VII and equal protection. More importantly, the ease with which that incorporation took place shows that courts might well extend the application of employment discrimination analysis to equal protection cases dealing with nonemployment situations, including challenges by minorities to law school admissions policies.

Chance v. Board of Examiners[109] involved the successful equal protection challenge by blacks and Puerto Ricans to the use of exams in selecting school administrators in New York City on the ground that the exams were racially discriminatory. Since only 1.4 percent of the principals and 7.2 percent of the assistant principals were black or Puerto Rican, the district court ordered the parties to prepare a survey

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106. *Id.* at 798.
107. 422 U.S. at 425.
108. Act of Mar. 24, 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C.A. § 2000e(a) (1974)).
109. 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972).

comparing passing rates of the different groups involved. The survey covered a seven year time span in which fifty different examinations were given to 6,000 applicants and it showed overall that "white candidates passed at almost 1½ times the rate of Black and Puerto Rican candidates."[110] From these statistics the district judge applied a *Griggs* analysis and found a prima facie case of discrimination. The court then found that the defendant had failed to carry its burden of making a "strong showing" that the tests were job-related, since the Board failed to establish that the exams were "valid as to content, much less to predictiveness."[111]

In affirming, the Second Circuit tried with difficulty to fit the case into more general equal protection analysis:

> Concededly, this case does not involve intentionally discriminatory legislation, *cf.* Loving v. Virginia, 388 U.S. 1 (1967), or even a neutral legislative scheme applied in an intentionally discriminatory manner, see Yick Wo v. Hopkins, 118 U.S. 356 (1886). Nonetheless, we do not believe that the protection afforded racial minorities by the fourteenth amendment is exhausted by those two possibilities. As already indicated, the district court found that the Board's examinations have a significant and substantial discriminatory impact on black and Puerto Rican applicants. That harsh racial impact, even if unintended, amounts to an invidious *de facto* classification that cannot be ignored or answered with a shrug. At the very least, the Constitution requires that state action spawning such a classification "be justified by legitimate state considerations."[112]

The defendant argued that plaintiff's showing of *de facto* discrimination should be governed by the rational relation test of judicial scrutiny,[113] and that the exams ought to be upheld as rational. Because the tests were struck down, the trial court must have erroneously applied the strict scrutiny test. The Second Circuit noted that the Supreme Court had not applied strict scrutiny "to a case such as this, in which the allegedly unconstitutional action unintentionally resulted in discriminatory effects. . . . Manifestly, the question whether that test should be applied to *de facto* discrimination classifications is a difficult one . . . ."[114] The appeals court then avoided the issue by saying that the question whether the exams were job-related would be answered

110. *Id.* at 210.
111. *Id.* at 219.
112. 458 F.2d at 1175-76.
113. *E.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949).
114. 458 F.2d at 1177 (citations omitted).

the same way under either test since, "the present examinations were not found to be job-related and thus are 'wholly irrelevant to the achievement of a valid state objective.' "[115]

While this conclusion might be supported by claiming that the failure of the Board of Examiners to follow professional validation standards[116] is irrational, it is still true that most test users have not validated their tests to determine if they are job-related. The other way to justify the Second Circuit's conclusion is that by citing *Reed v. Reed*,[117] the court was foreshadowing the "means scrutiny" model of equal protection subsequently developed by Professor Gunther.[118]

The First Circuit avoided the difficulty the Second Circuit had in squeezing employment discrimination cases into equal protection analysis by simply applying *Griggs* as one wing of equal protection analysis. In *Castro v. Beecher*,[119] a police recruitment case, the plaintiffs showed that only 2.3 percent of Boston police were black in a city population that was over sixteen percent black. A challenged test screened out ninety percent of Spanish applicants and seventy-five percent of black applicants, but only 35 percent of majority group members. Since the exam had not been shown to be job-related, the court found an equal protection violation: "The public employer must, we think, in order to justify the use of a means of selection shown to have a racially disproportionate impact, demonstrate that the means is in fact substantially related to job performance."[120] Since the burden was put on the state to make a showing of job-relatedness rather than merely to establish that the relationship was reasonable, the First Circuit did not appear to apply traditional equal protection analysis. Yet the court disclaimed the use of new equal protection, since that would entail proof of absence of alternative means—a test that the court thought would require the use of racial quotas and compensatory programs to train minority candidates.[121]

115. *Id.* at 1177, *quoting* Turner v. Fouche, 396 U.S. 346, 362 (1970), *citing* Reed v. Reed, 404 U.S. 71 (1971).

116. *See* AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS (1974).

117. 404 U.S. 71 (1971) (preference for males in selection of estate administrator struck down).

118. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

119. 459 F.2d 725 (1st Cir. 1972).

120. *Id.* at 732.

121. *Id.* at 733.

In *Vulcan Society v. Civil Service Commission*,[122] a firefighter case, Chief Judge Friendly of the Second Circuit adopted the language of "racially disproportionate impact" from *Castro* in place of the "*de facto* discrimination" language of *Chance* to describe the first step in discrimination analysis. The reason for the change was to make clear that a finding of *de facto* discrimination or racially disproportionate impact was not dispositive of the case.[123] All that such a finding did was shift the burden to the state to show that the tests were job-related. Only if the state failed to carry its burden—the burden of going forward and of persuasion—would there be a finding of illegal or invidious discrimination. As to the standard imposed on the defense, the court cited the language in *Castro, Griggs* and *Green*, that examinations must be "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used."[124] Chief Judge Friendly found further support for the use of the *Griggs* analysis in public employment equal protection cases in the Supreme Court's approving citation to both Title VII and equal protection cases in *Green*: "The Court . . . implicitly recognized that there is no significant distinction in the general job-relatedness requirement under either Title VII or § 1983 . . . ."[125]

In sum, the basic *Griggs* structure of discrimination analysis has become the accepted approach in equal protection challenges to public employment policies. That essential identity is quite practical and is presumably stable, since Title VII has now been extended to public employment. While the Second Circuit in *Chance* fought to incorporate discrimination analysis into the traditional two-tier equal protection approach, it abandoned that attempt in *Vulcan Society*. And so, at least for public employment, discrimination analysis operates as an independent wing of equal protection. The only result of the accommodation of Title VII discrimination analysis with equal protection may be to achieve uniformity now that Title VII has been extended to public employees. But there may be more to it than that. The cases show that at least in employment situations courts have found it easy and comfortable to incorporate discrimination analysis into the equal protection clause. But in a recent case, *Tyler v. Vickery*,[126] the Fifth Circuit refused to apply discrimination analysis to an equal protection challenge to the Georgia

122. 490 F.2d 387 (2d Cir. 1973).
123. *Id.* at 391 & n.4.
124. *Id.* at 394, *quoting* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
125. *Id.* at 394-95 n.9.
126. 517 F.2d 1089 (5th Cir. 1975) (Adams, J., dissenting).

bar examination. The court recognized that to adopt such an approach would result in finding the bar exam unconstitutional "[s]ince it is undisputed that the Georgia bar examination has greater impact on black applicants than on whites and has never been the subject of a professional validation study."[127] Three reasons were given for not applying discrimination analysis. First, the public employment cases were distinguished as situations in which the incorporation of such an analysis was necessary to maintain symmetry between private employment governed by Title VII and public employment, especially since Title VII was amended to be applicable to public employment cases subsequently arising. Secondly, the court relied on its previous *per curiam* affirmance of a district court decision that did not follow the public employment cases of the other circuits.[128] Thirdly, reliance was placed on *Geduldig v. Aiello*,[129] where the Supreme Court could have, but did not, apply Title VII authority to an equal protection claim of gender discrimination. The Fifth Circuit did not consider the cases discussed in the next section of this article, which trace the independent development of litigation techniques similar to disproportionate impact analysis, but which have arisen in the school segregation context.

C. *Disproportionate Impact Analysis Beyond Employment*

(1) Race Cases Up to *Brown I.*

There has recently emerged in school segregation cases a method of analysis or a technique for litigation that is, if not identical, very similar to the discrimination analysis developed in employment cases. This section will first explore the historical development of the fourteenth amendment to show that the purpose of the amendment today is the promotion of integration. Secondly, it will concentrate on the most recent school segregation cases to show that the distinction between *de facto* and *de jure* segregation has lost its legal significance. In place of that distinction there is a two-step structure of litigation that allows plaintiffs to establish a prima facie case of segregation by statistically showing that most students in most schools are in racially identifiable atmospheres. To resist a finding of unconstitutional segregation school

127. *Id.* at 1096.

128. Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972) (per curiam), *aff'g* 331 F. Supp. 1134 (S.D. Ala. 1971) (challenging the constitutionality of an exam used for police promotions).

129. 417 U.S. 484 (1974) (exclusion from state employment disability benefits of disabilities related to normal pregnancy not a violation of equal protection).

authorities must carry the burden of showing that the segregation occurred despite their best efforts to prevent it.

From the colonial years through at least the 1954 decision in *Brown v. Board of Education*,[130] some colonies and then states enacted elaborate codes to maintain first the slave system and then racial segregation. An early example of such a law is the 1740 South Carolina slave code, entitled, "An act for the better Ordering and Governing Negroes and other Slaves in this Province."[131] Essentially it provides that, except for then freed slaves, blacks were chattels, the personal property of white owners.[132] There was an in rem, personal property action recognized in which blacks could go into court to claim that they were free, but only if they could get some free person to be their guardian for the purposes of the action.[133] In other words, blacks were presumed to be slaves lacking the capacity to go into court on their own behalf. The extent of the legal controls designed to differentiate slave from free by keeping slaves in a manifestly inferior position extended even to such things as apparel. Section 40 of the code set out the kind and quality of apparel slaves could wear and provided that every free person was required to strip slaves of any nonconforming attire.[134]

The state law systems of slavery were accepted by the original Constitution. For the purpose of allocating congressional representatives and of imposing direct taxes, slaves were counted as three-fifths of

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130. 347 U.S. 483 (1954).

131. 7 S.C. Stat. 397 (McCord ed. 1740).

132. [A]ll negroes and Indians . . . mulattos or muslizoes who now are, or shall hereafter be, in this Province, and all of their issue . . . shall be . . . absolute slaves, and shall follow the condition of the mother and shall be deemed . . . to be chattels personal, in the hands of their owners, . . . to all intents, constructions, and purposes whatsoever . . . .

Id. § 1.

133. *Id.*

134. That no owner or proprietor of any negro slave, or other slave, (except livery men and boys) shall permit or suffer such negro or other slave, to have or wear any sort of apparel whatsoever, finer, other, or of greater value than negro cloth, duffils, kerseys, osnabrigs, blue linen, check linen or coarse garlix, or callicoes, checked cottons, or Scotch plaids, under the pain of forfeiting all and every such apparel and garment . . . and all and every constable and other persons are hereby authorized, empowered and required, when and as often as they shall find any such negro slave, or other slave, having or wearing any sort of garment or apparel whatsoever, finer, [than the above-enumerated kinds] . . . to seize and take away the same, to his or their own use, benefit and behoof; any law, usage or custom to the contrary notwithstanding. *Provided always*, that if any owner . . . shall think the garment or apparel of his said slave not liable to forfeiture . . . he may apply to any neighboring justice of the peace, who is hereby authorized and empowered to determine any difference or dispute that shall happen thereupon, according to the true intent and meaning of this Act.

Id. § 40.

free people.[135] Not only did the original Constitution have incorporated into it a legal property system based on the enslavement of blacks, but the Supreme Court, in *Dred Scott v. Sandford*,[136] held that, slave or free, black people were not citizens of the United States entitled to the protection of the Constitution. They could not become United States citizens even if they were awarded full citizenship by a state. In the Supreme Court's view there were two constitutional classes of citizens, white and black.

Come the Civil War, the Emancipation Proclamation and the Reconstruction period, the trend was to eliminate the slavery system and to recognize legally the fundamental humanity of blacks. The thirteenth, fourteenth, and fifteenth amendments, as well as national civil rights legislation,[137] were enacted to restructure our state laws to that end. There never has been doubt that the central purpose for enacting the Civil War amendments was to protect the legal rights of black citizens. In the *Slaughter-House Cases*,[138] which restricted the scope of the fourteenth amendment to that purpose, the Supreme Court said:

> [N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.[139]

Although the thirteenth amendment had outlawed slavery and had struck down such laws as the South Carolina slave code, the southern states enacted "black codes" that reimposed the same kind of social, economic, and political disabilities formerly attached to the slave system. It was the existence of such laws that provided part of the impetus for

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135. Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons.

U.S. CONST. art. I, § 2, cl. 3.

136. 60 U.S. (19 How.) 393 (1857).

137. 18 U.S.C. §§ 241-42 (1970); 28 *id.* § 1343(3); 42 *id.* § 1983 (Supp. II 1972).

138. 83 U.S. (16 Wall.) 36 (1872).

139. *Id.* at 71-72.

the enactment of the fourteenth amendment. Again, in the *Slaughter-House Cases*, Justice Miller described the purpose of the fourteenth amendment, including the equal protection clause, as providing a basis of challenge to the black codes:

> Among the first acts of legislation adopted by several of the States . . . were laws which imposed upon the colored races onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.
>
> They were in some States forbidden to appear in the town in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.
>
> These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon [statesmen] the conviction that something more was necessary in the way of constitutional protection to the unfortunate race which had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.[140]

Plaintiffs, butchers forced to go out of business because the state had created a monopoly, argued for a broad, nonracial scope of the Civil War amendments. They principally claimed that the right to be a butcher was a privilege of citizenship within the privileges and immunities clause of the fourteenth amendment, and that federal courts should protect them from state laws interfering with their right to do business.[141] Had the Court accepted their argument, the federal judiciary would have acquired general supervisory power over state law treatment of citizens. For example, if the main thrust of the equal protection clause were freed from its central purpose of protecting blacks, it could be argued that it established a rule of formal equality—"like cases be treated alike and different cases differently"—with the federal courts having the final say as to what was alike and what was different.

140. *Id.* at 70-71.
141. *Id.* at 51-55.

The courts have never accepted such a revolutionary inroad on the idea of federalism. But ever since the *Slaughter-House Cases* the central tension of equal protection litigation has been the determination of when courts would actively scrutinize state activity under the fourteenth amendment and when they would defer to decisions of the other arms of government. Professor Bickel's argument seems convincing that it was beyond the understanding of the framers of the fourteenth amendment that that amendment would give blacks immediate suffrage rights, much less access to integrated education. However, he also argued persuasively that the original understanding was "latitudinarian" enough to grow with the "moral and material state of the nation."[142]

To determine what the present day "moral and material state of the nation" is, at least as seen by the Supreme Court, will require some further inquiry into the course of equal protection litigation. In 1879 the Supreme Court in *Strauder v. West Virginia*[143] struck down a statute that on its face disqualified blacks from jury service. The Court, however, was careful to limit its inquiry to the race question, making it clear that the state was free to prescribe nonracial qualifications for jurors, such as limiting them to males, freeholders, citizens or educated persons. Even though most of those qualifications would obviously exclude a disproportionate share of blacks, the Court denied that "the Fourteenth Amendment was ever intended to prohibit this . . . . Its aim was against discrimination because of race or color."[144] While *Strauder* was limited to a racial exclusion on the face of a statute, it did open up to blacks one of the indicia of full citizenship in our society, the right and the obligation to serve on juries.

In 1886 the Supreme Court, in *Yick Wo v. Hopkins*,[145] expanded the scope of equal protection interpretation in two ways. First, it allowed persons other than blacks and former slaves to bring equal protection challenges against racial discrimination.[146] Secondly, it used the equal protection clause to reach beyond discrimination on the face of a law in striking down statistically demonstrated discrimination in the administration of a law neutral on its face.[147] In *Yick Wo*, a municipal ordinance prohibited operating a laundry without official permission

142. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 65 (1955).
143. 100 U.S. 303 (1879).
144. *Id.* at 310.
145. 118 U.S. 356 (1886).
146. *Id.* at 369.
147. *Id.* at 373-74.

unless the business occupied a brick or stone building.[148] While 150 Chinese laundry operators had been denied official permission, the eighty non-Chinese operators were left unmolested.[149] The Supreme Court found unconstitutional discrimination even without a racial classification on the face of the law:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[150]

In one sense the administration of this law was along precise racial lines: all those who were denied permission were Chinese, while no Caucasians were similarly treated. However, in another sense, the administration did not strictly follow racial lines. Some fifty Chinese laundry operators who presumably had not been denied permission joined the action.[151] Thus the Court found an equal protection violation even though "only" 150 of 200 Chinese were disparately treated. Perhaps it was sufficient for a racial classification to be found that all those adversely affected were Chinese.

Despite *Strauder*'s striking down of a statute with a racial classification and the thrust of *Yick Wo* beyond such facially discriminatory classifications, the Supreme Court in 1896, in *Plessy v. Ferguson*,[152] cited with approval, under the "separate-but-equal" doctrine, a statute with a racial classification on its face that did not exclude blacks from schools, but which provided for schools segregated by race.[153] Even during the long period in which the separate-but-equal doctrine operated to limit the bite of the fourteenth amendment, some progress was made by attacks on the failure of the states to provide any, much less separate, facilities for blacks.[154] In *Sweatt v. Painter*,[155] plaintiff was a black who applied to the University of Texas Law School

148. *Id.* at 357.
149. *Id.* at 359.
150. *Id.* at 373-74.
151. *See id.* at 359.
152. 163 U.S. 537 (1896).
153. *Id.* at 544-45. This was not the primary focus of *Plessy* however, which essentially dealt with *de jure* segregation of train passengers.
154. *See* Greenberg, *Litigation for Social Change: Methods, Limits and Role in Democracy*, 29 RECORD OF N.Y.C.B.A. 320 (1974), where Jack Greenberg of the NAACP Legal Defense Fund discusses the use of race-discrimination litigation as one model for the use of litigation strategy for social change.
155. 339 U.S. 629 (1950).

and who was rejected solely because of his race. Since the state provided no opportunity for blacks to get a legal education, Texas belatedly attempted to comply with *Plessy's* separate-but-equal standard by opening a law school for blacks.[156] Despite a much superior student-teacher ratio (5:1 versus 53:1) and a better library volume per student ratio (717:1 versus 76:1) in the black school, the Supreme Court found that the two schools were not substantially equal in educational opportunities:

> In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, tradition and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.
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> Moreover . . . . [t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. . . . The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.[157]

The value of interracial interchange and experience for blacks within predominately white institutions, the institutions that have power in themselves and provide access to other institutions of power, was the focus of another case decided the same day, *McLaurin v. Oklahoma State Regents.*[158] Here, a black plaintiff finally was admitted to doctoral studies in education at Oklahoma State University, since the state had failed to provide any separate graduate education programs for blacks.[159] Once admitted, however,

156. *Id.* at 632.
157. *Id.* at 633-34.
158. 339 U.S. 637 (1950).
159. *Id.* at 639-40.

> he was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library . . . and to sit at a designated table and to eat at a different time from the other students in the school cafeteria. . . .
>
> . . . .
>
> . . . [These conditions] signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.[160]

So even before *Brown* struck down racial segregation manifested on the face of statutes, there was some indication that there might exist an affirmative duty toward blacks to provide some real chance for participation in majority-dominated social institutions. The one limitation on that duty to provide an integrated environment was the free association right of each student. Thus, the Court recognized that the state could not compel other students to associate with McLaurin:

> It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no bar.[161]

The state, however, was precluded by the equal protection clause from enforcing by law or rule the free association rights of whites not to interact with blacks.[162]

(2) Post *Brown*: The Duty To Integrate and Disproportionate Impact Analysis

The above cases show that the "separate-but-equal" rhetoric was used to justify the same kind of exclusion required by the slave codes and black codes. So the stage was set for *Brown v. Board of Education*.[163] But these cases also showed that at least where the state failed

160. *Id.* at 640-41.
161. *Id.* at 641.
162. *Id.* at 642.
163. 347 U.S. 483 (1954).

entirely to provide facilities for blacks, it had the affirmative duty to admit blacks to previously all-white institutions and that, once blacks were admitted, the state had the obligation to provide an integrated environment, including the full opportunity, though not compulsion, for all students to meet and get to know one another. In *Brown* the Court held that state-imposed racial segregation in the public schools violates the equal protection clause. The Court dodged a direct challenge to *Plessy* by holding that segregated public schools are, as an empirical matter, "inherently unequal."[164] After discussing the "intangible" qualities involved in denying blacks access to graduate education in the context of *Sweatt* and *McLaurin*, the Court made the judgment that:

> Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[165]

The Court in *Brown* did not have to reach beyond state mandated—*de jure*—segregation. But the cases since *Brown* developing remedial jurisprudence have gone far to eliminate or at least blur the *de facto/de jure* distinction and to develop an affirmative duty component into equal protection analysis. The first remedy case was *Brown II*,[166] in which the Supreme Court remanded to the district courts with instructions that school districts be required "to achieve a system of determining admission to the public schools on a nonracial basis,"[167] to "effectuate a transition to a racially nondiscriminatory school system,"[168] and "to admit to public schools on a racially nondiscriminatory basis with all deliberate speed."[169]

The southern reaction to *Brown II* was the enactment of "pupil placement" laws requiring that children be assigned initially to racially identified schools but that they be given an opportunity to transfer to schools formerly reserved for the other race.[170] These plans were tested

164. *See id.* at 494-95.
165. *Id.* at 494.
166. Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II). See the superlative article, Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 285-92 (1972).
167. 349 U.S. at 300.
168. *Id.*
169. *Id.* at 301.
170. Note, *The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts*, 62 COLUM. L. REV. 1448 (1962).

and found wanting in *Green v. County School Board.*[171] The case involved a rural area with two schools, one formerly white and the other black. After three years of a "freedom of choice" plan allowing each pupil to choose between the schools, not a single white had chosen the formerly black school and only fifteen percent of the black students had chosen the formerly white school.[172] In striking down the plan as an ineffective means to the abolition of a segregated system, the unanimous Court recognized that, where state-compelled dual school systems had operated, the authorities had an affirmative duty to operate integrated systems. "School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[173] Because the housing in the rural school district was integrated (the segregated schools had been maintained by busing)[174] a residential or neighborhood school zone policy would have resulted in much more integration than the freedom of choice plan adopted by the school board. Thus, it was not until *Swann v. Charlotte-Mecklenburg Board of Education,*[175] the case that approved busing to end a segregated school system, that the Court faced a large urban school system where, because of segregated residential areas, a neighborhood school assignment would not bring about integration. In *Swann* the school board, after rejecting attendance policies that would increase integration, such as pairing and clustering of nonadjacent zones, adopted a policy providing neighborhood school attendance zones.[176] Since the neighborhood school plan would have left more than half the black elementary students in schools overwhelmingly black, the Court, in a unanimous opinion by Chief Justice Burger, indicated that the school board's duty extended beyond attendance plans neutral on their face, because:

> such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the

171. 391 U.S. 430 (1968).
172. *Id.* at 441.
173. *Id.* at 437-38. *See also* Monroe v. Board of Comm'rs, 391 U.S. 450 (1968).
174. 391 U.S. at 432.
175. 402 U.S. 1 (1971).
176. *Id.* at 8-10.

> form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments.[177]

To avoid presenting such "loaded" plans to district courts, school authorities were armed with discretion to use racial classifications even to the end of achieving racial balance:

> School authorities . . . might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.[178]

In *North Carolina State Board of Education v. Swann*,[179] the Supreme Court protected that range of discretion by striking down a statute that flatly prohibited assignment of students by race:

> [T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*, 347 U.S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy.[180]

It is ironic that a statute that would have been hailed as a great victory for integration in 1954 was found unconstitutional as a hindrance to integration in 1971. But it also shows the change in the conception of what is required to comply with equal protection. From a negative prohibition not to segregate there has evolved an affirmative obligation to integrate, at least where *de jure* segregation had been found to exist.[181] In *Swann* the idea of a neighborhood school assignment policy was late in coming. It was adopted only after the previous policy of assignment by race to separate schools had been struck down. This raises the suspicion that the neighborhood plan had been imposed as

177. *Id.* at 28.
178. *Id.* at 16.
179. 402 U.S. 43 (1971).
180. *Id.* at 45.
181. The existence of state-mandated school segregation was noted in congressional debate over the adoption of the fourteenth amendment. See Bickel, *supra* note 142. The "separate-but-equal" doctrine adopted to uphold segregation in *Plessy* apparently originated in Massachusetts. *See* Roberts v. City of Boston, 59 Mass. 198, 206, 209 (1849), which upheld school segregation against a claim based on a guarantee of equality in the state constitution. *See* Goodman, *supra* note 166, at 292-98, for a description of the broad reach of *de facto* segregation outside the South.

another device to maintain segregation or at least limit the scope of integration.

In cases since *Swann* the Court has had to face challenges to so-called *de facto* segregation where racially segregated residential patterns combine with neighborhood school attendance policies to the end that the races are segregated in the public schools. The first case dealing with this "Northern" pattern of school segregation was *Keyes v. School District No. 1.*[182] That case brought the first break in the previous unanimity of the Court in school segregation cases.[183] The previous cases dealt with racial classifications on the face of a statute, but *Keyes* involved a challenge to the Denver school system, which "has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education."[184] The district court, however, had found that the school authorities had engaged in intentional segregation of schools in one section of the district, despite the lack of a statutory mandate.[185] In upholding that finding, Justice Brennan, speaking for the Court, insisted that the *de facto/de jure* distinction was being maintained because the district court had looked for a "*purpose* or *intent* to segregate,"[186] and found it in the conduct of the school board which "by use of various techniques such as the manipulation of student attendance zones, school site selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools throughout the school district. . . ."[187]

It might be argued that the Court, in upholding the finding of *de jure* segregation, looked only to objective evidence, such as the racial consequences of certain school attendance and school construction decisions, to find intent or purpose to segregate. Yet there was some evidence showing strong segregative effect that really had no facially neutral justification. While the school attendance zones might be justified by a neighborhood school policy that was neutral on its face, no

182. 413 U.S. 189 (1973).

183. Justice Douglas concurred in a separate opinion, *id.* at 214; Chief Justice Burger concurred in the result, *id.*; Justice Powell concurred in part and dissented in part, *id.* at 217; and Justice Rehnquist dissented, *id.* at 254.

184. *Id.* at 191.

185. 303 F. Supp. 279 (D. Colo. 1969).

186. 413 U.S. at 193, 208.

187. *Id.* at 191. The Court also described the relevant factors in finding that a school is segregated: "What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration." *Id.* at 196.

neutral justification existed for the assignment of minority teachers and staff to minority schools.[188] So, lacking even the cover of a neutral justification, the school board could be seen as acting with the purpose of maintaining school segregation.

The big issue in *Keyes* was the impact on a whole school system of a finding of *de jure* segregation in one part of that system. The Court reversed and remanded, indicating that the obvious implication of segregating blacks into one group of schools was to segregate whites into the rest of the schools. Because *de jure* segregation had already been found, the burden had shifted to the school authorities "to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their action."[189] A further possible defense available to the school board was the lack of causation. Even if the board could not disprove segregative intent, it could rebut the prima facie case "by showing that its past segregative acts did not create or contribute to the current segregated conditions of the core city schools."[190]

As in *Swann*, the issue of the legitimacy of a neighborhood school attendance policy was raised as a defense but, again as in *Swann*, the Court avoided confronting the issue directly because of the finding that school authorities manipulated attendance zones to segregate the schools:

> We have no occasion to consider in this case whether a "neighborhood school policy" of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting *de jure* segregation. It is enough that we hold that the mere assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have practiced *de jure* segregation in a meaningful portion of the school system by techniques that indicate that the "neighborhood school" concept has not been maintained free of manipulation.[191]

Justice Douglas concurred, stating that "for the purposes of the Equal Protection Clause of the Fourteenth Amendment as applied to the school cases, no difference between *de facto* and *de jure* segregation

188. There may be a nonneutral yet constitutional justification for assigning minority teachers and staff to predominately minority schools. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court upheld an employment preference for Indians in the Bureau of Indian Affairs, at least partly under the rationale that the Bureau would be more sensitive and responsive to Indian problems if staffed by Indians.

189. 413 U.S. at 210.

190. *Id.* at 211.

191. *Id.* at 212.

[exists]."[192] Justice Powell, in an extended and powerful opinion, argued to end the *de jure/de facto* dichotomy. His major support for abolishing that dichotomy was the evolution of equal protection doctrine from *Brown I* to *Swann.* While *Brown* originally meant that blacks have "the right not to be compelled by state action to attend a segregated school system," now they have a right to expect that "local school boards will operate *integrated school systems.*"[193] In other words, the integration of schools, which entered equal protection jurisprudence as a remedy imposed on schools that had been *de jure* segregated, has become an affirmative obligation for all state officials under the equal protection clause. Given that affirmative duty on the part of school authorities, Justice Powell proposed a two-step formula for determining whether the authorities are properly performing their equal protection duties. Challengers to the way school authorities have performed those duties can make out a prima facie case with statistics showing segregation, which is established if "a substantial percentage of schools [is] populated by students from one race only or predominantly so populated."[194] Once a prima facie case is made out the burden shifts to the school authorities "to demonstrate they nevertheless are operating a genuinely integrated school system."[195] While not every school in the district need be integrated for the system to be genuinely integrated, the school authorities, to carry their burden, must show that, for the system as a whole, they had taken appropriate steps to:

> (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instruction, and curriculum opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close old ones, and determine the size and grade categories with the same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind.[196]

While Justice Brennan in *Keyes* spoke of subjective intent to segregate, Justice Powell had moved beyond intent, beyond *de jure/de facto* distinctions, to a statistical "differential impact" model of equal protection very much like discrimination analysis developed in the em-

192. *Id.* at 214-15.
193. *Id.* at 225-26 (Powell, J., concurring in part and dissenting in part) (emphasis in original).
194. *Id.* at 224 n.10.
195. *Id.* at 224.
196. *Id.* at 226.

ployment area:[197] plaintiffs establish a prima facie case by statistics showing that a substantial percentage of schools in the district or districts challenged are predominantly populated by students from one race only. Once a prima facie case is shown, the school authorities must show that the segregation occurred despite their best efforts to promote integration.

The important school segregation case of 1974 was *Milliken v. Bradley*,[198] which involved metropolitan Detroit school districts. The case is best known for limiting the *Swann* busing remedy. Without a finding of segregation in each school district of a metropolitan area, the Court found it improper to order cross-district busing, even if it were necessary to end segregation in the school districts that were found to be segregated.[199] While that aspect of the case was of the greatest immediate significance, in the long run it may be more important that a majority of the Court seemed to have accepted the position Justice Powell took in *Keyes*. Chief Justice Burger wrote for the Court, upholding the district court's findings that the center city school district had violated the equal protection clause because the "natural, probable, forseeable and actual effect" of various practices was to increase or maintain segregation.[200] The kinds of practices looked to by the district court, as described by the Chief Justice, were like those described by Justice Powell in his *Keyes* dissent—the manipulation of optional attendance zones in residential areas undergoing racial transition to allow white students to escape identifiably black schools; drawing north-south attendance zone boundaries despite awareness that east-west boundary lines would lessen segregation significantly; use of busing to maintain rather than lessen segregation; and school site and construction policies that failed to promote integration. The Court thus found that "under our decision last term in *Keyes v. School District No. 1*, . . . the findings [of segregative violations by the Detroit Board of Education] appear to be correct."[201] While that affirmance may not have been an acceptance of Justice Powell's position in *Keyes* that the *de facto/de jure* distinction should be abol-

197. *See* text accompanying notes 54-107 *supra*.

198. 418 U.S. 717 (1974). Justice Stewart concurred while Justices Douglas, Brennan, White and Marshall dissented. See *Symposium: Milliken v. Bradley and the Future of Urban School Desegregation*, 21 WAYNE L. REV. 751 (1975).

199. The Court set out the possible situations in which interdistrict busing would be appropriate: "[A]n interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." 418 U.S. at 745.

200. *Id.* at 725.

201. *Id.* at 738 n.18.

ished in favor of his differential impact test, the Chief Justice does accept something very much like Justice Powell's position on the use of statistics to establish a prima facie case:

> Disparity in the racial composition of pupils within a single district may well constitute a "signal" to a district court at the outset, leading to inquiry into the causes accounting for a pronounced racial identifiability of schools within one school system. . . . However, the use of significant racial imbalance in schools within an autonomous school district as a signal which operates simply to shift the burden of proof, is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy.[202]

While the Chief Justice and Justice Powell state the standard for the establishment of a prima facie case somewhat differently, the difference probably has little significance. For Justice Powell a prima facie case is made out if the data shows the "existence of a substantial percentage of schools populated by students from one race only or predominantly so populated."[203] Chief Justice Burger describes the standard as a "disparity in the racial composition of pupils" or as a "pronounced racial identifiability of schools within one school system."[204]

Once a prima facie case is shown, the burden of proof and presumably of persuasion is shifted to the school authorities for rebuttal. While Justice Powell elaborately described what a school district must do to carry its rebuttal burden,[205] Chief Justice Burger left it with a rather elliptical statement that the school authorities must show that "the causes accounting for a pronounced racial identifiability"[206] are not attributable to their policies.

While the *Milliken* majority's acceptance of Justice Powell's position in *Keyes* is not as clearly described in all of its ramifications as it might be, the structure of school segregation litigation is laid out as a two-step process. Plaintiffs can establish a prima facie case against school officials by showing the schools to be largely racially identifiable. The school authorities then must carry the burden of rebuttal. While the scope of possible rebuttal is not entirely clear, what is clear is that the mere assertion of a facially neutral justification will not by itself

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202. *Id.* at 741 n.19.

203. 413 U.S. at 224 n.10.

204. 418 U.S. at 741 n.19. These descriptions comport with what Professor Goodman saw as the Court's mind in *Green* and *Swann* as the elimination of "*severe* racial imbalance—the 'one-race' or 'racially identifiable' school—whatever its source." Goodman, *supra* note 166, at 292.

205. *See* text accompanying note 196 *supra.*

206. 418 U.S. at 741 n.19.

suffice. Such a justification, like a neighborhood attendance policy, will be accepted as legitimate but the inquiry will focus on how the policy has been implemented. Since the burden is on the school board, it presumably has to show that its policies could not have been implemented in such a way as to lessen segregation or that everything was done to promote integration. Given the wide discretion school boards were acknowledged to have in *Swann* to combat segregation, including the discretion to use quotas to promote racial balance, the rebuttal burden seems quite difficult, if not impossible, to meet. Whether doing less than was possible to integrate schools has the natural and probable effect of increasing segregation and is thus *de jure* segregation under Justice Brennan's majority opinion in *Keyes*, or whether the *de jure* finding has dropped from the picture as Justice Powell would have it, the majority in *Milliken v. Bradley* did accept a two-step test in segregation cases. The test shifts the burden rather easily to school authorities to defend their policies as not contributing to segregation. The burden-shifting is crucial, especially given the scope of discretion open to school authorities to adopt policies that promote integration.

There are several paths of justification school districts might advance in their defense. One is where the student population is nearly all of one race, so there was no way to integrate the student population regardless of the intradistrict policies adopted. Where that is the case the basic thrust of the litigation would go to the other wing of *Milliken* to determine whether interdistrict relationships have maintained or created segregation. A second justification might be a plea of ignorance. The school board in *Milliken* erred because it adopted various policies that had the "natural and probable" consequence of maintaining segregation when it had available other means of implementing legitimate policies that would have promoted integration. So school authorities might plead ignorance of policy alternatives that would have lessened segregation.[207] The opportunity to raise the defense of ignorance may be limited since, at least in large urban areas, integration of schools has been an issue so long that numerous alternative policies and plans for their implementation, including some that would lessen segregation, have been considered. More fundamentally, if school boards have a duty to promote integration, ignorance of that duty or of the consequences of the policies adopted should not be excused.

207. *Cf.* Jefferson v. Hackney, 406 U.S. 535 (1972) (differences in amount of "need" paid for by welfare schemes not racial discrimination where authorities were unaware that blacks and Spanish-surnamed persons were more concentrated in the programs that provided a smaller share of need).

A third and final justification involves the relationship between the duty to promote integration and the other obligations facing school authorities in the performance of their duties. The problem arises when there are some alternate ways of implementing legitimate school policies that could have improved the prospects for integration. Does that make it impossible for the school board to rebut the prima facie case? Or can the school board still justify the plans it adopted by somehow showing that the alternatives bore an unacceptably high cost, either educationally or financially, or were in some other way unjustified? When the inquiry reaches the level of balancing integration with financial and other educational goals the courts will be treading on difficult ground. Yet it is not that much different than what the federal courts have come to handle in Southern *de jure* cases in which they monitor every aspect of school administration while the dual school systems are dismantled.

Future litigation will determine the scope of justification. But what is already clear from *Milliken* and *Keyes* is that the Court has not confronted the legitimacy of such school policies as neighborhood school attendance zones, but has accepted their legitimacy and looked instead at their implementation to see if the results have promoted integration. If, finally, a school board is found to have failed to promote integration, the full range of *Swann* (as modified by *Milliken*) remedies are available, which may require school boards to give up their neighborhood school policies in order to eliminate segregation "root and branch."[208]

(3) Possible Limits on Disproportionate Impact Analysis

Some limits that might be placed on the use of disproportionate impact analysis in race cases have emerged from unsuccessful attempts to expand beyond race the range of judicial activism under the equal

208. Two other wings of racial discrimination cases use statistics to prove racial exclusion from a municipality and from jury service. In Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960), the city limits of Tuskegee, Alabama were changed, thereby excluding "from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident." Justice Frankfurter relied on the fifteenth amendment to strike down the gerrymandering because of its differential impact: "While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Id.* at 347. See Weaver and Hess, *A Procedure for Nonpartisan Districting: Development of Computer Techniques*, 73 YALE L.J. 288 (1963). In Carter v. Jury Comm'n, 396 U.S. 320 (1970), the Court relied on equal protection analysis, rather than the sixth amendment right to a jury trial, to find a discriminatory jury selection system where only thirty-two percent of the list was black in a sixty-five percent black county. See Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966), for a refined statistical analysis.

protection clause. In *Dandridge v. Williams*,[209] plaintiffs challenged Maryland's classification that set maximum benefits for aid to families with dependent children because the limit disadvantaged large families. The Supreme Court upheld the benefit limits by relying on the rational relationship standard of review applicable to the "area of economics and social welfare."[210] In so holding, the Court noted that there was "no contention that the Maryland regulation is infected with a racially discriminatory purpose or effect such as to make it inherently suspect."[211] Similarly, in *James v. Valtierra*,[212] the Court upheld against an equal protection challenge a California constitutional provision requiring all low-cost housing projects to be approved by local referenda.[213] In so doing, the Court distinguished *Hunter v. Erickson*,[214] where a referendum approval requirement for any ordinance regulating racial discrimination in real estate transactions was struck down because no other ordinances bearing on housing had to be enacted by referendum. *James v. Valtierra* was different because the referendum requirement was for "any low-rent public housing project, not only for projects which will be occupied by a racial minority."[215] Further, "the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority."[216]

With that precedent, equal protection litigators attempted to cast their challenges in a manner that would show racial discrimination. In *Jefferson v. Hackney*,[217] plaintiffs challenged a Texas welfare scheme that provided one hundred percent of "need" to aged persons eligible for benefits and ninety-five percent for the disabled and blind people who were eligible, but only seventy-five percent of "need" to families with dependent children.[218] The basis of the challenge was that more blacks and Mexican-Americans were eligible for aid to families with dependent children than were eligible for the programs that provided a higher percentage of need.[219] Thus, differential impact was shown and should have been considered discriminatory. The Supreme Court, in an

209. 397 U.S. 471 (1970).
210. *Id.* at 485.
211. *Id.* at 485 n.17.
212. 402 U.S. 137 (1971).
213. *Id.* at 142-43.
214. 393 U.S. 385 (1969).
215. 402 U.S. at 141.
216. *Id., citing* Gomillion v. Lightfoot, 364 U.S. 339 (1960), as authority to govern cases in which a claim of racial discrimination is made.
217. 406 U.S. 535 (1972).
218. *Id.* at 537 n.3, 545.
219. *Id.* at 538.

opinion by Mr. Justice Rehnquist, upheld the classification scheme by relying on *Dandridge v. Williams*. Because the Court found it unchallenged that the Texas officials "did not know the racial make-up of the various welfare assistance categories prior to or at the time when the orders here under attack were issued,"[220] it held that the mere showing that blacks and other minorities made up a greater percentage of persons eligible for family benefits which are calculated to provide less of their need was not unconstitutional:

> Appellants are thus left with their naked statistical argument: that there is a larger percentage of Negroes and Mexican-Americans in AFDC than in the other programs, and that the AFDC is funded at 75% whereas the other programs are funded at 95% and 100% of recognized need. . . . The basic outlines of eligibility for the various categorical grants are established by Congress, not by the States; given the heterogeneity of the Nation's population it would be only an infrequent coincidence that the racial composition of each grant class was identical to that of the others. The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be.[221]

Hackney is a difficult case to deal with. It can be avoided by considering that it preceded *Keyes* and *Milliken* and the recent desegregation cases, and so has been eclipsed by the newly-emerged analysis of those cases. Or it can be distinguished whenever the government officials have knowledge of the racial impact of the challenged policy. The case might also be distinguished in situations in which a challenged classification is more clearly drawn on racial lines. In *Hackney* the link between the challenged welfare programs was "need." In the context of these very different programs, that common thread of need might be viewed as an artifact or word-of-art that draws together schemes so dissimilar as to be incomparable. In other words, the government could have enacted and administered each of these welfare schemes as entirely separate programs. Without the unifying "need" criterion it would be very hard to find any way of attacking the entire welfare scheme as discriminatory just because minority group members were more concentrated in one program than another. Unless there were some method to compare treatment under the various programs, there would be no way to show that minority group members were disproportionately affected in an adverse way.

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220. *Id.* at 547.
221. *Id.* at 548 (footnote omitted).

While *Hackney* may be distinguished, more fundamentally it must be questioned. While Justice Rehnquist glibly treats it as a *Dandridge* case generally challenging the rationality of a welfare scheme, the central thrust of the case is that racial discrimination was involved in a state scheme that just happened to involve welfare benefits. Hopefully, even Justice Rehnquist would accept a challenge to a welfare scheme that excluded all blacks, or even most blacks, from receiving benefits they would receive if they were white. Even if this exclusion of blacks were accomplished by some device that was racially neutral on its face, it is inconceivable that a majority of the Court would uphold the device without some greater scrutiny than was apparent in *Hackney*. The question is why the Court upheld a policy that gave benefits at a reduced percentage of need to a group that had higher percentage of minority group members.

There seem to be several possible ways to fit *Hackney* into the mainstream. In a strange way the case might have presaged *Morton v. Mancari*[222] as a benevolent, rather than invidious, racial classification. If all welfare programs are viewed from afar as compensatory schemes to offset economic hardships caused by different life situations, including racial discrimination, then all these programs, including those viewed as compensating for racial discrimination, would be reviewed under the rational relationship standard used to uphold the employment preference for Indians in *Mancari*. Thus, where a program has no impact one way or the other on integration of minorities into full citizenship roles,[223] but is designed to buffer the impact of hardship, the courts would not take an activist posture in review. Yet such an approach has the danger of too easily accepting a compensatory rationale that would let real injustice slip through without careful scrutiny.

Hackney may have been somewhat clarified by *San Antonio Independent School District v. Rodriguez*,[224] in which the Court turned back the drive to have education treated as a "fundamental right" and wealth a "suspect classification" for "new" equal protection purposes. The case involved a challenge to the Texas local school financing system that results in different per pupil expenditures among school districts because of differences in their tax bases. Thus the claim was that the poor received less education because they lived in school districts with low tax

222. 417 U.S. 535 (1974) (employment preference for Indians upheld). See notes 43-53 and accompanying text *supra*.

223. See discussion in notes 227-38 *infra*, that the central purpose of the equal protection clause is the promotion of integration of minorities into full citizenship roles.

224. 411 U.S. 1 (1973).

bases. The Supreme Court reversed a district court finding that, in the context of educational financing, wealth was a suspect classification. The Court dodged the wealth classification issue by finding that, in the case as presented, poor school districts were not coextensive with the residential areas of poor families. There was no clearly defined group of poor persons against whom the school financing system discriminated.[225] The Court's tone of restraint in *Rodriguez*, as in *Dandridge* and *James v. Valtierra*, indicates that, if forced to face the question, the Court would hold that wealth is not a suspect classification. Take for example a challenge to the constitutionality of a sales tax. After *Rodriguez* it is unlikely that a showing that the tax is regressive, that is, that poor people pay a greater share of their purchasing power in sales tax than do the more affluent, would be found sufficient to strike down the tax on equal protection grounds. Under *Hackney* a showing that blacks and other minorities constituted a disproportionately large share of the poor would not seem sufficient to knock down the sales tax. A racial discrimination challenge to a sales tax might only be successful if some kind of showing could be made that, over and above the regressive impact the tax has on all the poor, there was some added adverse impact on blacks not shared by whites similarly situated economically. Such an approach isolates the variables of race and wealth and accepts the disproportionate impact on minorities that is attributable solely to economics. That isolation of race and wealth may be quite dangerous, however, because much of the economic plight suffered by minorities results from racial discrimination. In other words, there is a causal connection running from minority group status to economic deprivation. Perhaps the way to avoid eviscerating racial discrimination analysis would be to require a state using a *Rodriguez* and *Hackney* rationale to shoulder the burden of proving that racial discrimination was not causally related to the economic deprivation at issue. To do that, however, would require initially, at a minimum, the stiffening of the very casual scrutiny engaged in by the Court in *Hackney*.[226]

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225. *Id.* at 28.

226. In Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975) the court relied on *Hackney* and James v. Valtierra, 402 U.S. 137 (1971), to refuse to apply strict scrutiny to an equal protection challenge to the Georgia bar exam:

> The gravamen of [plaintiffs'] argument is that the disproportionate passing rates of black and white applicants on the examination serve to create the classification based on race which is needed to trigger strict judicial scrutiny. The difficulty with this position, however, is that it stands in the face of a clear body of law holding that an otherwise legitimate classification does not become constitutionally "suspect" simply because greater numbers of a racial minority fall in the group disadvantaged by the classification.

III. THE CONTEMPORARY EQUAL PROTECTION PURPOSE: PROMOTING THE RACIAL INTEGRATION OF MINORITY GROUP MEMBERS INTO FULL CITIZENSHIP ROLES

This section will pull together the various developments discussed so far that show the purpose of equal protection today to be the promotion of racial integration. Some of these developments, including *DeFunis* and *Morton v. Mancari*,[227] uphold preference programs designed to promote racial integration of law schools and public employment. Even the pre-*Brown* cases, which ordered states to admit blacks to higher education because no separate and equal facilites had been provided them, required the facilities to be fully integrated. That the central purpose of equal protection is to promote racial integration has been made clear in the post-*Brown* cases. Cases such as *Jefferson v. Hackney*[228] might even provide a basis for arguing that welfare programs that buffer the impact of racial discrimination without doing anything to promote the integration of minority group members into the full range of citizenship roles are outside the scope of contemporary equal protection.

The point can be made even more clearly by a slight change of perspective. Suppose that the federal government uses the Indian employment preference upheld in *Mancari* in such a way that all or substantially all Bureau of Indian Affairs employees are Indians. Or, a case closer to our topic, a state runs a law school for blacks only, excluding all white applicants. Can majority group members successfully challenge these segregated institutions?

The answer ought to be "yes," but to arrive at it requires a look at several cases in which whites have successfully raised claims challenging exclusionary state action. In *Loving v. Virginia*,[229] a black and a white were convicted of miscegenation; each of them claimed the statute violated equal protection. The state argued that there was no equal

517 F.2d at 1099. The court characterized plaintiffs' distinction that *Hackney* and *James* are applicable only to economic and social welfare areas of legislative action as being of no significance "since Georgia bar examinees are not judged on the basis of broad generalizations, but rather on the basis of individualized determinations of whether each applicant possesses the minimal competence required to practice law." *Id.* at 1100. Alternately, the court held that if the statistical showing of disparate racial impact did establish a prima facie case of discrimination the burden would shift to the defendant to demonstrate that "invidious discrimination was not among the reasons for his actions." *Id.* Such a showing would not be sufficient under Title VII, see text accompanying notes 89-107 *supra*, nor under the recent school segregation decisions, see text accompanying notes 207-08 *supra*.

227. 417 U.S. 535 (1974). See notes 43-53 and accompanying text *supra*.

228. 406 U.S. 535 (1972).

229. 388 U.S. 1 (1967).

protection claim because the law applied equally to blacks and whites: "[T]he meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree."[230] The Supreme Court rejected the notion that "the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all *invidious racial discriminations.*"[231] What made the classification invidious was that the antimiscegenation statute was a measure "which restrict[s] the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[232] The finding of invidiousness on the ground that the statute restricted the rights of both blacks and whites to integrate their lives in marriage follows much rhetoric about "strict scrutiny" and "compelling state interests."[233] Yet it is this finding, rather than the intervening rhetoric, that forms the core of the entire decision.

The case that most clearly shows that the promotion of racial integration is the prime contemporary purpose of equal protection is *Otero v. New York City Housing Authority.*[234] Plaintiffs were minority group members who applied for admission to a low rent public housing project, but who were turned down because the housing authority feared that admitting too many minority groups applicants would cause the project and its surrounding area to "tip" into a minority ghetto. That is, when the minority residents reached a certain numerical level in the neighborhood, all or most white residents would exercise their greater residential mobility and move out, leaving a minority ghetto.[235] The district court granted plaintiffs' motion for summary judgment, finding that, while the housing authority had a duty to foster integration, it could not exercise that duty where to do so would deprive minority persons of low-cost housing.[236] The Second Circuit reversed:

> We disagree as to the district court's interpretation of the Authority's duty to integrate. We do not view that duty as a "one-way

230. *Id.* at 7-8.
231. *Id.* at 8 (emphasis added).
232. *Id.* at 12.
233. *Id.* at 11.
234. 484 F.2d 1122 (2d Cir. 1973).
235. *Id.* at 1124.
236. *Id.* at 1130.

> street" limited to introduction of non-white persons into a predominantly white community. The Authority is obligated to take affirmative steps to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons.[237]

The remand order reflects the court's uncertainty in allowing quotas that would exclude minority group members because their exclusion is necessary to the furtherance of integration. On remand the defendant housing authority must carry the "heavy burden" of proving that "tipping" will occur unless plaintiff minority group members are denied access to the project.[238]

In light of *Otero* and the other recent cases highlighting the duty to integrate, the employment preference for Indians in the Bureau of Indian Affairs upheld in *Morton v. Mancari* and the preferential admission program upheld in *DeFunis* are almost old hat. The answer to the questions raised by the hypotheticals set out at the beginning of this section—the all-Indian Bureau of Indian Affairs and the all-black state law school—are clear. Both the non-Indian challenging the operation of the employment preference and the white applicant claiming admission to the law school ought to be successful.

The emergence of the duty to integrate requires the exercise of discretion by authorities acting for the state as well as reviewing courts. Inevitably some judgment must be made as to what is promoting integration and what is promoting separatism. In residential patterns like *Otero* the crucial question probably is the "tipping" point, that is, the percentage of minority population that induces the majority residents in an area to exercise their greater residential mobility by moving away, thus leaving a ghetto. In situations like *DeFunis*, the problem is most

237. *Id.* at 1125.

238. Another way of approaching the purpose of equal protection is to show that majority group members have equal protection claims. In Peters v. Kiff, 407 U.S. 493 (1972), a white defendant in a criminal case challenged the exclusion of blacks from the jury that tried him. The Court ruled that the right guaranteed by the sixth amendment is to a jury representative of the entire community, including black citizens, whether or not the defendant is black. *Id.* at 504. Though *Peters* is a right-to-fair-jury case rather than an equal protection case, the exclusion of blacks from jury service is an equal protection violation. *E.g.*, Carter v. Jury Comm'n, 396 U.S. 320 (1970). While the exclusion of blacks from a jury limits the range of their citizenship, it also affects whites by depriving them of the possibility of interchange with representatives of the entire community, including blacks, in the context of their exercise of citizenship roles as jurors. That whites have claims challenging the exclusion of blacks was established in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). In that case the Supreme Court accepted white plaintiffs as "private attorneys general" to enforce the fair housing provisions of the Civil Rights Act of 1968. The essence of the plaintiffs' claim was that they were deprived of the opportunity to be neighbors with blacks because blacks had been denied access to housing by the conduct of the defendant landlords.

likely as the University of Washington Law School saw it: to find as many qualified minority persons as is necessary for the law school to have a reasonable representation of groups that historically have been underrepresented in the legal profession. The word "quota" carries with it a heavy charge of emotion. Like "busing," it may be a code word for racial prejudice. So the question of how much minority representation is promoting integration may slip into hot debate over "quotas." Yet if state policymakers have before them data showing the effect their policy decisions will have on integration, the fourteenth amendment justifies the use of that knowledge to maximize integration.

IV. Disproportionate Impact Analysis Applied to Law School Admissions

So far the discussion has developed the notion that the contemporary purpose of equal protection is the promotion of racial integration, even if the means used to achieve that purpose might in certain situations act to the immediate disadvantage of particular members of minority groups. Persons challenging the performance of government policies promoting integration can establish a prima facie case that the authorities have failed in their duty by showing that the policies as they operate have a disproportionate impact on minorities. When a prima facie case has been made out, the defendant authorities must show that their policies are justified despite the disproportionate impact.

Applying disproportionate impact analysis to law school admissions starts with the fact that blacks, who make up over eleven percent of the general population, make up only 1.2 percent of lawyers and 4.1 percent of currently enrolled law students. In contrast, women, who make up over half of the total population, constituted less than three percent of the bar in 1970 but now make up about twenty percent of currently enrolled law students.

	1970		1974
	Population	Lawyers	Law Students
Total	203,212,000	325,000	110,713
White	177,749,000	321,150	105,768
Black	22,580,000	3,850	4,945
% Black	11.2%	1.2%	4.1%
Female	104,300,000	9,100	21,788
Male	98,912,000	315,900	88,925
% Female	51.4%	2.8%	19.7%[239]

239. U.S. Bureau of Census, 1970 Census of Population, Pt. 1, § 2, at 1-627 (1973) (black lawyers); American Bar Found., 1971 Lawyers Statistical Report,

It is indisputable that blacks are underrepresented in law schools and in the bar. And it is also clear that blacks are gaining representation in the legal profession at a much slower pace than the other most significantly underrepresented group—women.

These facts by themselves, of course, do not carry the day. The first objection to according legal significance to such facts would be based on *Mayor of Philadelphia v. Educational Equality League.*[240] The case involved a challenge to a mayoral appointment to a panel that nominated candidates to the school board. The system gave the mayor double appointing power: first he appointed the thirteen-member nominating panel and then he chose the school board from names put forward by that panel. According to the city charter, nine of the slots on the nominating panel were to be filled by the highest ranking officers of certain classifications of citywide organizations. The other four slots were to be filled from the citizenry-at-large. Plaintiffs claimed that the mayor had violated the equal protection clause since only two of thirteen, or fifteen percent, of the nominating panel were black, while thirty-four percent of the city population and sixty percent of the school population were black.[241] Mr. Justice Powell, writing for the Court, generally upheld the use of statistics in race cases, but the judgment for plaintiffs was reversed. The finding that plaintiffs had established an unrebutted prima facie case could not stand because the court below had relied on faulty statistical methodology:

> Statistical analyses have served and will continue to serve an important role as one indirect indicator of racial discrimination in access to service on governmental bodies, particularly where, as in the case of jury service, the duty to serve falls equally on all citizens. But the simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning in the context of this case. Respondents do not challenge the qualifications for service on the panel set out in the charter, whereby nine of the 13 seats are restricted to the highest ranking officers of designated categories of citywide organizations and institutions. Accordingly, this is not a case in which it can be assumed that all citizens are fungible for purposes of determining whether members of a particular class

TABLE 1, at 5 (1972) (women lawyers); White, *Is That Burgeoning Law School Enrollment Ending?*, 61 A.B.A.J. 202 (1975); ABA LAW SCHOOL AND BAR ADMISSION REQUIREMENTS (1975) (present law school population). Total minority group enrollment is 8,333 or 7.5 percent of total law school population. *Id.* The increased black and minority enrollment reflects the success of preferential admissions programs recently established. Those same programs do not extend to women, so the recent increase in number of women law students is attributable to other factors.

240. 415 U.S. 605 (1974).

241. *Id.* at 610.

> have been unlawfully excluded. At least with regard to nine seats on the panel . . . the relevant universe for comparison purposes consists of the highest ranking officers of the categories of organizations and institutions specified in the city charter, not the population at large. The Court of Appeals overlooked this distinction. Furthermore, the District Court's concern for the smallness of the sample presented by the 13-member Panel was also well founded. The Court of Appeals erred in failing to recognize the importance of this flaw in straight percentage comparisons.[242]

Essentially, Justice Powell found that the city population figures were appropriate as a base of comparison, but only for the four citizen-at-large slots, and that the proper comparison had not been developed.[243] In the long run, mathematical probability would anticipate about one-third of the candidates to be black, but, with only four slots open, panel membership may end up with any racial mixture and not be improbable. Thus, if the names of the entire population of the city were put in a barrel, it would be expected that, if enough names were pulled, one-third would be black. If, however, only four names were drawn, the sample would be too small to form the basis of any expectation of what the racial makeup of those selected would be. As to the other nine nominating slots, the general population figures would be useful only as a comparison to show that blacks were excluded from leadership positions in the various types of civic organizations listed in the charter. If the data had shown the disproportionate impact on blacks of the civic organization leadership criteria, that would have given plaintiffs their prima facie case and would have shifted the burden to the city to justify the use of those criteria. If no disproportionate exclusion of blacks from the leadership of these organizations was shown, then that data could be appropriately compared with the appointments to the school board to see if disproportionately few black leaders were selected.[244] Plaintiffs lost their case because they failed to develop the data correctly.

Because law students and lawyers could not be expected to have the same characteristics or qualifications as the general population, the gross disparity between the black population and black lawyers would by itself not be sufficient to establish a prima facie case, even though there is some precedent for that in Title VII.[245] But more data for the

242. *Id.* at 620-21 (citations omitted).

243. *Id.*

244. The Court did not reach the issue of scope of discretion of an elected official to appoint other officers. *Id.* at 616.

245. *See* McDonnell Douglas Co. v. Green, 411 U.S. 792, 805 n.19 (1973). See

challenge can be found in the elements of the basic admissions formula used by law schools, since each such element can be shown to have a disproportionate impact. Law schools today quite generally require applicants to have college degrees. These college graduate applicants are then compared for admission through the computation of a predicted first year average composed of some formula combining college grade point average with Law School Admission Test score. Each of these elements screen out blacks from consideration for law school admission at a higher rate than whites, and thus are subject to attack because of their disproportionate impact.

The first more or less universal requirement is that, as a condition of consideration, applicants must have a basic college degree.[246] While about twelve percent of all people over age twenty-five have college degrees, this figure can be broken down racially to slightly more than five percent of blacks and 12.6 percent of whites.[247] Thus, if a number of samples of 1000 people were drawn from the general population, somewhere around 112 members of each would be expected to be black. But of those 112 blacks, only six would be expected to be college graduates. If as many blacks as whites had college degrees, about fourteen members in each sample would be expected to be black.

The law school response to the argument that the college degree requirement has a disproportionate impact on blacks would be that the pool of college graduates is the proper universe of comparison. With only five percent of each college graduate pool being black, a compari-

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notes 77-83 and accompanying text *supra*. In Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), the Court allowed defendant to rebut plaintiff's prima facie case with specific statistics showing that there was no disproportionate impact at its plant. While this article limits its inquiry to the use of national statistics for simplicity, the range of statistics at regional and state levels shows a rather consistent exclusion of women, with the range being from one percent (North Carolina) to five percent (District of Columbia). *See* AMERICAN BAR FOUND., 1971 LAWYERS STATISTICAL REPORT, 1971 WOMEN LAWYERS SUPPLEMENT, TABLE 12, at 26-39 (1973). The distribution of black lawyers is rather consistently low. For example, in Washington the black population comprises only 2.1 percent of the total but less than one half of one percent of the bar. *See* Morris, *supra* note 1, at 38. In South Carolina, for example, over thirty percent of the population is black, yet, as of 1970, less than one half of one percent of the bar was black. See Edwards, *A New Role for the Black Law Graduate—A Reality or an Illusion*, 69 MICH. L. REV. 1407, 1409 (1971), for figures for all southern states. Presumably the proper statistical base for comparison is the general area where each law school draws its students and places its graduates. *See* Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614 (1973).

246. For a history of educational prerequisites in legal education, see Stolz, *Training for the Public Profession of the Law (1921): A Contemporary Review*, in ASSOCIATION OF AMERICAN LAW SCHOOLS, 1 PROCEEDINGS § II, at 142 (1971).

247. U.S. BUREAU OF THE CENSUS, 1973 STATISTICAL ABSTRACT, TABLE 175, at 115.

son with the 4.1 percent black law school enrollment would not be a showing of disproportionate impact. Plaintiffs would argue that a college degree prerequisite has not been validated as related to success in law school or as a lawyer and would cite Title VII authority for challenges to educational credentials for jobs.[248] While *Griggs v. Duke Power Co.* did strike down a high school diploma requirement for low-skill jobs in a power station,[249] another Title VII case, *Spurlock v. United Airlines, Inc.*,[250] sustained a college degree requirement for flight officers of an airline. Plaintiff, a black with two years of college and 204 hours of flight time, challenged United's minimum requirements for a flight officer of 500 hours of flight time and a college degree. He successfully established a prima facie case by showing that, of the approximately 5900 flight officers in the employ of United, only nine were black.[251] United was held to have rebutted plaintiff's case with statistics that claimed to show a direct correlation between numbers of flight hours and success in the flight officers training program.[252] The college degree requirement was upheld by simple reliance on the testimony of company officials.

> The evidence showed that United flight officers go through a rigorous training course upon being hired and then are required to attend intensive refresher courses at six-month intervals to insure that all flight officers remain at peak performance ability. United officials testified that the possession of a college degree indicated that the applicant had the ability to understand and retain concepts and information, given in the atmosphere of a classroom or training program. Thus, a person with a college degree, particularly one in the "hard" sciences, is more able to cope with the initial training program and the unending series of refresher courses than a person without a college degree. We think United met the burden of showing that its requirement of a college degree was sufficiently job-related to make it a lawful pre-employment standard.[253]

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248. *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See also* Note, 73 COLUM. L. REV., *supra* note 199, at 1614.

249. See text accompanying notes 56-76 *supra*.

250. 475 F.2d 216 (10th Cir. 1972).

251. *Id.* at 218.

252. The cut-off line of 500 hours seems not to be established as correct by the statistics. They correlate as follows:

No. of Hours	Failure Rate
200 or less	9%
201 to 500	14%
501 to 1000	8%
1001 to 1500	5%
1501 to 5000	2%

Id. at 219.

253. *Id.*

These nonempirically based defenses were accepted in *Spurlock*, despite substantial contrary authority,[254] because the court applied a lesser burden of business justification when the job involves high risk to the safety of others:

> When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. *Cf.* 29 C.F.R. ¶ 1607.5(c)(2)(iii). The job of airline flight officer is clearly such a job. United's flight officers pilot aircraft worth as much as $20 million and transport as many as 300 passengers per flight. The risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airlines. The courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job.[255]

Admittedly, a job as flight officer involves high risk to the safety of others; thus, *Spurlock* may have been rightly decided.[256] But a broad reading of *Spurlock* outside situations involving a high risk of physical danger to many people would be inappropriate, since it would hinder equal opportunity for entry into white collar and other high status jobs.[257]

While legal education does not involve high physical risk to the lives of many people in the way an airline pilot's job does, it is a stepping stone to a profession which is an important and powerful force in this society. Presumably the law school world would defend its use of the college degree requirement by arguing that law students need to be able to cope with the rigors of law school classes and that, even without any empirical verification, the attainment of a college degree is a

254. See text accompanying notes 84-88, 102 *supra*. *But see* Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, — MICH. L. REV. — (1975), where, in a discussion of Title VII remedies, the authors describe reasons why judges might be more restrained in granting preferential remedies to white collar discrimination.

255. 475 F.2d at 219. Despite the emphasis on safety in the Court's opinion, United's evidence bore only on success in the training program and was not relevant to safe performance for flight officers flying planes with passengers.

256. However, it could be argued that Spurlock sought a chance to *train* for a flight officer job and that no risk to the public was involved if he proved himself incapable of performing in the training program.

257. See Edwards & Zaretsky, *supra* note 254, at —.

good predictor that the applicant can succeed in law school classes. However, there exist data, unexplored in *Spurlock*, that indicate there is no necessary correlation between achievement in school and the performance of posteducation roles, even though those roles have educational prerequisites as conditions of entry. Professor Berg has traced the post World War II trend of ever-increasing educational credential requirements for jobs and found it to be based on an unproved assumption that the more the education the better the job performance.[258] After reviewing the available data he concluded that the assumption that more education is better is a myth. "The purposeless credential consciousness creates unnecessary barriers to upward mobility as well as increasing the job dissatisfaction of those better credentialed individuals who end up with the jobs."[259] Professor Berg recently restated his conclusions:

> It is simply not creditable, in our judgment, to consider the very large increases in the numbers of college graduates in many occupations in the period 1955-1970 to be the result of wholly rational employer decision-making. Rather, we see these changes as adaptations of demand to available supply, adaptations informed by beliefs rather than by relevant facts. . . . Once again, we must be mindful of the facts that questions of distributive justice are involved, and that it is at best glib, and, at worst, irresponsible, to ignore the social implications of practices that favor some group at the expense of others. The fact is that "underutilization" of college graduates not only contributes to occupational malaise among college graduates whose expectations are frustrated; it displaces non-graduates.[260]

Under Title VII discrimination analysis it is still not clear if empirical evidence is the only kind that will rebut a prima facie case based on empirical data.[261] Yet, if a challenger can bring forth data like that collected and analyzed by Professor Berg to bolster the showing of

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258. Looking at the development of "human capital" economics and the ever-rising credential requirements for jobs, Professor Berg stated the general social assumptions made about the value of education as a correlate to success in life settings outside academia:

> Analyses which examine the benefits of education tend to consider only income and related returns and to define cost in narrow terms. Employers have been inclined to accept a parallel logic without much question in the administration of wages and salaries, believing in general that the better-educated employees will be better for their organizations. According to managers in private enterprise, educational achievements have been taken as evidence of self-discipline and potential for promotion. Moreover, trainability is presumed to correlate with educational achievement as are productivity, personality—important in many jobs—and adaptability.

I. BERG, EDUCATION AND JOBS: THE GREAT TRAINING ROBBERY 12 (1971).

259. *Id.* at 194.

260. Berg, *University and Marketplace*, 3 COLUM. U. REC. 4, 5 (1975).

261. See text accompanying notes 89-102 *supra*.

disparate impact, courts ought to require the defense to respond in kind. In at least one case, a court ordered an empirical study made once it was clear that a prima facie case had been made out.[262]

Even if the college degree requirement is upheld, there still is a substantial disparity between the college graduate pool and the law school enrollment of blacks. While presently 7.4 percent of all college students are black,[263] only 4.1 percent of the present law school enrollment is black.

Beyond the college degree requirement there is data suggesting the individual items that make up the admissions formula also have a disproportionate impact. The average grade point for white students is substantially higher than for blacks:

GPA	Black	Whites
B plus and above	21%	50%
B	44%	32%
C or C plus	34%	16%[264]

Thus, the percentage of white college students having GPA's of B plus or above is nearly two and one-half times as high as that of blacks and the percentage of white students having GPA's in the C range is less than half that of blacks. That is a significant differential which, of course, reduces the admissions prospect for blacks as a class.

As in *Spurlock*, where the court accepted simple testimony that college degrees are important to pilot training, a tendency may exist to assume that college grades predict graduate school grades and subsequent job performance. However, data are available that undermine both those assumptions. In a study of the use of undergraduate grades as predictors of grades in the first year of graduate study, the data revealed a very low correlation between college grades and graduate study performance. "Studies relating undergraduate grades to first-year grades in graduate and professional schools over the past 20 years and in all kinds of programs have shown correlation coefficients that fluc-

262. Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972).

263. The figures have fluctuated substantially for blacks recently: "The percentage hovered between 2 to 3 percent in the early sixties. Blacks made up 5.7 percent of total enrollment in 1968. The figure rose to 6.3 percent in 1971, and peaked the following year at 8.7 percent. But in 1973, black enrollment dropped to 7.8 percent, and to 7.4 percent at the beginning of this school year." N.Y. Times, Mar. 26, 1975, at 1, col. 1.

264. Baird, *Portrait of Blacks in Graduate and Professional Schools*, in ETS, FINDINGS, no. 2, at 1-4 (1964).

tuate around the value 0.30."[265] Further, there is no demonstrable connection between college grades and adult achievement beyond academia, including achievement in law. "Although this area of research is plagued by many theoretical, experimental, measurement, and statistical difficulties, present evidence strongly suggests that college grades bear little or no relationship to any measures of adult accomplishment."[266] In medicine, an extensive study has been made of the performance of 500 physicians based on eighty different measures of good medical practice. As in the more general studies, no correlation was found between undergraduate or medical school grades and performance as a physician:

> [A]cademic achievement *does not* bear a positive relationship to performance as a practicing researcher, academician, or physician. On the contrary, in each of our five studies both premedical and medical school achievement was found to be essentially independent of the numerous measures of professional contributions, accomplishments, and activities, that we analyzed. . . . [A]cross all groups studied . . . academic grades showed a zero (chance) relationship to our measures of physician performance.[267]

In light of the adverse impact on minorities and the data undermining the assumption that college grades are predictors of future performance, legal education ought to be required to come forth with concrete evidence supporting the use of college grades. Even the most recent addition to the law school admissions formula, a variable to quantify differences in quality of the applicant's undergraduate college, can be challenged. In the study of physician performance no correlation was established between that performance and the prestige of undergraduate college or medical school attended.[268]

The final element of the typical law school admission formula, the

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265. J. WARREN, COLLEGE GRADING PRACTICES: AN OVERVIEW 5 (ERIC Clearinghouse on Higher Ed. Rep. No. 9, 1971). For the best description of statistical correlation in a legal context see Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691 (1968). For an even simpler explanation of the concept see *Appendix C: A Layman's Guide to Statistical Terms*, in C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 351 (Harper Colophon ed. 1973).

266. D. HOYT, THE RELATIONSHIP BETWEEN COLLEGE GRADES AND ADULT ACHIEVEMENT (American College Testing Program Research Rep. No. 7, 1965).

267. P. PRICE, C. TAYLOR, J. RICHARDS & T. JACOBSEN, PERFORMANCE MEASURES OF PHYSICIANS 111 (1963). The same conclusion has been found for scientific researcher positions. The average college grade for the top third in research was 2.73 and for the bottom, 2.69, both in the B minus range. *See* Taylor, Smith & Ghiselin, *The Creative and Other Contributions of One Sample of Research Scientists*, in SCIENTIFIC CREATIVITY: ITS RECOGNITION AND DEVELOPMENT (C. Taylor & F. Farron ed. 1963).

268. *Id.*

LSAT score, also has a disproportionate impact on blacks. Evans and Reilly tried to determine whether the time limits involved in giving the LSAT have a discriminatory effect on blacks. To reach that issue they had to generate data on the mean or average LSAT scores of the special black sample (given free at predominately black colleges in the South) and a random sample of students tested at the regular test sites. The black students had a mean score that was thirty-five percent lower than the mean score achieved by the regular sample.[269] Other data to the same effect are rumored to be known to the Educational Testing Service but are unpublished. Brill indicated that he has seen unpublished data that showed a gap of 133 points between the median scores of black and white males on the LSAT.[270] There appears to be no doubt that the use of the LSAT has a disproportionate impact on blacks and other minorities.

This issue of testing and test validation in education and, even more so, in employment has been the subject of much study.[271] The EEOC has issued guidelines for testing that refer to the prevailing standards for test validation as established by the American Psychological Association.[272] In *Griggs v. Duke Power Co.*[273] the Supreme Court indicated that great deference ought to be given to the guidelines as an expression of the will of Congress.[274] Most recently, in *Albemarle Paper Co. v. Moody*[275] the Court struck down an employer's attempt to validate tests used to screen employees out of low level jobs in a paper mill.[276] The best method of test validation is by "predictive" methods. The classic validation study in the employment context would begin with the testmaker making a careful job analysis to discover the skills and

269. Evans & Reilly, *A Study of Speediness as a Source of Test Bias*, 9 J. ED. MEAS. 123 (1972).

270. Brill, *The Secrecy Behind the College Boards*, 40 NEW YORK 67-70 (1974).

271. *See generally* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972); Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Company*, 72 COLUM. L. REV. 900 (1972); Note, 68 COLUM. L. REV., *supra* note 265; Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for Both Public and Private Employers*, 41 GEO. WASH. L. REV. 505 (1972).

272. EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607, 1607.5(a) (1974). The APA has recently revised its standards now promulgated in AMERICAN PSYCHOLOGICAL ASS'N, *supra* note 116.

273. 401 U.S. 424 (1971).

274. *Id.* at 434.

275. 422 U.S. 405 (1975).

276. *Id.* at 436.

traits necessary for performance on the job. Once the job analysis is complete the testmaker develops test items thought to measure as many of the skills and traits as are necessary to the job. The next step is to administer the test to a representative sample of job applicants and then, as is crucial for predictive validation, hire *all* the applicants. The following step is to have the testmaker measure the job performance of all the members of the sample group. Finally, the test scores are compared to the job performance scores with the relationship, the so-called correlation coefficient, expressed statistically with -1.00 (perfect negative correlation) through 0.00 (pure chance relationship) to + 1.00 (perfect positive correlation). If the testmaker judges the test to be a valid and useful measure of job performance, the employer can then use the test to decide which job applicants ought to be hired.

According to this preferred method of validation, the LSAT fails for two basic reasons. First, the LSAT is not designed to predict performance as a lawyer.[277] Rather, it is designed to predict performance in the first year of law school. Second, the validation techniques used for the LSAT are not the preferred predictive techniques. Educational Testing Service (ETS) constructs LSAT test items not on the basis of an analysis of the "job" of being a first year law student, but on what its professional testmakers, who are not lawyers, think would be pertinent to performance in the first year of law study. This so-called "rational" technique of test item selection is not favored. Once the test is given and scored, ETS, on a school by school basis, attempts to validate the test by comparing LSAT scores with the law school grades of those test takers who have been admitted to the particular law school.

277. The "radical" challenge to the use of tests would reject the LSAT precisely because it fails to test for the long term "life outcome." *See* McClelland, *Testing for Competence Rather than for "Intelligence,"* 28 AM. PSYCH. 1 (1973). The National Teacher Examination (NTE), another test published by Educational Testing Service (the publisher of the LSAT), has been struck down when school boards used NTE scores to try to predict teaching performance of experienced teachers when the test was designed only for persons without teaching experience. Walston v. County School Bd., 492 F.2d 919 (4th Cir. 1974); Baker v. Columbus Municipal Separate School Dist., 462 F.2d 1112 (5th Cir. 1972).

Professor Linn criticizes the LSAT because the criterion against which the test is validated, first-year grades, is inadequate:

> Inasmuch as grades are an inadequate criterion measure, then the absence of predictive bias is of little value. The first-year grade average may be thought to tap too narrow a range of behaviors; it may lack reliability, or it may itself be subject to systematic errors for members of one group (i.e., it may be biased). Greater emphasis needs to be placed on the selection and development of criterion measures that go beyond first-year grades.

Linn, *Test Bias and the Prediction of Grades in Law School*, 27 J. LEGAL ED. 293, 323 (1975).

Unlike a purely predictive validation study, in which all test takers would be admitted to law school so that their performance could be compared to their LSAT scores, this "concurrent" technique used for the LSAT generalizes the correlation coefficient established between the test scores and the law school grades of those who are admitted to law school, and applies it for all future applicants who take the test whether or not they are admitted.

Even assuming the acceptability of ETS' validation techniques, there are data challenging the practical significance of the LSAT as a predictor of law school performance. In 1962-63 the overall correlation of LSAT score to first-year average was at the .45 level.[278] One critic challenged that level as being practically useless:

> Research reports to date present overwhelming evidence that tests used in the selection process do not predict the criterion of grades at any practical level . . . .
>
> . . . . .
>
> LSAT or a combination of LSAT, WA [writing ability] and GB [general background] do not predict law school grades (GPA) for practical purposes of selection, placement or advisement for candidates seeking entrance into law school (correlations of approximately the .40 level).[279]

The response of the ETS program director to this challenge by Dr. Goolsby to the usefulness of the LSAT was quite interesting. While admitting that the use of the LSAT was only thirteen percent better than a random selection technique (for example by drawing applicants from a barrel of the names of all applicants), Dr. Winterbottom said that any improvement on chance was worth doing.

> Because of the general increase in the number of students applying to law school, an increase which has not been matched in classroom space, the percentage of applicants accepted has tended to decline. Thus, despite correlations which are admittedly low in absolute terms, the relevance of the test scores as an admissions criterion has probably been enhanced.[280]

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278. B. PITCHER, THE LAW SCHOOL ADMISSION TEST AS A PREDICTOR OF FIRST YEAR LAW SCHOOL GRADES: 1962-63 (ETS Statistical Rep. No. 65-32, 1965). Generally a correlation is statistically significant if it reaches a .05 level. Beyond that the determination of practical significance is a matter of judgment based on such things as the size of the sample, whether the test will screen a few applicants in or will only screen out a small percentage of the test takers.

279. Goolsby, *A Study of the Criteria for Legal Education and Admission to the Bar*, 20 J. LEGAL ED. 175-77 (1967).

280. Winterbottom, *Comments on "A Study of the Criteria for Legal Education and Admission to the Bar," an article by Dr. Thomas M. Goolsby, Jr.*, 21 J. LEGAL ED. 75 (1968).

A more recent study shows a marked decline in correlation of LSAT score to first-year law school performance. Based on surveys conducted in 1972-73 for ninety-nine law schools, the median correlation for predicting first-year law school grades from LSAT scores alone was .33.[281]

Presumably, ETS would respond to the new figures by saying that even greater admission pressures justify the continued reliance on LSAT scores for law school admissions. But that conclusion is certainly more questionable in light of the legal bases presently available to challenge the validation techniques used for the LSAT. While the EEOC test guidelines allow these so-called "rational" and "concurrent" validation techniques where predictive techniques are not technically feasible,[282] recent employment discrimination authority makes their use legally infeasible if not indefensible. In *Albemarle Paper Co. v. Moody*,[283] the company had used two kinds of tests, the Wonderlic and the Beta Exam. The company used "concurrent" techniques to attempt to validate the tests in preparation for litigation. The Supreme Court described the technique used:

> Jobs were grouped together solely by their proximity in the line of progression; no attempt was made to analyze jobs in terms of the particular skills they might require. All, or nearly all [incumbent] employees in the selected groups participated in the study—105 employees in all, but only four Negroes. Within each job grouping, the study compared the test scores of each employee with an independent "ranking" of the employee, relative to each of his coworkers, made by two of the employee's supervisors. The supervisors, who did not know the test scores, were asked to
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> > "determine which ones they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against . . . ."[284]

281. ETS, LAW SCHOOL VALIDITY STUDY SERVICE 20 (1973). It is claimed that the LSAT may predict first-year law school performance better for blacks than whites, who tend slightly to get better first-year grades than predicted by their test scores. ETS, PREDICTING LAW SCHOOL GRADES FOR BLACK AMERICAN LAW STUDENTS (1973). *See* Linn, *supra* note 277.

282. The test user must show that the best methods were not "technically feasible." 29 C.F.R. § 1607.5(a) (1975). Technical feasibility is defined in terms of a test sample with a "sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc." *Id.* § 1607.4(b).

283. 422 U.S. 405 (1975).

284. *Id.* at 430.

The Court, looking to the EEOC guidelines, held this attempted validation "materially defective." First, the "study in this case involved no analysis of the attributes of, or the particular skills needed in, the studied job groups."[285] Secondly, the "study compared test scores with subjective supervisorial rankings"[286] under standards that were vague and fatally open to divergent interpretation with no neutral on-the-scene oversight. Thus there was no way to determine whether the criteria actually considered were related to "job-specific ability." While the Court did not mention it, the reliance on supervisor ratings allows the entry of racial bias of the supervisors.[287] For example, in a study of how supervisors in the Chicago police department rated patrolmen, it was found that black officers who had been rated very highly by their white supervisors scored very high on a deference to authority test, while no such relationship was found for white policemen.[288] Thirdly, the study focused only on the job groups near the top of various lines of progression, while the tests were used to select employees for entry level jobs. Because performance on the job may teach people how to do well on the tests and because many of the incumbent employees at high-level jobs had never passed the tests, the Court found the validation study inadequate because it applied to a situation different than the one for which the test was used:

> The fact that the best of those employees working near the top of a line of progression score well on a test does not necessarily mean that that test, or some particular cutoff score on the test, is a permissible measure of the minimal qualifications of new workers, entering lower level jobs.[289]

Finally, and most devastatingly for the use of concurrent validation strategies, the Court found the sample of incumbent employees did not reflect the pool of job applicants. "Albemarle's validation study dealt only with job-experienced, white workers; but the tests themselves are given to new job applicants, who are younger, largely inexperienced, and in many instances nonwhite."[290] The Court relied on a general standard of the American Psychological Association that the sample

285. *Id.* at 432.
286. *Id.*
287. *See* Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).
288. *See generally* LEAA, U.S. DEP'T OF JUSTICE, PSYCHOLOGICAL ASSESSMENT OF PATROLMAN GRATIFICATIONS IN RELATION TO FIELD PERFORMANCE (1968). The authors of this study conclude that white police supervisors think all blacks inferior—a prejudice that is carried over into their assessment of black policemen.
289. 422 U.S. at 434.
290. *Id.* at 435.

population for the validation study must reflect the same characteristics as the population for which the test will be used,[291] as well as the EEOC guideline requirement of "differential validation" for minority groups.[292] Thus, the results of the validation study could not be generalized to the entire applicant pool.

In sum, data is presently available for plaintiffs to make out a prima facie case against the present law school admissions practices. While present authority exists that might form the basis for upholding the college degree requirement, the use of undergraduate averages, and especially the LSAT, are quite vulnerable. No data are presently published that would allow the law school world to carry its burden of justification.

V. REMEDIES: A CHARTER FOR REFORM

Should minority plaintiffs be successful in challenging the present law school admissions policies as racially discriminatory, they would be entitled to relief under a broad mandate: "a court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[293] Presumably the elements of the admission process found discriminatory, such as the college grade point average and LSAT score,[294] would be enjoined, while affirmative relief could be imposed including mandatory preferential admission programs.[295]

Such relief would be dramatic since it would completely cut admissions procedures free from their traditional moorings. Less dramatic relief is possible. For example the use of college grade point and LSAT score might not be enjoined if it could be shown that their racially dis-

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291. AMERICAN PSYCHOLOGICAL ASS'N, *supra* note 116, ¶ C.5.4 (1966).

292. 29 C.F.R. § 1607.5(b)(5) (1975). In United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973), the company attempted concurrent validation with incumbent employees. The court struck down the validation since the sample for the study did not include the forty percent of job applicants, including most blacks, who had failed the test and so were never hired. *Id.* at 916-18.

293. Louisiana v. United States, 380 U.S. 145, 154 (1965).

294. *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

295. School desegregation remedial plans have included the use of racial ratios in pupil assignment, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), and in faculty assignments, United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969). For other public employment race cases authorizing *DeFunis*-type preference programs as remedies see Larson, *Remedies for Racial Discrimination in State and Local Government Employment: A Survey and Analysis*, 5 COLUM. HUMAN RIGHTS L. REV. 335 (1973). Such remedies have also been imposed in private employment cases, see Edwards & Zaretsky, *supra* note 254, at —.

criminatory impact could be eliminated with the preferential admissions program. But the prospect must be faced that traditional admissions criteria are constitutionally vulnerable and, as Justice Douglas pointed out in *DeFunis*,[296] the present system of law school admissions is by no means constitutionally mandated.

All that being clear, it is still not clear what ought to replace the present system. Even with preference programs designed to protect members of groups historically subject to discrimination, return to a completely subjective admissions procedure, divorced from even the facial neutrality of the present admissions formulae, would hardly be considered progress. Presumably, random selection from among all applicants would be an improvement over completely subjective, political selection techniques.[297] Such a system would offend the long standing notion that legal education can do better than chance in its admissions decisions.

If a new system of admissions is to be formed on the basis of testing, the test or tests ought to be designed to withstand constitutional challenge. What follows is a sketch of what could and should be done. While conventional test theory might allow the development of a test based on an analysis of performance in law school, critics of testing would demand that the test be based on close analysis of desired "life-outcomes," in this case the practice of law.[298] Presumably the answer would be to study both to see any inconsistencies. While the practice of law might involve more skills than can be taught in law school, any inconsistencies ought to be decided in favor of the skills necessary to practice law. Skills necessary to law school performance that are not necessary to good lawyering ought not to be tested for and presumptively call for a change in legal education to conform with good lawyering in the larger world.

While some data are available describing what lawyers do,[299] and

296. DeFunis v. Odegaard, 416 U.S. 312, 331 (1974) (Douglas, J., dissenting). See text accompanying note 23 *supra*.

297. A general system of random selection would tend to create greater homogeneity across law school populations since the present self-selection based on published grade point average and LSAT score cutoffs would no longer occur.

298. *See* McClelland, *supra* note 277, where the author claims that tests like the LSAT fail because they are designed to test for shared middle class experiences that the middle class test makers rely on in developing test items, instead of testing for skills and traits known to be needed for the attainment of desired life-outcomes.

299. See J. CARLIN, LAWYERS ETHICS: A SURVEY OF THE NEW YORK CITY BAR (1966); J. CARLIN, LAWYERS ON THEIR OWN (1962); E. SMIGEL, THE WALL STREET LAWYER (1964). For ongoing research see AMERICAN BAR FOUND., 1974 ANNUAL REPORT 8-9 (1974).

literature is available setting forth the lawyering skills thought to be amenable to law school instruction,[300] none of the data look to the development of lawyering skills and traits to the end of establishing appropriate criteria for admission to law school. It is a large item to get any kind of agreement on the skills and traits incident to good lawyering, if, for no other reason, than the broad range of social roles that lawyers perform in our society. But the development of data might clarify and simplify the issues, or at least get the discussion framed in common language of accepted usage. Perhaps the vulnerability of the present law school admission practices might be a positive pressure for agreement.

Presuming, perhaps rashly, that some agreement could be reached on the skills and traits necessary to be a good lawyer and also presuming that test items can be developed for some significant number of those skills and traits, the next step is for each law school to run a predictive validation study. And that is controversial because it entails giving the test to the entire applicant pool to a law school and then admitting people regardless of their test scores. While law schools could not accept all tested applicants without vastly increasing a number of slots in the entering class, they could select, for purposes of the validation study, the entering class by random selection. The follow-up validation study ought to focus first on law school performance but, in the longer run, should be based on an assessment of performance of the subjects of the study once they are practicing law.

If there is a substantial correlation between test performance and subsequent performance in law school and in the practice of law, then the test can be used to select among law school applicants those most likely to be good lawyers. According to discrimination analysis, such a hypothetical test could survive attack even if it were shown to have a disparate impact on protected groups. However, the EEOC testing guidelines require differential validation for minority and nonminority groups.[301] The test is limited to use for those groups for which it is valid. If scores are valid at different levels for the groups, the cutoff scores must be set to predict the same probability of success for each group.

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300. For the latest summary, see Holmes, *Education for Competent Lawyering: Case Method in a Functional Context*, — COLUM. L. REV. — (1976). *See also* E. GEE & D. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA 1-10 (Council on Legal Education for Professional Responsibility, Inc. publication, 1975).

301. 29 C.F.R. § 1607.5(b)(5) (1975).

Whether or not the validity of present law school admissions practices is litigated, the data presently available to form the basis for a challenge by groups historically discriminated against are clear enough that the law school world ought to undertake some needed reforms in this area.