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AFFIRMATIVE ACTION: PROTECTING THE UNTENURED MINORITY PROFESSOR DURING EXTREME FINANCIAL EXIGENCY

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INTRODUCTION

During the late 1960's and early 1970's interest in attending law school boomed and the legal education industry experienced substantial economic growth.¹ Law schools responded to that growth by improving or increasing the size of their faculties and facilities. Minorities, however, comprised few of the new inductees into the legal teaching profession of the period.² Consequently, the vast majority of minority law professors have been teaching for a relatively short period of time. Now, as law school enrollments decline and the economic roller-coaster of the 80's approaches a low point, there is growing concern that untenured minority professors,³ following the traditional last-in first-out employment termination practice, will be the primary victims of tightening law school budgets.

It is not the purpose of this article to discuss the economic, social, or historical complexities of the process which keeps women and Blacks from attaining appointments to law faculties in proportion to their numbers and qualifications. Rather this article suggests that on the eve of a period of substantial decline in law school enrollment, law schools should be able to assure law students, minority professors and society in general

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1. Between 1968-69 and 1970-71 the number of persons taking the LSAT doubled from 60,000 to 120,000. R. STEVENS, *Legal Education In America From The 1850's, To The 1980's*, 235 (1983).

2. The law teaching profession is still more than 92% white. PRAGUE, *Minority Law Teachers*, 1986 AALS Newsletter 86-4.

3. The majority of approved schools have a tenure level of about 50% and a fourth are at about 75%. The median percentage of tenured faculty increased 2.2% between the 1979-80 and 1980-81 academic years. Memorandum QS8081 (March 23, 1981) from the Consultant on Legal Education to the deans of approved schools.

that the few gains minorities have made over the past years will not be discarded during the current financial exigency.

This article will discuss affirmative action programs as a means of alleviating the potential demise of (untenured) minority professors. Section I will discuss the historical development and meaning of affirmative action. This section also scrutinizes the present affirmative action policy of the American Bar Association (ABA) and its potential ability to formulate plans for ensuring employment for untenured minority professors during periods of financial exigency. Section II will examine the case law in the area of preferential layoff plans. This section sets forth a means of formulating defensible affirmative action plans in a time of increasing suits opposing affirmative action. Section III concludes that affirmative action programs should include special provisions for the employment of untenured minority professors during financial exigency, also, the American Bar Association as chief accreditation organization for law schools must take a more definite stance in this area.

ACADEMIC FREEDOM, TENURE AND THE THEORY OF RETRENCHMENT

The concept of academic freedom implies that teaching and research shall be free from political and governmental regulation. Though no precise definition of academic freedom has been articulated,⁴ the ABA requires that law schools have an established and announced policy of academic freedom and tenure.⁵ The ABA has adopted the 1940 Statement of Principles on Academic Freedom and Tenure promulgated by the American Association of University Professors (AAUP) and the Association of American Colleges, as illustrative of academic freedom and tenure policies for law schools.⁶ Therein tenure is set out as:

4. One definition given by Arthur O. Lovejoy, the founder of the American Assn. of University Professors is:

Academic freedom is the freedom of a teacher or researcher in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.

W. HERBERG, C.H. PRITCHETT, D. FELLMAN, V. EARLE, S. HOOK, ON ACADEMIC FREEDOM, 1 (1972). Compare AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM, ACADEMIC RESPONSIBILITY, ACADEMIC DUE PROCESS IN INSTITUTIONS OF HIGHER LEARNING, 7 (Rev. Ed. 1966).

5. A.B.A., 1983 *Approval of Law Schools*, Standard 405, 12. "A law school which appears to have no comprehensive system of evaluation for and granting tenure is not in compliance with Standard 405." Interpretation 7 of Standard 405.

6. *Id.* at 22. The weight accorded to AAUP standards and policy is uncertain, however, where institutional regulations explicitly refer to the 1940 Statement, courts have undertaken to

a means to certain ends; specifically:

- (1) freedom of teaching and research and of extramural activities, and
- (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.⁷

Typically, once a law professor has completed a probationary period, usually not to exceed seven years, tenure secures for him a limited right of continued employment.⁸ Tenured faculty members, however, may be dismissed for cause.⁹ There is no uniform definition of what constitutes adequate cause.¹⁰ Immorality,¹¹ incompetence¹² and neglect of duty¹³ have all been found to be sufficient cause for dismissal of tenured professors. Bona fide financial exigency is also recognized as a basis for dismissal of tenured professors.¹⁴ Exactly what constitutes financial exigency is

consider its history and later bilateral interpretations and unilateral AAUP refinements as a guide to what the Statement means in a particular situation. For example, a federal appellate court reversed a lower court's decision holding that a university's regulation, under which a tenured faculty member was dismissed for "adequate cause," was unconstitutionally vague and overbroad. The appellate court took notice that the university regulation "was adopted almost verbatim from the 1940 Statement of Principles of the AAUP" and construed an advisory letter by the Association interpreting the 1940 statement as eliminating any overbreadth resulting in facial invalidity of the university regulation, *Adamian v. Jacobsen*, 523 F.2d 929, 934-35 (9th Cir. 1975). See also *Browzin v. Catholic University of America*, 375 F.2d 843 (D.C. Cir. 1975).

7. A.B.A., *1983 Approval of Law Schools* at 22.

8. *Id.*

9. *Id.*

10. See *Recommended Institutional Regulations on Academic Freedom and Tenure*, 58 AAUP BULL. 430, RIR 5 (1972).

11. *Koch v. Bd. of Trustees of Univ. of Ill.*, 39 Ill. App. 2d 51, 187 N.E.2d 340, (1963), *cert. denied*, 375 U.S. 989 (1964).

12. *Chung v. Park*, 514 F.2d 382 (3rd Cir. 1975).

13. *Shaw v. Bd. of Trustees of Frederick Community College*, 549 F.2d 929 (4th Cir. 1976).

14. A.B.A., *1983 Approval of Law Schools*, 24. In the majority of cases courts have interpreted contracts which contained an explicit reference to financial exigency. See, e.g., *Browzin v. Catholic Univ.*, 527 F.2d 843 (D.C. Cir. 1975); *Bellak v. Francona College*, 386 A.2d 1266 (N.H. 1978); *Am. Ass'n of Univ. Professors v. Bloomfield College*, 129 N.J. Super. 249, 322 A.2d 846 (ch. div. 1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (app. div. 1975); *Schever v. Creighton University*, 199 Neb. 618, 260 N.W.2d 595 (1977). In other cases where the contracts did not mention the term, the courts construed tenure as implicitly granting institutions the right to make bona fide dismissals for financial reasons. See *Johnson v. Board of Regents*, 337 F. Supp. 227, 234-35 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975); *Levitt v. Board of Trustees*, 376 F. Supp. 945 (D. Neb. 1974). *Cf. Rehor v. Case Western Reserve Univ.*, 43 Ohio St. 2d 224, 331 N.E. 2d 416 (1975). No case indicates that the grant of tenure creates a right from dismissal for bona fide financial reasons.

not clear, nevertheless, large deficits,¹⁵ and declining enrollments accompanied by legislative budget cuts¹⁶ have been held to establish bona fide financial distress adequate to justify termination of a tenured professor's employment contract.

The theory of academic freedom and tenure has also been interpreted to require financially strained institutions to place tenured professors in other suitable positions before terminating their contracts.¹⁷ The department in which the professor formerly worked is normally the most likely place where a suitable position should be found. However, the university has not discharged its obligation to the tenured professor until it has considered placement in another department or school.¹⁸ This, in essence, is the theory of retrenchment.

The theory of retrenchment prohibits financial exigency from becoming an excuse for dismissing a tenured professor who is merely unpopular, controversial or misunderstood. The retrenchment requirement stands as a partial check against such abuses.¹⁹ The AAUP's Statement of Principles on Academic Freedom and Tenure as adopted by the ABA has also been interpreted to suggest that financially distressed institutions should terminate non-tenured professors before dismissing tenured professors.²⁰

I. AFFIRMATIVE ACTION

A. *Failure of Present Law School Affirmative Action Programs*

The broader social contract within which affirmative action operates calls for assurance that the ranks of the minority law professors, especially Blacks and women, will be representative of the full heterogeneity of class, ethnicity, race and gender of those who complete training as lawyers. The legal profession, especially legal scholars, have not been fulfilling that broader contract. Even in a decade characterized by a highly vocal, if controversial, commitment to affirmative action, the number of minority professors in legal education has changed little.²¹

15. *Bellak v. Franconia College*, 118 N.H. 313, 386 A.2d 1266 (1978).

16. *Graney v. Bd. of Regents*, 92 Wis. 2d 745, 286 N.W.2d 138 (1979); *Levitt v. Board of Trustees*, 376 F. Supp. 945 (D. Neb. 1974). See also *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978).

17. *Browzin v. Catholic University of America*, 527 F.2d 843 (D.C. Cir. 1975).

18. *Id.* n. 7 at 847.

19. *Id.*

20. *On Institutional Problems Resulting From Financial Exigency: Some Operating Guidelines*, 60 AAUP BULL. 4(c), 267 (1974).

21. BELL, *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319 (1986). "The modest but measurable growth in the number of black and brown teachers on

Affirmative action within legal education is in need of reform. At present, all ABA approved law schools adhere to some type of affirmative action program, yet approximately one-third of the ABA approved schools still have no minority faculty members, and another one-third have only one minority faculty member.²² The various affirmative action programs usually reflect university policies and federal laws prohibiting discrimination on the basis of race, color, religion, national origin, or sex.

The major shortcoming of the majority of law school's affirmative action programs is that the success of a particular program, in most regards, depends totally on the particular law school's faculty conscience and motivation.²³ This is demonstrated by the fact that the majority of law schools conscientiously attempt to hire only one black professor (tokenism)²⁴ and thereafter to carry out an affirmative action program by allowing other Blacks to interview or otherwise participate in the application process even though the minority applicant will not receive serious consideration for employment.²⁵ This system has failed to produce proportionate numbers of minority law professors and it will inevitably fail

the faculties of white schools that climbed from almost none to 200 in the last 15 years is now in decline." These sad statistics are contained in the *Society of Law Teachers Statement on Minority Hiring in AALS Law Schools: A Position Paper on the Need for Voluntary Quotas* (1984) . . . The report finds that among 92 AALS schools responding to the survey there were 28 schools with no minority faculty and 32 schools with only one. another 20 schools have two minority faculty members. Excluding the four historically black schools, Howard, North Carolina Central, Southern and Texas Southern, there are only 14 schools with more than two minorities. . . ." *Id.* at n.1.

22. PRAGER, *Minority Law Teachers*, 1986 AALS NEWSL. 4. Based on 1983-84 Task Force data.

23. Most scholars agree that for the most part, the rationale behind the creation many affirmative action programs has been more political or expedient than humanitarian. The policies and programs have been for the most part developed to avoid confrontation with federal agencies rather than to correct past discrimination. See, e.g. ROBERT P. HARO, *AFFIRMATIVE ACTION IN HIGHER EDUCATION*, 3,4 (1977).

24. See PARKER, *Ideas, Affirmative Action and the Idea 124.627*, 10 NOVA L.J. 761 (1986).

25. The following excerpt outlines clear and concise guidelines for the development of an effective affirmative action program. Few, if any, law schools utilize such guidelines in developing their affirmative action programs. The majority of court ordered affirmative action plans are developed pursuant to guidelines as illustrated by this excerpt. See, e.g. *United States v. Paradise*, 55 U.S.L.W. 4211 (1987).

The first concern of any affirmative action program should be to develop a corresponding ratio between population characteristics for the state or geographical region. Such considerations as qualified and available talent, realistic time tables and projection should be coupled with the ratio. Next, the institution and its key decision makers should be fully educated about the purposes of affirmative action, the influence of both racism and discrimination within the employment and promotional processes, and the best methods possible to correct deficiencies or underutilization of minorities and women. There should also be a person or group of people accountable for the implementation of the policy. A base year should be developed from which

to protect the few minority professors currently engaged in legal teaching during difficult financial times.

B. *Historical Development and Meanings*

Today the phrase affirmative action seems ubiquitous. Rarely does affirmative action not receive attention in the daily press or news telecast. It is an important part of most political campaigns and a common part of the vocabulary of lawyers and laymen. Nevertheless, people generally disregard the origins of affirmative action and they frequently differ over what the term does or should mean.

A brief discussion of the historical development of the race-conscious concept of affirmative action will be helpful to stress the importance of affirmative action in legal education.

The race-conscious concept of affirmative action can be traced to the enactment of the thirteenth, fourteenth and fifteenth amendments.²⁶ These amendments, including their enforcing Civil Rights Acts, were adopted primarily for the benefit of Blacks.²⁷ In the *Slaughter House Case*,²⁸ Justice Miller stated that the "one pervading purpose" of those three amendments was to secure and establish the freedom of the slave race and to protect the newly-made freeman and citizen from his former oppressors.²⁹ Justice Miller in *Slaughter House* also stated that other citizens could share in the protection of the reconstruction amendments, "[but] in any fair and just construction of any section or phrase of these amendments it is necessary to look to the purpose which we have said was the pervading spirit of them all."³⁰ Though the term affirmative action was not then in use, the fundamental issues then and now are the same: whether public programs should be designed to provide special benefits or protection for persons on the basis of their membership in a specified group.

The phrase "affirmative action" first appeared in a federal statute in 1935, the National Labor Relations Act of 1935 (NLRA).³¹ There the National Labor Relations Board was empowered upon a finding of an

growth and improvement must be computed and compared against. This base year would also serve as the basis for an index of performance in the attainment of affirmative action goals. R.P. HARO, *AFFIRMATIVE ACTION IN HIGHER EDUCATION*, 5,6 (1977).

26. U.S. Const. amend. XIII, XIV, XV.

27. See *Slaughter House Cases*, 83 U.S. (16 Wall) 36 (1873). See also JONES, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901 (1985).

28. 83 U.S. (16 Wall) 36 (1873).

29. *Id.* at 71.

30. *Id.* at 72.

31. Labor-Management Relations Act, 29 U.S.C. sections 157-169, (1982).

unfair labor practice to issue cease and desist orders and to take such affirmative action, including reinstatement of employees with or without back pay, as would effectuate its policies.³² The present meanings attributed to affirmative action came not from the NLRA of 1935, but from the Civil Rights Act of 1964,³³ almost thirty years later. The 1964 Act marked the first appearance of the phrase in a federal statute dealing with civil rights.

Since its appearance in the Civil Rights Act of 1964, the phrase "affirmative action" has appeared widely in other civil rights statutes, regulations, and court opinions; yet neither Congress nor courts have attempted to define the term. Law professors, however, have not followed this practice and have instead offered varying definitions of "affirmative action." Three such definitions follow:

(1) "The preferential treatment of individuals who are members of previously discriminated against minorities;"³⁴

(2) "The use of considerable resources of energy and funds to attract individuals of particular minorities in order to cure or ameliorate past injustice;"³⁵ and

(3) "Public or private programs which provide or seek to provide opportunities . . . to persons or groups on the basis of, among other things, their membership in a specified group or groups."³⁶

The definition attributed to affirmative action is very important. The definition should express an affirmative duty. This duty is usually effectuated in one of two ways. The first is the most affirmative; the particular law faculty considers the applicant's minority status as an advantage in the initial hiring stages and intentionally undertakes to hire a minority person. This method is best expressed in definition (1) or a combination of definitions (1) and (2) above. Under the second method minorities are only allowed equality of opportunity in the employment process. The applicant's race or ethnicity is usually not considered in the initial phase; however, if the minority applicant remains among the finalists, his minority status is generally considered as an additional advantage. This second method is practiced by the majority of law schools. Whether this method should be considered affirmative action is questionable since the

32. *Id.* at section 160(c).

33. 42 U.S.C. § s 2000a - 2000e(17) (1982).

34. KARST & HAROWITZ, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 n.1,2 (1974).

35. BLOCK, *New Wine in an Old Bottle: The Etymology of Affirmative Action*, 66 AAUP 54, 55 (1980).

36. JONES, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 903 (1985).

applicant's qualifications, not color or sex, are the predominant factors in his being offered the position.³⁷

C. *The ABA and Affirmative Action*

Since 1921, the ABA has been engaged in setting procedures and minimum standards to be met and observed by law schools in obtaining and retaining the approval of the Association. The ABA accreditation of law schools is a matter of critical importance³⁸ because graduation from an ABA approved law school is generally necessary for admission to the bar of most states.³⁹ From its inception the ABA has been devoted to the improvement of the legal profession through the improvement of the pre-legal and legal education of those who apply for admission to the bar.⁴⁰

At present, the ABA provides approved schools with little guidance for the development of affirmative action programs. The ABA's employment policy simply states:

The law school shall maintain equality of opportunity in legal education without discrimination or segregation on the grounds of race, color, religion, national origin, or sex. The denial of employment to a qualified individual will be treated as made upon the grounds of race, color, national origin or sex if the grounds for denial relied upon is an employ-

37. For a detailed analysis of problems confronted by Blacks and other minorities seeking law teaching positions *See*, AALS section on minority groups, Report of Conference of Minority Administrators and Law Teachers (1976); BELL, *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319 (1986); PARKER, *Ideas, Affirmative Action and the Idea*, 10 NOVA L.J. 761 (1986); and PRAGUE, *Minority Law Teachers*, 1986 AALS NEWSL. 4.

38. In 1921 the American Bar Association was recognized by the Department of Higher Education as the official accreditation agency for American law schools. The primary purposes of the American Bar Association as well as other accrediting agencies are (i) establishment of minimum educational standards; and (ii) insistence on the maintenance of minimum educational standards for protection of the public, the institutions and their graduates; (iii) stimulation for continued self-improvement by the institutions and programs; (iv) protection of institutions from improper external or internal pressures. W. SELDEN & H. POTTER, *ACCREDITATION; ITS PURPOSES AND USES*, 7 (1977).

39. Graduation from an ABA approved law school meets the law study requirement of every state and a number of states limit bar admission to graduates of ABA approved schools. California, Vermont, Virginia and Washington permit law office study as a substitute for a law school graduation. Maine, New York and Wyoming permit a combination of law school and law office study as a substitute for a law school graduation. West Virginia and Wisconsin have a "diploma privilege," which permits graduates of one or more law schools located within the state to be admitted without a written bar examination. *A Review of Legal Education in the United States Fall, 1985 Law Schools and Bar Admissions Requirement* 75 (1985).

40. *See* HARNO, *Legal Education in the United States* (1953); SULLIVAN, *The Professional Association and Legal Education*, 4 J. LEGAL EDUC. 401 (1952).

ment policy of the school which is intended to prevent the employment of individuals on the ground of race, color, religion, national origin or sex though not purporting to do so.⁴¹

One would be hard pressed to describe this as an affirmative action statement, policy, or directive. This becomes even clearer when the above standard is compared with the ABA's standard on the organization and administration of law schools, wherein the ABA's position regarding the admission of minority students is stated. This standard is as follows:

Consistent with sound educational policy and the Standards, the law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups (notably racial and ethnic minorities) which have been victims of discrimination in various forms. This commitment would typically include a special concern for determining the potential of such applicants through the admissions process, special recruitment efforts, and a program which assists in meeting the unusual financial needs of many such students.⁴²

Pursuant to this standard the vast majority of law schools accredited and seeking accreditation from the ABA have established affirmative action admissions programs.

The ABA has demonstrated an affirmative position in regards to minority student admission to law schools⁴³ while all but ignoring the important role of affirmative action for minority professors.⁴⁴ While law schools and their affiliated universities should be and are primarily responsible for developing their own affirmative action programs, a sub-

41. A.B.A., *1983 Approval of Law Schools*, Standard 211, 5.

42. *Id.* Standard 212 at 6. This standard was adopted by the Association after the Bakke Case. It requires that ABA approved schools "demonstrate . . . by concrete action, a commitment to providing full opportunities. . . to those who have been victims of discrimination. . . ."

43. It has been argued that the ABA takes such a position in regards to minority admissions because students have a less protected interest in gaining admission to a law school than employees have in maintaining employment or gaining a promotion. *See, e.g., Bartlett v. Pantzer*, 158 Mont. 126, 489 P.2d 375 (1971) (although the courts may compel institutions to follow their stated admissions standards after accepting application fees based on the school's publications, they generally will not require the institution to actually admit an applicant unless the denial of admission is clearly arbitrary and capricious). *Brookins v. Bonnell*, 362 F. Supp. 379 (E.D. Pa. 1973) (absent arbitrary or capricious action, an applicant for admissions has no constitutional due process right to a hearing to prove his qualifications for admission and no constitutional right to admission). *Compare* *Bishop v. Wood*, 426 U.S. 341 (1976) (a property interest in employment requiring due process notice and hearing before termination may arise from statute or employment contract).

44. *Compare supra* notes 37 and 38 and accompanying text. Ethnic diversity in faculty, as well as student body is educationally sound. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 311-315 (1978).

stantially more definitive standard from the ABA would encourage law schools to enforce current affirmative action programs as well as formulate better policies regarding the continued employment of untenured minority professors during financially exigent times.

II. DEVELOPING A PROTECTIVE LAYOFF PLAN

The position taken by the ABA with regard to untenured minority professors in institutions experiencing financial problems is very important. However, law schools, and where appropriate their affiliated universities, should shoulder the ultimate responsibility for instituting a retrenchment or other policies protective of such groups.

The faculty or appropriate university body is usually primarily responsible for determining faculty status, appointments, reappointments, denials of reappointments, promotions, tenures and dismissals. The faculty's judgment in these areas is central to general educational policy. Law faculties also exercise primary responsibility in determining the criteria for identifying which appointments will be terminated. In determining where within the academic program termination of appointments will occur, law faculties should consider affirmative action as well as other educational policies.

Any policy or guideline developed for the purpose of protecting untenured minority law professors during periods of financial exigency should be incorporated into affirmative action programs.⁴⁵ However, the increase in the number of suits opposing affirmative action generates mixed signals about what affirmative efforts are required or permissible.⁴⁶ Any modification of affirmative action programs must be tailored to withstand legal challenges while still accomplishing their purpose.

45. Some law schools have language in their academic freedom and tenure policy such as, "a tenured professor will not be terminated in favor of a nontenured faculty member except in extraordinary circumstances where a serious distortion of the academic program might occur." This language could seemingly protect untenured minority professors. It is more narrowly tailored than any which might be used for the same purpose in an affirmative action program because it does not involve the sometimes critically suspect element of race. However, such language can be the subject of broad interpretations which more likely than not will fail to protect untenured minority professors because tenured professors whose jobs are at state will be defining what this language means. Note also that there is no constitutional requirement that any layoff plan be based on strict seniority. *See, e.g., Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521 (1949). However, the constitution requires that states meet a heavy burden of justification when it implements a layoff plan based on race. This burden can be met if the plan is sufficiently narrowly tailored to meet its purpose.

46. *See, e.g., Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

A. *Developing Preferential Policy and The Case Law*

If existing affirmative action programs are to be used as a means of protecting untenured minority professors during periods of financial distress, what can be done to minimize successful legal challenges? Lower federal courts have repeatedly upheld voluntary preferential affirmative action hiring, promotion and layoff plans involving policemen, firemen and college faculties. Many such decisions have been left standing by the Supreme Court.⁴⁷

The first major case dealing with a voluntary affirmative action plan in the public sector was *Regents of the University of California v. Bakke*.⁴⁸ A majority of justices (although not producing a majority opinion) held that a public university's minority admissions quota violated Title VI's ban on discrimination in federally funded programs. A second majority, however, agreed that race may be taken into account in the admissions process. Four justices⁴⁹ were of the opinion that affirmative action policies, including quotas, were permissible only if they were adopted to further important governmental objectives and were substantially related to achievement of those objectives.⁵⁰ Justice Powell's decisive fifth vote expressed the opinion that admissions policies which furthered diversity in the student body without rigid quotas were within the First Amendment rights of universities to adopt and did not violate the constitutional rights of applicants from the majority race.⁵¹ *Bakke* offers no clear or definitive guidelines for resolving issues surrounding voluntary affirmative action plans in the public sector. Not only is *Bakke* a case without a majority opinion, it is also a case in which a majority of justices agreed on certain results for conflicting reasons.

*Firefighters Local Union No. 1784 v. Stotts*⁵² is another important Supreme Court decision in the area of preferential layoff plans. *Stotts* began as a class action filed in 1977 by a Black employee of the Memphis, Tennessee fire department. The complaint alleged a pattern of race discrimination by the fire department and other city officials in violation of Title VII of the Civil Rights Act of 1964 as well as section 1981 and section 1983 of the United States Code.

47. See, e.g., *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1980) (police); *Warsocki v. City of Omaha*, 726 F.2d 1358 (8th Cir. 1984) (firefighters); *Valentine v. Smith*, 654 F.2d 503 (8th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981) (college faculty).

48. 438 U.S. 265 (1978).

49. Justices Brennan, White, Marshall, and Blackmon.

50. 438 U.S. 357-359.

51. *Id.* at 311-319.

52. 467 U.S. 561 (1984).

On April 25, 1980 a consent decree for the purpose of remedying the hiring and promotion practices of the Department with respect to Blacks was approved and entered by the district court. Pursuant to the decree, the City of Memphis agreed to adopt a long-term goal of increasing the proportion of minorities in each job classification in the fire department to approximately the proportion of Blacks in the labor force in Shelby County, Tennessee.

In 1981 the City announced it would reduce the fire department's work force. Layoffs would be based on a last hired, first fired seniority system which had been part of a memorandum of understanding with the union. Black firefighters contested the plan because it would have nullified the effect of the favorable hiring and promotion actions they were experiencing pursuant to the consent decree.

The district court found that the layoff plan was not adopted with a discriminatory intent. The court, however, concluded that the plan would have an adverse impact on black firemen and was not bona fide under section 703(h) of Title VII.⁵³ The court then issued a preliminary injunction prohibiting the City from applying the plan insofar as it would decrease the percentage of Blacks in certain positions within the department. To comply with the order the City adopted a modified plan terminating some Whites with more seniority than Blacks who were retained.

The firefighters union and the City appealed. The Sixth Circuit rejected the district court's conclusion that the regular seniority system was not bona fide. Nevertheless, it affirmed the district court's order because the order was intended to enforce the consent decree.

The substantive issue addressed by the Supreme Court in *Stotts* was whether the district court exceeded its authority when it modified the consent decree. The Court did not focus on race-conscious hiring but rather on the race-conscious protection (in a period of retrenchment) of the minority hiring gains that had resulted from the 1980 consent decree. The Supreme Court held that under Title VII of the Civil Rights Act of 1964 the district court exceeded its statutory power when it ordered an affirmative action layoff plan protective of newly hired Blacks in contravention of a bona fide seniority plan protected under section 703(h) of Title VII.

While *Stotts* has been heralded by critics of affirmative action, the deci-

53. Section 703(h) provides: it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, national origins. 42 U.S.C. § 2000e-2(h).

sion should be read narrowly.⁵⁴ The *Stotts* decision limits the power of federal courts to modify a consent decree over the objection of one of the parties to the decree.⁵⁵ Neither can courts ignore the protection section 703(h) of Title VII accords to a bona fide seniority system. *Stotts* cannot be read to limit the Supreme Court's decision in *United Steelworkers v. Weber*⁵⁶ which upheld a voluntary private sector affirmative action program with racial quotas against a Title VII challenge. Neither did it address the lawfulness of voluntary preferential affirmative action plans in the public sector. The question of whether a public employer could have voluntarily adopted the kind of layoff policy ordered by the district court was expressly reserved by the Court.⁵⁷

In *Wygant v. Jackson Board of Education*,⁵⁸ the Supreme Court specifically addressed the question of whether a public employer could extend preferential protection against layoff to some of its employees based on race or national origins. In 1972 the Jackson Board of Education (Board) and Jackson Education Association (Union) added a layoff provision to their collective bargaining agreement which stated:

In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance.⁵⁹

During 1976-77 and 1981-82 school years, non-minority teachers were laid off while minority teachers with less seniority were retained. The dismissed non-minority teachers brought this suit in federal district court charging violations of the Equal Protection Clause, Title VII, 42 U.S.C. § 1983, and other federal and state statutes.

On motion for summary judgment the district court dismissed all but

54. Justice Steven's concurring opinion stated that "the Court's discussion of Title VII is wholly advisory. These cases involve no issue under Title VII; they involve only the administration of a consent decree." 467 U.S. at 590.

55. Federal courts may, however, enter consent decrees that provide broader relief than the court could have awarded after trial without the consent of one of the parties. There is no conflict with or violation of section 706(g) of Title VII when a federal court enters such a consent decree. *Local Number 93 Int'l Ass'n of Firefighters v. City of Cleveland*, 54 U.S.L.W. at 5005 (1986).

56. 443 U.S. 193 (1979).

57. 467 U.S. at 583.

58. 476 U.S. at 267.

59. *Id.* at 270-271.

the equal protection claims. The district court, addressing the equal protection charge, found that the racial preferences granted to minorities need not be grounded in a finding of "plain discrimination" and upheld the constitutionality of the layoff provision. The petitioners appealed and the Sixth Circuit affirmed the district courts' decision.

On review the Supreme Court reversed and ruled that the layoff plan was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Court, however, specifically recognized the constitutionality of voluntary preferential affirmative action programs in public employment.⁶⁰ There also seemed to be agreement that race may be affirmatively taken into account in employment plans even if there has been no finding of past discrimination.⁶¹

Wygant suggests that any affirmative action plan must be justified by a compelling state purpose and the means chosen by the public employer to carry out the purpose must be narrowly tailored.⁶² The phrase "narrowly tailored" requires consideration of whether lawful alternatives and less restrictive means could have been used.⁶³ The layoff plan need not be limited to remedying specific instances of identified discrimination for it to be sufficiently narrowly tailored.⁶⁴ *Wygant* indicates that a preferential layoff plan will be more defensible if it is grounded in a policy that acknowledges discrimination and the institution's responsibility for or interest in correcting the results.

Courts have also scrutinized the suitability of the affirmative remedy involved to the discrimination found. This reasoning implies that a variety of criteria must be considered in formulating a defensible layoff plan which will provide more job security to untenured minority professors. The plan should identify and, as far as possible, document specific problems of underrepresentation and the specific policies and practices involved in perpetuating them. In addition, the means employed in the plan should be narrowly and specifically tailored to the specific problems of untenured minority professors.

Affirmative action programs are regarded as temporary measures.⁶⁵ Courts generally look for indications of when they will end. Conse-

60. *Id.* at 287.

61. *Id.* at 289.

62. *Id.* at 267.

63. *Id.* at 280.

64. Justice O'Connor noted in her opinion, "the court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor." *Id.* at 287.

65. *Id.* at 275.

quently, this would seem to require that a racially based layoff plan include clearly articulated measurable goals which imply an end point and/or a basis for reasonably estimating how long such remedies will be in force.

In *Wygant* the Supreme Court refused to determine whether the particular layoff plan at issue would have been sufficiently narrowly tailored without reference to the hiring goal it was intended to further.⁶⁶ In addition, the Court expressly reserved the question of whether any preferential layoff plan could withstand strict scrutiny. *Wygant*, while not prescriptive, seems to suggest some very general and useful guidelines for a more defensible layoff plan. Institutions considering such plans, however, need not have engaged in past discrimination.⁶⁷

III. CONCLUSION

Affirmative action is an important element of a sound educational policy. Assuring that minority professors will remain a viable part of legal education is an essential part of this recognition.

Institutions that have not provided for financial exigency need hasten to do so because there is a natural tendency for those who feel threatened by affirmative action to view it less harshly in good times than in bad. Furthermore, the exact mechanism used to implement preferential layoff plans will depend on considerations and objectives which will require much time, effort, and thought.

As with affirmative action in general, the mood of the law faculty and how it interprets its duty are important factors in determining how well the plan is formulated in theory and how well it works in reality. However, by enshrining preferential layoff plans in affirmative action programs, untenured minority professors are given a legal recourse they would not otherwise have.

The role of the ABA is equally important in this regard. If minority professors are to remain in legal education, the ABA must take a more active role regarding minority employment and announce a more definitive and affirmative position. The policy adopted by the ABA is especially important since it is the only collective enterprise that seriously attempts to regulate law schools.

The Supreme Court decisions in this area must be given the strictest possible adherence. The cases, while not offering definite rules for formu-

66. *Id.* at 294.

67. *Id.* at 286, 290. See also Title VI of the Civil Rights Act of 1964, 34 C.F.R. § 100.3(b)(II) (1984) ("Even in the absence of such prior discrimination, a recipient [of federal financial assistance] in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.")

lating racially based plans, do provide some general guidance. The key to formulating a preferential layoff plan which will withstand legal challenges seems to revolve around the issue of its being sufficiently narrowly tailored. In this regard a wise starting point would be to set out the purpose of such plans as "assuring the presence of minority professors in the academic program." No distinction need be drawn between (tenured or untenured) minority professors. Nonusage of the terms tenure and untenured is important because it demonstrates an interest in assuring the presence of minority professors in legal teaching. By not drawing distinctions between classes of minority professors, the plan is arguably sufficiently tailored to protect minority professors in general without creating a fear in tenured professors that a special class of minority professors is being promoted. Furthermore, there is no logical need to draw a distinction between minority professors since only a very small number are in fact tenured.

The potential effect of financial exigency on minority professors is further demonstrated when several other factors are considered in conjunction with the minority employment practices of many law schools. For instance, the number of minority professors, especially Blacks, is presently in a state of decline. Perhaps the most startling fact of all is that minorities find it as difficult to obtain employment in law teaching at predominantly white schools today as it was in the 60's.

These facts should also illustrate the importance of retaining minority professors already within the system. Many law schools, especially in the South, are already experiencing the effects of declining enrollments and budget cuts. Since it is very unlikely that funds will be available to hire new faculty members or that anyone would join the faculty of a law school that is experiencing financial difficulties given humanistic concerns for employment security, it is reasonable to conclude that minority professors already teaching should be retained at other costs.