The Three Rs of Faculty Affirmative Action Programs in Public Schools: Race, Reverse Discrimination, and the Rehnquist Court

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The Three Rs of Faculty Affirmative Action Programs in Public Schools: Race, Reverse Discrimination, and the Rehnquist Court

Diane E. Baylor†

When may a public school board voluntarily establish minimum percentages for its minority faculty members? This Comment seeks to answer that question and to propose methods by which school boards may defend such programs against claims of reverse discrimination.

Under the Rehnquist Court, affirmative action programs have been increasingly vulnerable to claims of reverse discrimination. This Comment explores how recent Supreme Court decisions on affirmative action affect the permissibility of minority hiring preferences in the field of education.

The justifications for affirmative action in education may be distinguished from the rationales supporting race-conscious hiring in other careers. Schools, unlike other employers, are in the business of teaching and educating against racial and ethnic prejudices; thus, they possess enormous potential for social reform. Faculty heterogeneity in educational institutions influences not only the teachers as employees in the workplace, but also the students and their future.

Through the permissive and sometimes mandatory desegregation of public school systems, the Court has expressed its constitu-

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3 In the employment context, the Court has treated voluntarily adopted affirmative action programs with greater severity than those programs adopted subsequent to judicial findings of discrimination. The rationale for the disparate court treatment is theoretically sound: where courts have already found evidence of prior discrimination, courts should facilitate remedial programs and shield necessary remedies from manufactured claims of reverse discrimination. In all other instances, courts subject race-conscious practices to the strictest scrutiny to guard against equal protection violations.

However, the practical consequences of this judicial distinction in the field of education are perverse. Absent a prior judicial finding of intentional segregation, school boards must prove themselves guilty of discrimination in order to implement voluntarily a program intended to promote equality of opportunity in education. The incentives against proving one's own guilt appear sufficient to discourage voluntary action. Compare, for example, United States v Paradise, 480 US 149 (1987) to City of Richmond v J. A. Croson Co., 109 S Ct 706 (1989).
tional commitment to integrated education. By approving race-
conscious remedial measures in schools that have not expressly dis-
criminated in the past, the Court has implied that schools, unlike
other organizations, may have a special role in eradicating societal
discrimination.

Because of the prejudicial danger of race-conscious policies,
the Court has generally confined their use to only those settings
where the policies serve to remedy intentional discrimination. Nev-
ertheless, the Court has upheld school desegregation and affirm-
ative action policies even where the evidence of past discrimination
is tenuous. Contending that prior intentional discrimination justi-
fied the race-conscious programs, the Court has actually upheld
plans to redress racial imbalances which were more readily traced
to mere historical or societal discrimination than to discriminatory
action by the schools themselves.

In addition to the Court’s commitment to integrated educa-
tion, another factor which differentiates faculty affirmative action
programs from minority hiring in other fields of employment is the
states’ interest in providing diverse educational opportunities for
students. The states have a special duty to provide public educa-
tion. In satisfying this duty, states conceivably have an interest in
offering the schooling opportunities which yield the best and most
productive citizens for the future. Arguably, schools besieged by
student and faculty racial imbalances produce graduates less able
to cope with the realities of a diverse and heterogeneous society.
Thus, the states’ interest in education extends to school
integration.

Despite these reasons favoring race-conscious faculty hiring
and despite the Court’s expressed commitment to school desegre-
gation, the Supreme Court has recently initiated a trend which
both impedes minorities’ equal protection claims of race discrimi-
nation and simultaneously eases the burden of proving reverse dis-
crimination. In particular, City of Richmond v J. A. Croson Co. reveals the Court’s antagonism to any voluntary race-conscious ac-
tion, even for remedial purposes. Compounded by the recent resig-
nations of Justices Brennan and Marshall, the Court’s most vocal
proponents of affirmative action, the legal burdens encountered by

* See, for example, Swann v Charlotte-Mecklenburg Bd. of Educ., 402 US 1 (1971);
Keyes v School Dist. No. 1, 413 US 189 (1973); Columbus Bd. of Educ. v Penick, 443 US
* 109 S Ct 706.
pro-affirmative action litigants are becoming increasingly insurmountable.

The Court's interpretation of the Equal Protection Clause has been inconsistent over time. However, as more Reagan and Bush appointees have joined the bench, the Court has become more ideologically oriented toward a "colorblind" Constitution, one which requires a discriminatory villain before permitting any race-conscious remedies. Such a view may be called the "perpetrator perspective" because of its emphasis on past wrongdoing as the only permissible justification for present undoing. Under this "colorblind" framework, the Court has

[cast] affirmative action as penance for particular sins of discrimination . . . . Only some—those who have themselves been guilty of race discrimination—may be permitted the mea culpa of voluntary affirmative action, or be prescribed such measures as penance by a court.

The Rehnquist Court assumes that any use of racial criteria violates the Fourteenth Amendment, unless the race-conscious policy-maker can provide a compelling state interest, such as remedying past sins, sufficient to satisfy a skeptical bench. Only those who prove themselves guilty of discrimination receive the Rehnquist Court's permission to remedy racial disparities.

This Comment asserts that many hiring decisions which are facially "colorblind" or "race-neutral" may nevertheless be discriminatory both in impact and in intent. If the Rehnquist Court treats school boards as it has treated other affirmative action employers, then students and educators should expect a decrease in school policies designed to promote integration and to remedy the effects of societal discrimination. This Comment encourages courts to relax their perpetrator perspective in favor of a forward-looking justification for affirmative action in the schools. Instead of chilling schools' attempts to further racial equality by dwelling on past

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5 Freeman, 64 Tulane L Rev at 1412.

6 Sullivan, 100 Harv L Rev at 91.

7 Both Croson, 109 S Ct 706, and Wards Cove Packing Co. v Atonio, 109 S Ct 2115 (1989), are recent decisions in which the Court disallowed race-conscious remedies for lack of clear proof of prior discrimination.
wrongs, courts should evaluate programs in light of their potential to create a racially integrated future.  

Part I of this Comment explains why schools are exceptional settings for addressing racial discrimination. The Comment analyzes how education's special role has evolved and fared in the courts. Part II addresses the increasing difficulty of defending affirmative action programs against claims of reverse discrimination. This part discusses the district court decision of Vaughns v Board of Educ. of Prince George's Cty. and the Supreme Court's possible grounds for overturning it. This part further explains the Court's perpetrator perspective, as presented in City of Richmond v J. A. Croson Co., and the difficult burden of proving past discrimination to justify race-conscious remedies. The last part proposes academic freedom and diversity as alternative compelling justifications for affirmative action in education and illustrates how these arguments may be used to overcome the Court's stringent strict scrutiny test.

The Rehnquist Court has not addressed the special concerns of affirmative action in education. New faculty affirmative action programs, if properly couched in school desegregation terminology and First Amendment claims to academic freedom and diversity, may pass constitutional muster despite the newly constituted Court. Perhaps by confronting the Court with its own inconsistencies, educators and school boards may carve out a special educational exception to the recent trend against affirmative action.

I. THE COURT'S TREATMENT OF SCHOOL DESSEGREGATION

Integrated education may be the most effective way to implement social change and to eradicate the vestiges of past societal discrimination. In schools, people of diverse backgrounds have a unique opportunity to share ideas and to challenge racial prejudices. The Court, too, has acknowledged the importance of schools in effecting social change:

[i]n educational settings particularly . . . the Supreme Court has recognized not only the crucial role of racial integration in facilitating equal opportunity but also the

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* Sullivan, 100 Harv L Rev at 80.
* 742 F Supp 1275 (D Md 1990).
positive educational value of assuring racial diversity and facilitating multiracial experiences.\footnote{11}

Responsive to the need for racial integration in public schools, the Court has mandated desegregation for those schools which were racially discriminatory.\footnote{12} The Fourteenth Amendment states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”\footnote{13} This clause has been the cornerstone of school desegregation litigation. As interpreted in \textit{Brown v Board of Educ.} (“Brown I”),\footnote{14} the Equal Protection Clause prohibits “separate but equal” treatment in public education. At times, failure to implement affirmative action and desegregation programs perpetuates the separate but equal model condemned in \textit{Brown I}.\footnote{15}

The Court has upheld only those racial integration methods that fit within the sin-based paradigm\footnote{16} as remedying past intentional discrimination. In \textit{Brown I}, the Court determined that racial segregation of schools offends equal educational opportunities for minorities. However, because the Court premised its holding upon the narrow principle that race is not a constitutionally permissible basis for school assignment, \textit{Brown I} signifies that only those educational facilities which are segregated de jure violate the Fourteenth Amendment.\footnote{17} \textit{Brown I} is silent with respect to the Fourteenth Amendment’s impact on racially imbalanced schools which result from de facto or societal segregation.\footnote{18}

\footnote{11} Joint Statement, \textit{Constitutional Scholars’ Statement on Affirmative Action After City of Richmond v J. A. Croson Co.}, 98 Yale L J 1711, 1713 (1989).\footnote{12} \textit{Brown v Board of Educ.}, 349 US 294 (1955) (“Brown II”).\footnote{13} US Const, Amend XIV, § 1.\footnote{14} 347 US 483 (1954) (“Brown I”).\footnote{15} \textit{Brown II}, 349 US 294. See also \textit{Brown I}, 347 US 483.\footnote{16} See Sullivan, 100 Harv L Rev at 80 (cited in note 4).\footnote{17} \textit{Brown I}, 347 US 483.\footnote{18} As pertaining to schools, de jure segregation denotes explicit and intentional racial separation. Thus, assigning students to schools on the basis of race comprises unconstitutional de jure segregation. De facto school segregation implies racial separation as the result of any facially race-neutral assignment policy. For example, assigning students to schools on the basis of geographic proximity or free choice may generate de facto segregation if racial imbalance results. Despite the similarity in the results, the Court has differentiated between de jure and de facto segregation on the grounds that the Fourteenth Amendment affords a remedy only for intentional discrimination. See Annotation, \textit{De Facto Segregation of Races in Public Schools}, 11 ALR3d 780 (1967). See also Owen Fiss, \textit{Racial Imbalance in the Public Schools: The Constitutional Concepts}, 78 Harv L Rev 564 (1965) for an explanation of the differences between intentional segregation, policies of approval and policies of disregard.
Since Brown I, the Court has at least superficially maintained the distinction between de jure segregation and de facto segregation. However, at the same time that the Court has required a remedial basis for race-conscious desegregation, the Court has recognized that discriminatory intent is not the only evil of segregation. Regardless of its source, racial imbalance in public schools causes psychological harm by "[generating] a feeling of inferiority as to [black students'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Furthermore, academic inadequacy and perpetuation of social barriers also result.

Perhaps because of these recognized defects of racially imbalanced schools, the Court has upheld school boards' voluntary race-conscious policies for integration with surprising leniency. Some Justices have even urged the Court to abandon the distinction between de jure and de facto segregation entirely. Affording schools such leeway in adopting desegregation plans is unusual. When deciding the constitutionality of race-conscious employment practices, the Court usually requires stringent evidence of past intentional discrimination before allowing any voluntary affirmative

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19 Racial segregation is "insulting and humiliating to the members of the segregated group and this is claimed to be especially true of racial segregation in America because of the historical connection between slavery and the Jim Crow laws designed to achieve this separation." Fiss, 78 Harv L Rev at 568.


21 "Students in [racially imbalanced] schools are also deprived of the intellectual stimulation that comes from the exchange of ideas and the development of personal relationships in a racially and socially heterogeneous context. This academic inadequacy seriously impairs the Negro's ability to compete in society and deprives society of an appreciable amount of talent." Fiss, 78 Harv L Rev at 569-70.

22 "[S]egregated education, regardless of the policy responsible for it, perpetuates the barriers between the races; stereotypes, misunderstandings, hatred, and inability to communicate are all intensified." Id at 570. "The underlying premise of the protest against racially imbalanced schools is that the public school system is the most general mechanism of social mobility in American society and the institution of local government that plays the most prominent role in the life of the community." Id at 567.

23 See The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement, 37 Minn L Rev 427 (1953) (consisting of the appendix to appellants' briefs filed in Brown I) for more information on the psychological and social ramifications of segregated schools.

24 See, for example, note 2.

25 Justice Powell argued against the use of the de jure/de facto distinction. Keyes v School Dist. No. 1, 413 US 189, 217-53 (1973) (Powell concurring in part and dissenting in part). Justice Douglas contended that the Court actually had abandoned the distinction: "there is, 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." Id at 214-15 (Douglas concurring).
action programs. Yet in the context of public schools, the Court is likely to “infer” past intentional discrimination; this inference permits the Court to sustain a voluntary or court-ordered desegregation program absent clear proof of intentional discrimination.

In *Swann v Charlotte-Mecklenburg Bd. of Educ.*, the Court began employing presumptions of past discrimination to validate race-conscious desegregation. There, the Court upheld the use of race-conscious methods to bolster the integration of schools in which colorblind geographic assignment of students to public schools caused racial segregation. Straining to fit its decision within a remedial framework, the Court asserted that the remote cause of the segregation to be remedied was the former existence of a dual school system which affected residential patterns and caused racial homogeneity when students were assigned to schools based on geographic proximity.

Here, as in later decisions, the Court freely inferred compensable de jure segregation from proof of current de facto segregation. By presuming a temporal link between past intentional discrimination and present de facto segregation, the Court circumvented its usual requirement of proof of specific discriminatory intent.

Another judicial “inference” which eased the burden of proving segregative intent for a prima facie claim of discrimination in education is that “purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a system-wide discriminatory intent unless otherwise rebutted.” Even from evidence of covert discrimination in a single area of the school system, the Court is willing to presume that dis-

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26 *City of Richmond v J.A. Croson Co.*, 109 S Ct 706 (1989), illustrates the Court's reluctance to find proof of discrimination sufficient to justify a race-conscious employment policy in a traditionally racially imbalanced industry.

27 See note 2.


29 Information relevant to showing the existence of a dual school system includes racial composition of teachers and staff, the quality of school buildings and equipment, and the organization of sports activities. Id at 18. Racial identifiability of schools in these aspects constitutes a prima facie violation of substantive constitutional rights under the Equal Protection Clause. Id. A court, then, can draw on many different aspects of a school system in order to conclude that the system is unconstitutionally segregated.

crimination contaminates the entire school system,\textsuperscript{31} and that discriminatory motives pervade elsewhere.\textsuperscript{32}

Through these inferences of covert discrimination and temporal and system-wide infection, the Court has weakened its requirement that those attempting to defend integrationist practices in education must prove past segregative intent. Although the Court has stated explicitly that disparate impact and foreseeable segregative consequences are not alone sufficient to establish an equal protection violation,\textsuperscript{33} the Court has inferred segregative intent from that very information.\textsuperscript{34} Thus, the Court has used the fiction of prior discrimination in order to bring de facto segregation under the remedial power of the Equal Protection Clause.\textsuperscript{35}

The Court's "forward-looking"\textsuperscript{36} understanding of the benefits integrated education provides in eradicating discrimination may explain the Court's readiness to find "intent" behind school segregation. Implicit in the Court's decisions is a conviction that the education system has a profound impact on the student, the community, and the minority members' potential for achievement and advancement in society. Thus, where voluntary school integration is at issue, the Court has fudged the requirement of past discrimination and deferred to its forward-looking intuitions to allow schools greater latitude in crafting race-conscious relief for racial imbalances.\textsuperscript{37}


\textsuperscript{32} For an explanation of the "repetition theory," see id at 176-77. "The Court is willing to infer that the board repeated its pattern of behavior: if there were racial assignments in one portion of the system, then it is fair to presume that its use of geographic criteria elsewhere was a facade and that race was the real basis of assignment." Id at 176.

\textsuperscript{33} \textit{Penick}, 443 US at 464.

\textsuperscript{34} See id at 465, quoting \textit{Penick}, 429 F Supp at 255 ("Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.'").

\textsuperscript{35} See Fiss, \textit{School Desegregation} in Cohen, Nagel & Scanlon, eds, \textit{Equality} at 178 ("[T]here is implicit evidence that what moved the Court in \textit{Swann} and \textit{Keyes} was the segregated pattern [not the tenuous finding of prior discriminatory purpose], and that the reliance on past discrimination was dressing designed to improve the acceptability of its decisions by making them appear to be direct descendants of \textit{Brown}.").

\textsuperscript{36} See Sullivan, 100 Harv L Rev 78 (cited in note 4).

\textsuperscript{37} In \textit{Swann}, 402 US 1, the dicta mentioned that [s]chool authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary
Why, then, has the Court been unwilling to make the same inferences to protect faculty affirmative action programs against claims of reverse discrimination? Professor Sullivan suggests that

[v]isiting affirmative duties to integrate only upon past wrongdoers . . . makes racial preferences seem more like corrective or retributive justice than like social engineering. It thus helps to rebut charges that racial balancing has become an end in itself.38

Regardless of what accounts for the Justices' ambivalence, the Court apparently perceives affirmative action hiring programs as a substantially greater threat to Equal Protection theory than other race-conscious methods of integration in public schools.

II. THE COURT’S TREATMENT OF AFFIRMATIVE ACTION IN EMPLOYMENT

A. Vaughns Versus Croson

Recently, in Vaughns v Board of Educ.,39 the U.S. District Court for the District of Maryland upheld the Board of Education's integrationist practice of assigning teachers to schools on the basis of race, years after a judicial finding that the school's faculty was already fully integrated. Despite the plaintiffs' reverse discrimination arguments and their reliance on Croson, the court determined that the race-conscious faculty employment policy withstood strict scrutiny and survived the mandates of the Fourteenth Amendment.

To maintain a racial balance among the faculty reflective of the composition of the county-wide teaching population, the employment plan set minimum minority faculty percentages as well as establishing a seniority override mechanism for staff reductions; the percentages were continuously adjusted upward in accordance with increases in the minority composition of the county's general

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powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Id at 16. Burger, writing for the majority, has thus conceded that schools should be granted extraordinary leeway to fashion remedial plans broader than those within a court's power to impose. See also Fiss, School Desegregation in Cohen, Nagel & Scanlon, eds, Equality at 158 (cited in note 31) ("The permission to make racial assignments to achieve integration at the elementary and secondary level has not been confined to school systems that operated on a dual basis in the recent past.").

38 Sullivan, 100 Harv L Rev at 92.
39 742 F Supp 1275 (D Md 1990).
and teaching populations. In previous litigation, although the court had held the county in violation of a previous desegregation order with respect to student integration, the court had found that the vestiges of past racial segregation in faculty assignments had been eliminated. The Board’s rationale for maintaining the policy, even after the court’s finding, was to prevent school faculties from “tipping,” that is, from becoming racially identifiable, and to provide every student the experience of being taught by an integrated faculty.

In 1989, the federal government and 35 predominantly white tenured teachers instigated the Vaughns litigation. Both the government and the named plaintiffs, who had been involuntarily transferred pursuant to the seniority bypass policy, contended that the policy unlawfully discriminated on the basis of race. They claimed that no constitutional rationale could justify the Board’s continued race-conscious faculty assignment programs because the faculty assignment goals had been achieved and there had been no discrimination against minorities in faculty assignment or hiring since that time. Plaintiffs asserted that because the school district was unitary with respect to its faculty, the voluntarily continued use of racial criteria in faculty assignments could serve no remedial purpose and therefore failed to advance a compelling state interest.

Relying heavily on the fact that the student population had not yet attained unitary status, the court’s decision granted the Board great leeway to implement affirmative action programs in any aspect of its school system, including the already racially-balanced teaching staff. The court justified this latitude by asserting that the true nature of the Board’s race-conscious remedy was not to redress prior teacher employment discrimination, but rather to vindicate the rights of school children by reducing the racial identifiability of individual schools. Employing forward-looking rho-

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40 Id at 1278-82.
41 Vaughns v Board of Educ. of Prince George’s Cty., 574 F Supp 1280 (D Md 1983) (“Vaughns II”). See also Vaughns v Board of Educ. of Prince George’s Cty., 355 F Supp 1051 (D Md 1972) (“Vaughns I”).
48 Vaughns, 742 F Supp at 1282.
49 Id at 1285.
4 Id.
44 Id at 1286.
50 Vaughns, 742 F Supp at 1286.
ric, the court determined that the Board surmounted the compelling interest hurdle of the strict scrutiny test.47

The recent decisions in City of Richmond v J. A. Croson Co. and Wards Cove Packing Co. v Atonio, both of which preceded Vaughns, indicate that a reversal would be likely were Vaughns ever to reach the Supreme Court. In Croson, the Court held that Richmond’s 30 percent minority business enterprise subcontracting requirement was unconstitutional. Although evidence of past discrimination in the nation-wide construction industry abounded, the Court determined that the minority set-aside did not serve a compelling interest because of insufficient proof of discrimination specific to Richmond; the Court found unpersuasive the extreme disparities between the small number of city contracts with minority firms and the city’s large minority population.48

To satisfy strict scrutiny, affirmative action programs must serve a compelling interest.49 Richmond claimed as its compelling interest the eradication of discrimination in its construction industry. And while the Court has consistently upheld the elimination of past discrimination as a compelling interest,50 the Croson Court required specific proof of past discrimination before it would accept the legitimacy of the “remedial” defense to reverse discrimination claims. According to the Court’s reasoning, Richmond failed the compelling interest test because it could not muster sufficient evidence to prove specific past discrimination. After Croson, states and their subdivisions must identify past racial discrimination with particularized findings before they may adopt race-conscious relief.51

In contrast to the leniency the Burger Court afforded voluntary school desegregation programs, when a voluntary affirmative action program’s purpose is remedial in nature, the state and other

47 See id at 1292.
49 See id at 723-24. A race-conscious program must also be narrowly tailored to achieve the constitutionally permissible end. This Comment addresses only the compelling interest prong of the strict scrutiny test.
50 For example, see Sheet Metal Workers v EEOC, 478 US 421 (1986); Firefighters v Cleveland, 478 US 501 (1986).
51 “While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.” Croson, 109 S Ct at 727. See also Note, Minority Business Set-Asides Must be Supported by Specific Evidence of Prior Discrimination, 58 U Cin L Rev 1097, 1112-13 (1990) (“[T]he fourteenth amendment required Richmond to identify racial discrimination in its construction industry with particularized findings.”).
enactors must take care to develop a paper trail of past discrimination if they wish to satisfy the compelling interest hurdle under the Rehnquist Court:

_Croson_ establishes that the constitutionality of a remedial affirmative action plan hinges on appropriate findings of discrimination. Although the issue of the institutional competence of states and cities to adopt remedial affirmative action plans appears to be settled for the time being, _Croson_ virtually ensures future litigation over the adequacy of findings used to support an affirmative action plan.\(^5\)

Similarly, in _Wards Cove Packing Co. v Atonio_,\(^3\) the Court upheld the employment practices of an Alaskan cannery, despite overwhelming evidence of discriminatory impact and historical racial separation. Even the majority conceded that the cannery operated as a two-tiered hierarchical work force, in which blacks filled the unskilled, low-status jobs while whites dominated the skilled, high-status jobs. The employer maintained separate hiring channels and job-segregated housing and eating facilities for the skilled and unskilled workers; dissenting Justice Stevens characterized the atmosphere as bearing "an unsettling resemblance to aspects of a plantation economy."\(^4\) Nevertheless, the majority concluded that the plaintiffs had not proved enough to require an explanation from the employer. Thus, in the employment context, the Rehnquist Court has refused to adopt the inferences of discriminatory intent from the _Swann_ line of desegregation cases.

_Croson_ and _Wards Cove_ are significant deviations from previous decisions which had not demanded evidence of past discrimination to substantiate the remedial purpose of an affirmative action program. Only three years earlier in _Wygant v Jackson Bd. of Educ._,\(^5\) five members of the Court rejected the notion that public employers should be required to make specific findings of past discrimination before enacting an affirmative action plan.\(^6\) While the

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\(^5\) Id at 289 (O'Connor concurring). See also dissenting opinions, id at 313 (Stevens dissenting).

\(^6\) Id at 2128 n 4.
Rehnquist Court’s rejection of amorphous “societal discrimination” as a justification for race-conscious action has its base in *Wygant*, the present stringency of the Court’s evidentiary requirement is new and alarmingly sufficient both to chill incentives to adopt remedial programs and to ensure future litigation over the adequacy of findings used to support affirmative action plans.

B. Would *Vaughns* Survive Strict Scrutiny Under the Rehnquist Court?

Despite the Rehnquist Court’s antipathy for affirmative action, *Vaughns* is not necessarily inconsistent with *Croson*. For example, the Court could choose to read the evidence in *Vaughns* as supporting a finding of past discrimination sufficient to justify its continued use of race-conscious hiring policies. However, without Justice Brennan’s unfailing vote in favor of affirmative action programs, the Supreme Court appears unlikely to tolerate continued affirmative action for an already desegregated faculty. While a *Vaughns* reversal is not compelled by *Croson*, the current trend of affirmative action litigation indicates the Court’s unwillingness to concede a compelling governmental interest, absent clear proof of discriminatory intent.

Although the Burger Court occasionally inferred past discrimination to justify voluntary school desegregation, the Rehnquist Court is now unwilling to waive the requirement of overt proof of discrimination to protect voluntary affirmative action programs against reverse discrimination challenges. Especially where employment policies are at issue, the Court has set a high evidentiary standard that provides a disincentive to adopting race-conscious remedial policies.

Employers or school boards wishing to adopt affirmative action programs must either prove themselves guilty of past discriminatory intent or base their programs on grounds other than remedying past discrimination. With respect to the first option, one commentator advises that states and cities adopt a strategy to meet the evidentiary challenge by compiling extensive records of discrimination. However, for school systems, this strategy may prove unpalatable and infeasible. Never before have educators

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*Id* at 274 (“This Court never has held that societal discrimination alone is sufficient to justify a racial classification.”).

*Note*, 58 U Cin L Rev at 1123 (cited in note 51).

*Id* at 1135.
been required to build a trail evincing past discrimination. Rather, schools have had strong incentives against building a paper trail which established their own guilt: fear of race discrimination suits and judicially mandated solutions.

Because the Burger Court had implicitly waived the requirement of proof of discriminatory intent by tacitly retracting from the distinction between de jure and de facto segregation in school systems for the purposes of desegregation, school boards probably made little effort to record the historical development of the system's segregation. Under the current standard, therefore, school boards will not be able to find clear proof of past intentional discrimination. Discriminatory segregation in schools is the end product of years of either overt or, more likely, covert and subtle discriminatory practices, whose intent may not be readily discernible. Nevertheless, the Court is likely to strike down affirmative action plans intended to remedy faculty imbalances by characterizing the plans' purpose as combating societal rather than specific instances of discrimination, the same technique used to strike down the plan in *Croson*. "As a result, the term 'societal discrimination' has become a shibboleth that presages a finding of an affirmative action plan's unconstitutionality."[60]

For the same reasons that the Court has implicitly waived requirements of specific proof of discriminatory intent for student desegregation programs, the Court should likewise waive proof for faculty affirmative action programs. Unfortunately, this course of action appears unlikely, given the current anti-affirmative action trend of the Court.

III. NON-REMEDIAL COMPPELLING INTERESTS FOR VOLUNTARY FACULTY AFFIRMATIVE ACTION PROGRAMS

Where proof of prior discrimination is scarce, school boards should advance other compelling interests to defend their voluntary affirmative action programs rather than strain to show past discriminatory intent to justify a race-conscious remedy. Two interests derived from the First Amendment may prove to be equally persuasive as remedying past discrimination. Institutional aca-

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[60] Prior to *Croson*, "states were not obliged to develop a detailed evidentiary record to support a racial classification and therefore had no reason to do so." *Milwaukee Cty. Pavers Ass'n v Fiedler*, 707 F Supp 1016, 1029 (W D Wis 1989). See also Note, 58 U Cin L Rev at 1131.

[61] Note, 58 U Cin L Rev at 1124.
demic freedom and diversity in education are two grounds which the Court might accept as interests sufficient to withstand strict scrutiny.

A. Institutional Academic Freedom

A school board implementing a voluntary affirmative action program could defend itself against charges of reverse discrimination by claiming protection under the judicially created academic freedom doctrine, which insulates school decisions from judicial interference. The Court has considered academic freedom to be "a special concern of the first amendment." The theory guiding institutional academic freedom is that the First Amendment requires judicial deference towards academic activities and judgments because freedom in the intellectual life of a school is essential to democracy and to the successful education of the country's future leaders.

Generally, the Court has applied the academic freedom doctrine to universities' hiring practices; the same rationales justify its extension to all public schools:

University [and grade school] hiring programs . . . are intimately connected with the protected purposes of scholarship and teaching, since institutional success in these areas depends substantially upon the personal capacities of individual faculty members. . . . [F]ederal regulation of faculty selection interferes with the protected purposes of scholarship and teaching, and thus infringes the [schools'] rights to freedom of association.

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62 This Comment refers to institutional academic freedom to distinguish it from other types of freedoms associated with academia. Institutional academic freedom implies judicial abstention from educational institutions' decisions, whereas other formulations of academic freedom invoke the courts' authority to protect teachers and students from First Amendment restrictions by schools and universities. For an analysis of academic freedom's historical development in the courts, see J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment", 99 Yale L J 251 (1989).

63 Keyishian v Board of Regents, 385 US 589, 603 (1967). See also Regents of the Univ. of California v Bakke, 438 US 265, 312 (1978).

64 See Sweezy v New Hampshire, 354 US 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").

Although academic freedom "has flowered in dicta and rhetoric more than in holdings and rules," the Court has protected the First Amendment right of schools to be free from government interference in the performance of their educational functions. The most frequently cited formulation of the academic freedom doctrine is Justice Frankfurter's concurring opinion in Sweezy v New Hampshire:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

In Bakke, the Court accepted the fourth essential freedom, the determination of who may be admitted to study, as a valid justification for race-conscious student admissions policies which do not operate as racial quotas. For the majority, Justice Powell wrote that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."

More recently, in Regents of the Univ. of Michigan v Ewing, Justice Stevens reaffirmed the Court's commitment to academic freedom in rejecting an expelled medical student's Due Process claim against the medical school. Stevens wrote: "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also . . . on autonomous decision-making by the academy itself." Discussing the Ewing decision, Professor Peter Byrne commented:

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* Byrne, 99 Yale L J at 312.

* See, for example, Sweezy, 354 US 234, in which the Supreme Court reversed a conviction of a Marxist economist for refusing to answer the State Attorney General's investigation questions about the content of his lecture in a humanities class at the University of New Hampshire. See also Keyishian, 385 US 589, in which the Supreme Court found unconstitutional a subversive organization law which required state university professors to certify that they were not Communists.

* Sweezy, 354 US at 263 (Frankfurter concurring), quoting a statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand.

* See Bakke, 438 US at 312-15.

* Id at 312.


* Id at 226 n 12 (citations omitted).
Once again, the Court found that academic freedom provided the necessary justification for interpreting a constitutional provision as not inhibiting the discretion of academic decision-makers.\footnote{73}

Therefore, by emphasizing Frankfurter's first essential freedom, the determination of who may teach, a school board could argue that faculty hiring decisions are precisely the type of academic activity that the academic freedom doctrine protects from court meddling.

B. Diversity in Education

Like academic freedom, diversity may also satisfy strict scrutiny as a compelling interest sufficient to justify voluntary race-conscious faculty hiring. The Court has yet to decide a school board lawsuit on the grounds of diversity; however, the Court's dicta in past school affirmative action disputes and in its post-\textit{Croson} decision upholding racial diversity in broadcasting\footnote{74} reflect a willingness to endorse affirmative action programs on First Amendment grounds.

When applied to faculty affirmative action programs, the diversity argument may succeed because the Court has accorded schools, unlike other employers, special, symbolic treatment. The Court has characterized the classroom as "peculiarly the 'marketplace of ideas.'"\footnote{75} Thus, as a truth-seeking enterprise, a school's quest for a "robust exchange of ideas" is a goal "of paramount importance in the fulfillment of its mission."\footnote{76} Therefore, constraints on a school board's pursuit of ideological diversity appear contrary to its purpose.

Beyond uncovering truth, academic institutions serve to broaden minds and to prepare students for adulthood. The Court believes that schools are best able to do so by providing an "atmosphere of 'speculation, experiment and creation' . . . [which] is widely believed to be promoted by a diverse student body."\footnote{77} "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."\footnote{78}

\footnote{73}{\textit{Byrne}, 99 Yale L J at 317 (cited in note 62).}
\footnote{74}{\textit{See Metro Broadcasting, Inc. v FCC}, 110 S Ct 2997 (1990).}
\footnote{75}{\textit{Keyishian}, 385 US at 603.}
\footnote{76}{\textit{Bakke}, 438 US at 313.}
\footnote{77}{Id at 312.}
\footnote{78}{Id at 313, quoting \textit{Keyishian}, 385 US at 603.}
Because diversity can promote truth-seeking, introspection and tolerance, the Court proclaimed in *Bakke* that the attainment of diversity at least among the student body "clearly is a constitutionally permissible goal for an institution of higher education."79 By analogy, diversity among the faculty in grade schools or public universities is equally desirable.80

The Court has hinted that a diversified faculty may also foster a compelling state interest. In her concurring opinion in *Wygant v Jackson Bd. of Educ.*,81 Justice O'Connor distinguished the non-compelling goal of providing role models for students from "the very different goal of promoting racial diversity among the faculty."82 By differentiating the two purposes for faculty affirmative action, O'Connor, an unlikely supporter of affirmative action, indicated that even she might uphold a program if racial diversity were proposed as its justification. Moreover, she and the dissenters83 rejected the assumption that a finding of past discrimination was a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan.84 By doing so, they opened the door for alternative justifications not grounded in remedying prior discriminatory conduct.85 O'Connor recognized that a requirement of findings of illegal discrimination "would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."86 Because the Court should promote, rather than discourage voluntary programs, alternative interests must be allowed as justifications for voluntary race-conscious programs.87 Therefore, although the hold-

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80 One note has interpreted Powell's dicta as establishing that "educational diversity," even broader than student body diversity, "is a concern of such importance to the nation as a whole that a government policy aimed at securing it advances a compelling state interest." Note, 92 Harv L Rev at 896 (cited in note 65).
82 Id at 288.
83 Justices Marshall, Brennan, Blackmun and Stevens.
84 *Wygant*, 476 US at 289.
85 Justice Stevens advances a completely forward-looking perspective by suggesting that "[r]ather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future." Id at 313 (Stevens dissenting).
86 Id at 290.
87 See Joint Statement, 98 Yale L J at 1714 (cited in note 11) ("[I]t is essential not to deter voluntary efforts by forcing such governments to point fingers needlessly or to make compromising public admissions in order to establish the necessary predicate for race-conscious remedies. To do so would be to reopen old wounds, not to heal them. And this is a time for healing.").
ing in Wygant struck down a layoff policy which placed racial balancing above seniority, the decision was by no means a ban on voluntary race-conscious faculty hiring.

When a reverse discrimination claim is posited against a First Amendment freedom of association argument for diversity in education, perhaps the Court will accommodate the faculty affirmative action policies. The First Amendment concerns may constitute a sufficiently compelling interest to overcome the strict scrutiny test.

Recently the diversity justification has been revived by the FCC to defend its minority preferences for radio station ownership against reverse discrimination claims by majority owned broadcasters. In *Metro Broadcasting, Inc. v FCC,* by a five to four vote, the Supreme Court upheld the FCC's distress sale policy and minority ownership program exclusively on the grounds of "[serving] the important governmental objective of broadcast diversity." The distress sale program gave minority enterprises priority to buy broadcast licenses at windfall prices from license owners whose qualifications to hold a license were in dispute. Unless they sold out to minority enterprises, these license owners were forbidden to transfer or assign their licenses until their qualifications to hold a license had been resolved through FCC hearing procedures. In effect, the distress sale policy encouraged owners to sell out to minority enterprises at distress sale prices, thereby bypassing the lengthy hearing process.

The minority ownership policy gave minority-owned applicants a "qualitative enhancement," or, in other words, preferential treatment when allocating broadcasting licenses. The FCC's justification for the preference was to further "the public interest goal of diversity of viewpoint—to enhance the public's exposure through programming on broadcast stations to the viewpoints of the significant, diverse groups that make up the nation."

**110 S Ct 2997.**

**The distress sale policy issue was an appeal from the decision in Shurberg Broadcasting of Hartford v FCC, 876 F2d 902 (DC Cir 1989). There, the D.C. Circuit Court held that the FCC's distress sale program unconstitutionally deprived Shurberg and non-minority-owned Shurberg Broadcasting of their equal protection rights under the Fifth Amendment.**

**The minority ownership program issue was an appeal from Winter Park Communications v FCC, 873 F2d 347 (DC Cir 1989), in which the D.C. Circuit Court upheld the FCC's preference for minority applicants for broadcasting licenses.**

**Metro, 110 S Ct at 3009.**

**See Shurberg, 876 F2d 902.**

**Winter Park, 873 F2d at 353 n 6, citing Brief for FCC at 29-30.**
Sustaining both affirmative action programs, Justice Brennan wrote the majority opinion and likened broadcasting diversity to classroom diversity. He drew upon Powell's majority opinion in *Bakke* and Stevens's dissent in *Wygant* in noting that both media and academic diversity serve important First Amendment values.\(^9\)

The majority's assessment of broadcasting diversity easily extends to the classroom: in both instances, the benefits of diversity "redound to all members of the viewing and listening audience."\(^5\) Furthermore, the gains from diversity are "not limited to the members of minority groups who gain access to the broadcasting industry"\(^9\), or, by analogy, to a school's minority teachers. Justice Stevens, in his concurrence, endorsed the opinion because it adopts a "focus on future benefit, rather than the remedial justification."\(^7\) Thus, *Metro* is a significant precedent, useful for supporting diversity arguments for faculty affirmative action programs.

However, the *Metro* victory is limited. Instead of using strict scrutiny, Justice Brennan applied the rationality standard to evaluate the FCC's programs because the programs were congressionally mandated. In analyzing congressional race-conscious measures, the Court applies a lower standard because of the need for judicial deference to federal legislation.\(^9\) Reaffirming the rule of *Fullilove v Klutznick*,\(^9\) Brennan stated:

> benign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.\(^10\)

Therefore, *Metro* does not indicate how the Court would decide under the strict scrutiny standard applied to state and school board affirmative action programs.

The dissenters, Justices O'Connor, Rehnquist, Scalia and Kennedy, argued that diversity alone is insufficient to pass strict scru-
With the departures of Justices Brennan and Marshall from the bench, predicting the impact or vitality of Metro for the diversity argument is impossible.

**Conclusion**

Racial imbalance in schools is detrimental because it causes psychological damage and hinders equal educational opportunities. In contrast, racial integration among both faculty and students may provide "one of the most important lessons that the American public schools teach." The diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

To achieve these benefits, school boards must be permitted to adopt remedial race-conscious programs without fear of further judicial sanction.

However, the current Court's propensity to require proof of past discrimination before allowing voluntary affirmative action programs places school boards in an awkward position. Unless school boards implementing affirmative action policies are willing and able to prove their own past discriminatory hiring and admission practices, they fall subject to reverse discrimination litigation.

To prevent recent anti-affirmative action decisions from having adverse ramifications in public school systems, courts should invoke the principles used to justify educational affirmative action programs in the past. The compelling goals of academic freedom and diversity, previously accepted by the Court as adequate justifications for desegregation, should now be revived to defend preferential minority faculty hiring against attacks of reverse discrimination. By reminding the Court of its past commitment to racial integration and diverse educational opportunities, perhaps the domain of education will remain protected against the current Supreme Court's sin-based misunderstandings of racial justice.

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101 See id at 3029 (O'Connor dissenting).
103 Id.