



Curriculum Units by Fellows of the Yale-New Haven Teachers Institute
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Affirmative Action: Is It Still Necessary?

Curriculum Unit 96.01.13
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My unit is intended for my eighth grade Social Studies classes. This unit may also be used in a high school American history course. There are three reasons why I chose to focus my unit on affirmative action. One, my school is becoming a magnet school with a concentration on global studies. As a consequence, my students will be studying issues that affect different ethnic groups in the United States. Two, many of my students come from a variety of ethnic groups—i.e. African-American, Polish, Italian, Laotian, Luthuanian, Turkish, Kenyan, Guinean, Hungarian. Based on the fact that a majority of my students are minorities, affirmative action can and could play an integral role in their future. Finally, many Americans' view and the Supreme Court's view of affirmative action has changed drastically over the past several years since its inception. Thus, in my opinion I strongly feel that my students need to have an understanding of how and why affirmative action evolved in the United States as well as the current status of this policy.

In order to accomplish this task my unit has two basic objectives. First, I intend to provide my students with the history of affirmative action in relation to education and employment. Second, I wish to explore with my students some of the major Supreme Court decisions involving affirmative action. The cases that I wish to discuss with my students are as follows: Regents of the University of California(at Davis) v. Allan Bakke, Fullilove v. Klutznick, Local 28, Sheet Metals Workers Association v. E.E.O.C, Wygant v. Jackson Board of Education, United States v. Paradise, Firefighters Local Union No. 1784 v. Stotts, Johnson v. Transportation Agency Santa Clara County, California, Local No. 93 International Association of Firefighters v. City of Cleveland, United Steelworkers v. Weber, City of Richmond v. J. A. Croson Co. I hope as a result of studying these cases my students will come to an understanding of when the Supreme Court finds affirmative action plans permissible.

Thomas Sowell, a neoconservative black scholar(Rosenfeld 1991, p. 311), contends that the first use of the term affirmative action first originated as a result of the Wagner Act of 1935. One of the first assignments I will give my students in this unit will be for them to ask their parents what affirmative action means. Afterwards I will present them with the following definition of affirmative action that we will use throughout the unit. Affirmative action is a phrase that refers to attempts to bring members of underrepresented groups, usually groups that have suffered discrimination into a higher degree of participation in some beneficial program. Some affirmative action efforts include preferential treatment; others do not.(Greenawalt 1983, p. 17) At this point I will ask my students what is meant by preferential treatment because my students need to understand the meaning of this phrase if they are to have a thorough understanding of affirmative action. My students need to know that many people view affirmative action programs as a means to provide preferential

treatment to minorities and women. I intend to record all of the responses my students obtained from their parents so that we can discuss them at the conclusion of the unit to determine their accuracy.

Affirmative action as we know it today came into existence as a result of Title VII of the Civil Rights Act of 1964. The following type of affirmative action plans/programs were found to be appropriate under Title VII—a. adoption by employers of training programs that emphasize providing minorities and women with the opportunity, skill, and experience to perform [in given jobs] (CFR Section 1608.3 (c) 1 1985) b. extensive recruiting programs (CFR Section 1608.3 (c) 2 1985) c. modification in promotion and layoff procedures(CFR Section 1608.3 (c) 3 1985) d. other appropriate employment tools which recognize the race, sex or national origin of applicants or employees (ibid) e. a systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking . . . skills to enter and, with appropriate training to progress in a career field.” Revamping selection instruments or procedures . . . to reduce or eliminate exclusionary effects on particular groups in particular groups in particular job classifications”, and a systematic effort to provide career advancement training . . . in dead-end jobs. (ibid) The Supreme Court decisions that I listed above that I will discuss later in my unit brought into question the constitutionality of many of the programs that were deemed appropriate under Title VII of the Civil Rights Act of 1964. Therefore, I intend on having my students record in their notebooks the major provisions listed above of appropriate affirmative action programs under Title VII so that they will be able to identify the provisions that were being questioned in the Supreme Court cases that we will discuss later in my unit.

Before discussing some of the major Supreme Court decisions relating to affirmative action I think it is important to take a look at some of the views which shaped the U.S. policy under Title VII of the Civil Rights Act of 1964 which mandated that certain businesses develop affirmative action programs with my students. First, however, I would like to recommend to anyone interested in teaching my unit to follow a strategy I intend to use in presenting my unit. At the onset of our seminar, Multiculturalism and the Law, we read a book by Toni Marie Massaro entitled *Constitutional Literacy; A Core Curriculum for a Multicultural Nation* . In her book Massaro contends that in teaching U.S. history that the teacher should present the major issues of American history in the form of conflicts. In adopting this strategy the teacher would present varying viewpoints on the issue being studied, whether these different viewpoints are intellectually or culturally based. Students need to understand that some conflicts according to Massaro may never be resolved. In adopting this strategy the student will be insured of receiving a balanced picture of the American history issue being studied. In my opinion affirmative action is one issue in the history of the U.S. that students will encounter varying viewpoints, especially in the area of whether affirmative action programs are fair or constitutional. I hope to show my students that the affirmative action issue is still a controversial constitutional question that is far from being resolved despite the decisions that have been handed down by the Supreme Court that we will study in my unit.

One of the first views I would like to discuss concerning affirmative action is that of Alan Goldman author of *Justice and Reverse Discrimination*. Goldman states that, “No social system that abandons those at the bottom to an enforced circle of dire poverty can be justified in the name of freedom. A free market society with severe racial biases and no rule for hiring results in that situation. Thus, we again arrive at the conclusion that society has a right to impose a rule for hiring against private corporations justified this time in the name of freedom”(Goldman 1979, p.40). This statement can be somewhat misleading if one automatically assumes that Alan Goldman’s support of affirmative action includes his support of preferential treatment. For this is not the case. According to Michel Rosenfeld, author of *Affirmative Action and Justice* , Goldman considers that the most important point of his book is his stance that preferential treatment in education and hiring for blacks and women ought to be rejected because it tends to benefit the best qualified members of the victim group,

who presumably need help the least, at the expense of its least qualified members, who are apparently in the greatest need of assistance (Rosenfeld 1991, p.89). Goldman also puts forth the argument that the most competent individual should be hired regardless of race or sex in most situations. In my opinion, if we were living in an unbiased society this principle of hiring the most competent would be something upon which we could all agree. However, the United States is not such a place yet. For example, the city of West Haven needed a school superintendent. There were two finalists for the position. One was an Italian male with a Master's Degree and a Sixth Year Certificate in Administration serving at the time as a principal. The other candidate was a black female who was Assistant Superintendent of Schools in Baltimore with a Ph. D. If the person with the best credentials should have been hired according to Goldman's philosophy it should have been the Ph.D candidate with experience in running a school system; this however was not the case. The West Haven Board of Education cited the principal's experience and knowledge about construction as the deciding factor because the West Haven school system is about to initiate a major reconstruction program for many of its schools. I find it hard to believe that a board of education would select a candidate based on their knowledge of construction than their knowledge and experience concerning the educational process. It is also inconceivable to me that an assistant superintendent of schools would not also possess knowledge concerning school construction and renovation. I believe that situations and occurrences like these serve as a strong argument that affirmative action is still necessary. Affirmative action would not necessarily have guaranteed the Ph. D the job, but I am sure that it could have increased her odds in obtaining the position. Mr. Goldman in his book does cite several instances when preferential hiring should occur. Before discussing the circumstances under which Goldman believes that preferential treatment is justified, one must first examine how this philosopher views preferential treatment in general. Alan Goldman believes that preferential treatment for one group is tantamount to reverse discrimination to another group, which he contends is unjust unless it occurs under the circumstances I am about to discuss. According to Goldman preferential treatment for past discrimination should not be administered in broad terms encompassing an entire group, but only to individuals or members of groups that can show direct harm or that their rights have been violated (Goldman 1979, pp. 53-57). This philosophy that individuals or members of a group must show direct harm or that their rights have been violated has been incorporated in many of the recent Supreme Court decisions regarding affirmative action as will be shown later in my unit.

Alan Goldman and some critics of affirmative action contend that the fact that there are some minorities and women who are not in need of preferential treatment, but yet still benefit from provisions of this policy is a glaring problem of affirmative action programs. One affirmative action program that brings this situation into question are set-asides. In this type of program the federal, the state, or the municipal government will allot a certain percentage of contracts for minority or women owned businesses. Some people argue that these set-asides give an unfair advantage to some minority and women business owners that do not need such an advantage. Another type of affirmative action program that many critics tend to question involves instances where well-off minorities and women receive preferential treatment to educational institutions, thus denying positions which could have been given to minorities and women in more desperate need. I also find this type of affirmative action program unsettling and in need of correction. Goldman offers a suggestion that could quickly correct this problem. Minority and women applicants for affirmative action educational/employment programs simply should be asked via the application process if they consider themselves to be victims of earlier discrimination in education, or in hiring, whether they grew up in a chronically deprived community (Goldman 1979, 202). The answers to these questions could be used to filter out minorities and women who are not in need of preferential treatment. Goldman realizes that these procedures mainly are dependent on the honesty of the applicants and are thus subject to abuse. However, Goldman contends that this type information can be verified.

In a meeting with my seminar leader, Robert A. Burt, Alexander M. Bickel Professor of Law, the question of set-asides sparked an interesting discussion. Bo (the name Professor Burt preferred to be called) felt that affirmative action set-asides for minorities and women who were quite well-off was not the intent of Title VII of the Civil Rights Act of 1964. Bo went on to state that wealthy minorities and women were no different than wealthy white men who were not deserving of preferential treatment. Bo related to me his personal experiences with some wealthy minority business people which led him to the belief that they tended not to be concerned about the economic and social well being of minorities less fortunate than themselves. Professor Burt felt that the resources these people received could be put to better use by more deserving minorities and women. I on the other hand had a different view of set-asides for wealthy minorities and women. I felt the set-asides were still necessary regardless of the concern wealthy minority and women demonstrated for their less fortunate counterparts. I believed that even those these individuals had reached a certain status that they were still subjected to discrimination in some form and needed affirmative action to keep the playing field level. I also contended that I knew some wealthy business people who have done a great deal to help out the less fortunate in the community. As I stated earlier, Toni Massaro asserted that there are some conflicts that cannot be resolved. Discussions such as these are good because it gives an individual a chance to be exposed to a different point of view. It also leads one to conclude that there are no right or wrong answers to some issues and that we need to respect each others opinions when resolution or a common opinion can not be reached. I strongly believe that this is an important lesson that my students need to learn. Thus, I am going to have my students write position papers on whether well-off minority and women business owners are entitled to preferential treatment under affirmative action. To insure that both sides of the issue are fairly discussed the position the students will take will be chosen by random selection with an equal number of chances allotted for each side of the issue.

Irving Thalberg, author of *Themes in the Reverse Discrimination Debate*, concedes that it is likely that “the more vile and flagrant an injustice was, the more its victims will be hindered from developing the cognitive skills or ambition needed in today’s job market” (Thalberg 1980, p.143). Thalberg asserts that American racism has not only left its imprint on every black, regardless of wealth or position, but has also fomented the development of the kind of self-doubt, self-hatred, and negative self-image that leads to incapacitating sense of lesser worth (ibid, p.146). This feeling of lesser worth according to Thalberg is a great handicap in the job market. Just before our summer vacation began I had an interesting conversation with one of my students who admitted in an off-the-cuff way that he was dealing drugs. When I began to counsel him on the dangers of drug dealing the student turned to me and said, “Come on Mr. Rhodes, tell me where am I going to get a job making the kind of money I’m making now?” It seems that the imprint that Thalberg was talking about had made this young man believe that his future did not hold a job for him in which he could make the money he was making selling drugs. In a latter part of my unit I am going to talk about some other segments of affirmative action other than preferential treatment that could benefit a student who has an outlook on life as pessimistic as the above student. Proactive affirmative action programs, training and recruitment programs in particular, can help alleviate this feeling of lesser worth that Thalberg believes minorities feel as a result of being raised in a racist society. I will make sure my students are aware that many employers and business professions continue to recruit minorities and women for employment.

There are several other benefits of affirmative action that must be noted besides employment to groups that have been denied access as a result of first-order discrimination (this type of discrimination refers to when individuals have been discriminated against based on a company or a government policy). Some other benefits of affirmative action are as follows: a. a more rapid integration of the workforce (Goldman 1979, p. 141) b. easing of tensions between sexes and races (ibid) c. development of desirable role models and destruction of negative stereotypes (Greenawalt 1983, p. 64) d. achievement of diversity among the student

body at institutions of higher learning(*ibid*), and promotion of better services for minority communities(Fullinwider 1980, p. 18)

One question people who do not directly benefit from affirmative action programs tend to ask is how long will we need these type of programs? There is no easy answer to this question. Everyone realizes that affirmative action programs can not go on indefinitely or to the point that racism comes to an end in the U.S., because that may never happen. One logical answer might be to assess the effectiveness of affirmative action programs that have been implemented in numerous areas. A practical problem confronting any assessment of the benefits and harms likely to be produced by particular affirmative programs stems from the difficulty of projecting with any degree of accuracy the foreseeable consequences of any complex and far-reaching social policy (of this nature)(Fullinwider 1980, p. 19) There is a strong call coming from many Americans that affirmative action policies should come to an end now. These calls are not just coming from right-wing extremist and conservatives but from such black leaders as Congressman Gary Franks and Supreme Court Justice Clarence Thomas. Gary Franks is calling for an end to quotas and preferential hiring and Clarence Thomas is advocating that American blacks should pull themselves up by their own boot straps as he did. I find it ironic that Gary Franks and Clarence Thomas, two African-Americans, who probably benefited from affirmative action programs that were in existence while they pursued their education and also aided them in their career pursuits afterwards could advocate ending affirmative action programs when they know that America is still a racist society. I guess since they feel they have obtained a certain social and political status that other American blacks can do the same without the affirmative action assistance that was available to help them. I think that Clarence Thomas and Gary Franks are looking at the world through rose colored glasses for now is not the time for affirmative action to come to an end, for it is still necessary!

I think part of the answer to how and when the U.S. can end its affirmative action programs centers on our education systems. Goldman in his book stresses over and over that the most competent should be given the job regardless of their race or sex. Our education systems need to be restructured so that a black or female student from New Haven has the same educational opportunities as students from the more affluent communities of Connecticut. Pouring more funds into urban school systems like New Haven is not the complete answer. Dr. Comer's School Development Program has a motto that says, "It takes a whole village to raise a child!" The child's environment must be made safe so that he can concentrate on learning and not just merely surviving in the dangerous world in which he or she lives. In addition, there must be decent housing for the child in which to live. The child's parents can not be left out of this equation. The parent must have a decent job so they can earn enough money to support their family. Once we have all of these things in place as a nation and we start to produce urban students that compete with their affluent counterparts and we create a society with rules that will adhere to Goldman's principle of hiring the most competent individual will we be ready to end affirmative action in my opinion. I intend to have my students in class write a short essay about when and under what circumstances they think affirmative action should be alleviated. (*Lesson Plan #1*)

There are two critical issues that need to be discussed at this time. One issue focuses on the examination of the effect that affirmative action has on the displaced nonminority male person. The other issue involves tests the Supreme Court has established to help mediate decisions involving affirmative action. No one can deny that when preferential treatment occurs that it is at someone else's expense. If you happen to be the person who is the victim of such an action you can hardly be expected to see affirmative action as a just policy. This is illustrated by all of the individuals who challenged the constitutionality of affirmative action programs all the way to the Supreme Court. For some of these individuals any argument put forth in favor of affirmative action being constitutional and just would just fall on deaf ears. So it is not my intent in this part of my unit to submit arguments that would justify affirmative action to these individuals, but to present arguments so that my

students can understand why in some cases affirmative action is constitutional and just in spite of the harm it may cause a few individuals.

Michel Rosenfeld in his book *Affirmative Action and Justice* states that Robert Fullinwider believes that a strong case can be made that preferential treatment of blacks at the expense of whites can lead to a net benefit for society. (Rosenfeld 1991, p.96) Fullinwider contends that black gains due to affirmative action will have a beneficial effect on society as a whole, whereas the corresponding white losses will only have a detrimental effect on those individuals who are directly affected. Students will need to keep in mind that many affirmative action programs set goals for the number of minority or women applicants it will hire or accept into its educational institution. These affirmative action goals never comprise a majority of the applicants hired by an employer or admitted to these educational institutions. Usually these goals reflect the percentage of minorities who live in the area, meaning the percentage is usually around 20%-25%. Many times it is less than this. What students should realize is that the remaining 75%-80% on a particular job site or at an educational institution are nonminority, also prior to affirmative action it was not unusual to have businesses and schools comprised of only 1%-3% minority. The same held true for women. Fullinwider also believes that black gains also served as inspiration to other blacks in the community without having a negative effect on the white community because whites continued to hold onto most of the positions that wield power and prestige and the general level of relative affluence would not be threatened by isolated individual failures (Rosenfeld 1991, pp,97-98).

Rosenfeld cites Judith Thompson, whose work, "Preferential Hiring" appears in *Equality and Preferential Treatment*, as saying that a white male has only an equal opportunity right to the job for which he competes. The job according to Thompson belongs to the community, which is ultimately responsible for its allocation. Thompson also believes that the community may if it feels necessary, limit the white male's right to equal opportunity in pursuit of a great benefit. Ms. Thompson contends that compensating those whom one has wronged is compelling and likely to provide great benefits. Thompson thus asserts that since the community has wronged blacks and women in the past for which it owes them compensation, preferential treatment amounts to a just and suitable means to achieve such compensation (Thompson 1977, 35-36). After reading about what Thompson had to say on the subject of affirmative action I couldn't help but see a link between her views and eminent domain. Eminent domain allows a community to acquire private property (at a fair market value) if it is in the interest of the community. Thus, if affirmative action is viewed in this manner, the U.S. government was justified in implementing this corrective policy to make up for past harms to minorities and women. One thought must be noted with this line of thought, and that is that the white male that is displaced by an affirmative action program is not compensated directly as an individual is in a case of eminent domain. However, society as a whole benefits as a whole when we have diversified work forces and educational institutions. For diversification in education and employment is the hammer which can knock down the walls of negative ethnic stereotypes which exist in the United States today which have been allowed to grow and fester in the past when minorities and women have been denied equal opportunities.

All of the major challenges to affirmative action programs have occurred because individuals felt that their rights had been violated under the equal protection clause of the Fourteenth Amendment. Owen Fiss who wrote "Groups and the Equal Protection Clause" in 1977 which was published in *Equality and Preferential Treatment* states that the Supreme Court has adopted the antidiscrimination principle as a mediating principle for interpreting the equal protection clause. Fiss goes on to point out that the antidiscrimination principle operates in three steps. The first step reduces the equality established by the equal protection clause to a purely formal requirement insisting only that like cases be treated alike. In the second step the antidiscrimination principle cannot merely ban discrimination or classification, it can only prohibit "arbitrary"

or “ invidious” classifications (Fiss 1977, p. 86) Finally, in the third step is included the identification of the criterion of discrimination employed in a particular legislative classification and determining whether the discrimination in question is sufficiently related to the stated purpose to be served by the legislation to be constitutionally permissible (ibid). Rosenfeld states this third step requires judicial review of the “fit” between legislative “means” and legislative “ends”. According to this principle the judges would be value neutral and just be relegated to determine if the law fit into the above equation for the law to be judged constitutional or not. A principle as rigid as this is subject to be vulnerable to cases which do not fall within these boundaries. As a result, the Supreme Court established three different standards of fit. The first standard only applied to cases involving social and economic legislation, it was referred to as the minimum scrutiny standard. This standard requires the classification to be rationally related to a legitimate legislative end. The second standard known as the intermediate level standard was more stringent and was applied to gender-based classifications. This standard required that gender-based classifications be substantially related to the achievement of an important state purpose. The third standard which was the most stringent, the strict scrutiny test, applied to racial and ethnic origin classifications among other things. In this instance it must be shown that the challenged classification is necessary to achieve a compelling state purpose. I assume these are still the steps and standards that the Supreme Court used also to determine the constitutionality of affirmative action programs.

It is at this time I would like to provide my students with a brief history concerning how affirmative action became a policy of the United States. The idea of compensation or preferential treatment did not originate with the establishment of affirmative action. The idea of compensating a group for past harms has its origins with the philosophy which created the Freedmen’s Bureau in 1865. As stated earlier the phrase ‘affirmative action’ was first used in relation to the Wagner Act of 1935. However, the phrase “affirmative action”, which, in a general sense, means the taking of steps to ensure that past practices of racial discrimination have no future discriminatory effects, appeared first in the counsels of the Eisenhower administration and then in an executive order issued by President Kennedy in 1961 (Eastland and Bennett 1979, p. 126). It is important to emphasize and make students aware that the executive branch played a key role in establishing the U.S. affirmative action policy. As we will see later it was two presidential orders which served as an impetus for the growth of affirmative action programs throughout many segments in American society.

The legal justification for affirmative action programs can be traced back to Title VII of the Civil Rights Act of 1964 (Goldman 1979, p. 204). Goldman goes on to state that this act prohibited discrimination based on race, sex, national origin, etc. This act also prohibited employers from developing programs which entailed preferential treatment to any individual or group. Title VII, section 703 (j) specifically states: “Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer.” (Eastland 1979, p.130) The intent of Congress on this point is made evident by the conversation during a debate on this issue by Senator Hubert Humphrey of Minnesota and Senator George Smathers of Florida. The conversation went as follows:

Mr. Humphrey: [T] he Senator from Florida is so convincing that when he speaks, as he does, with the ring of sincerity in his voice and heart, and says that an employee should be hired on the basis of ability—Mr. Smathers: Correct.

Mr. Humphrey: And that an employer should not be denied the right to hire on the basis of ability and should not take into consideration race—how right the Senator is . . . But the trouble is that these idealistic pleadings are not followed

by some sinful mortals. There are some who do not hire solely on the basis of ability. Doors are closed; positions are closed; unions are closed to people of color. That situation does not help America

...

I know that the Senator from Florida desires to help American industry and enterprise. We ought to adopt the Smathers doctrine, which is contained in Title VII. I never realized that I would hear such an appropriate description of the philosophy behind Title VII as I have heard today.

Mr. Smathers: Mr. President, the Senator from Minnesota has expressed my doctrine completely (Eastland and Bennett 1979, pp. 130-131)

In accordance with the Civil Rights Act of 1964 President Johnson issued two executive orders which seemed to embody the philosophy of Title VII asserting that people should be hired on the basis of ability without giving preference to an individual's or group's sex, race, religion, or national origin. The first order was Executive Order 11246 which was issued in 1965. This order was amended by Executive Order 11375 to include "sex" in 1967. Together, the orders required the following: The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Even though the intent of Congress and the two executive orders issued did not advocate preferential treatment in regards to affirmative action, that was exactly what resulted with the development of many affirmative action programs.

There are two reasons why preferential treatment developed. Ironic as it might seem it was President Johnson who was responsible in part for this occurring. Johnson's 1965 commencement speech at Howard University provided the direction his administration would take in relation to affirmative action programs. Johnson said it was not enough to give blacks freedom and "legal equity" and "equality as a right"; rather, it was now compelling that blacks have "equality as a fact" and "equality as a result" (Eastland and Bennett 1970, pp. 129-130). The equality of "fact" and "result" that Johnson had referred to in his 1965 commencement speech seemed to greatly influence the actions of the Department of Labor which was responsible for developing guidelines for affirmative action programs at this time. Terry Eastland and William J. Bennett in their work *Counting by Race; Equality from the Founding Fathers to Bakke and Weber* stated that in 1967 the Department of Labor issued regulations pursuant to Johnson's executive orders required that an affirmative action program be a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of these procedures was to create equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected at specific and meaningful procedures is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and thus, to increase materially the utilization of minorities and women, at all levels and in all segments of his workforce where deficiencies exist (Eastland and Bennett 1979, pp. 131-132). This Department of Labor regulation was referred to as Order No. 4. I intend on discussing with my students the difference between a goal and a quota at this time. A quota is more rigid in nature than a goal in that a quota requires that an actual number be reached in order for compliance. Whereas, in the case of a goal it is an indicator of probable compliance that an employer or institution aims to meet but is not required to meet. One major reason, in my opinion, goals seem to be more acceptable than quotas is the fact that quotas lock an employer or institution into a rigid number, thus forcing them into accepting individuals who might not meet their minimum

requirements.

Order No. 4 had the force of law behind it. The first case in employment that the Department of Labor attempted to enforce Johnson's executive orders via the department's regulations occurred in Philadelphia in 1969 with the construction industry. The Philadelphia Plan as it was known required construction contractors with the city to hire minorities in accordance with numerical goals. Philadelphia was chosen in large part because of its history of discrimination against blacks in the construction industry. The Department of Labor felt that its plan would not hold up in court if they chose a city where there was not a history of discrimination. The plan was challenged in the courts and upheld. It served as a model for other affirmative action programs across the nation. After their success in Philadelphia the department did not limit itself to requiring the development of affirmative action in areas where there had been a history of discrimination against blacks because it felt that opportunities for all minorities today had been narrowed because of "200 years of American history." (Eastland and Bennett 1979, p. 133) As will be shown later, the Supreme Court would reject this philosophy and would accept only affirmative action programs in cases where actual harm or discrimination cases against individuals or groups could be proven. In cases involving universities the authority to enforce Order No. 4 was delegated by the Labor Department to the Civil Rights Division of HEW. In October of 1972 HEW issued its own set of guidelines in respect to Order No. 4 according to which each higher learning institution had to develop its affirmative action program. These guidelines in addition to ensuring nondiscrimination, mandated that employers make efforts to recruit, employ, and promote members of groups that had formerly been excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer (Goldman 1979, p. 205). These guidelines stipulated that goals are to be distinguished from quotas in that goals are required, whereas quotas are neither required nor permitted.

Order No. 4 was in direct contradiction with the intent of Title VII of the Civil Rights Act of 1964 which provided the legal basis for affirmative action. I think the Department of Labor was correct in its actions at this time because any affirmative action program without goals and timetables would have resulted in no change in the status for minorities and women in employment and education. There are two cases in point that seem to substantiate my point in this regard. Both of these cases originated in the state of Alabama and involved affirmative action orders handed down by the courts. In one case, *U.S. v. Fraser* (1970), the court did not set any goals or timetables for Alabama state departments to hire more black applicants, the court simply mandated that the various state departments recruit more blacks. Whereas in *NAACP v. Allen*, a case involving the Alabama state highway patrol, Judge Frank Johnson ordered that one black applicant be hired for every white applicant hired. Judge Johnson took this stance because in the 37 year existence of the Alabama highway patrol not one black applicant had ever been hired. The judge refused to accept the highway patrol department's excuse that they could not find one acceptable black applicant. Even though the Alabama state highway patrol department told Johnson they had even advertised in the *Black Dispatch*. The fact that the department also asked the judge prior to his ruling in the case to ask the NAACP, the Urban League, and the SCLC to give them some names of some black applicants did not deter Judge Johnson from handing down his affirmative action ruling. What resulted after Judge Johnson's decree was that more blacks were hired by the Alabama highway patrol over the next few years than all the seventy-five other departments of the state departments put together. I think these two cases illustrate that an affirmative action program without goals results in very little change or no change at all.

I obtained this information about these Alabama cases from the transcript of a forum that was held on the topic, "Affirmative Action and the Constitution" held on May 21, 1985. John Charles Daly served as moderator. The participants were William B. Allen, Drew S. Days III, Benjamin L. Hooks, and William Bradford Reynolds. I plan on using this transcript as an educational tool in the teaching of my unit. Prior to examining the actual

Supreme Court cases regarding affirmative action I will have several of my students represent the members of this panel and read their respective transcripts. After each response to a particular issue regarding affirmative action I will lead the audience (the rest of my class) in a discussion on each participant's position on that particular issue. A copy of this forum's transcript can be found in Yale's Sterling Memorial Library, the call number for this work is KF 4755.5; Z9;A33X;1987(LC). **(Lesson Plan #2)**

Starting with its 1978 decision in *Bakke* according to Michel Rosenfeld in *Affirmative Action and Justice* the Supreme Court has handed down before 1990 ten decisions which squarely addressed the legitimacy of affirmative action. (Prior to the *Bakke* case it should be noted that the Supreme Court refused to hear the *DeFunis v. Odegaard* case in 1974 which involved a constitutional challenge to a preferential admission program for minority applicants to a state law school because the Court said the case was moot.) The ten decisions covered affirmative action in several different contexts—public university admissions, employment hiring, promotions and layoffs, public work contracts. Rosenfeld states that what is remarkable about these ten decisions is that the Supreme Court failed to establish authoritatively or clearly the boundaries of affirmative action. Rosenfeld based this belief on the fact that in none of these cases where the constitutionality of affirmative action was addressed did a majority of the Court join together in a single opinion. It was not until two years after the *Bakke* case that for the first time the entire Supreme Court would address the constitutionality of affirmative action programs in *Fullilove v. Kluznick*. In *Fullilove* six of the justices held that the affirmative action program involved in this case was constitutional. Rosenfeld points out that it was not until *City of Richmond v. J. A. Croson Co.* (1989) did a majority of justices agree on a constitutional standard to be used in affirmative action cases. Rosenfeld contends that since the *Bakke* decision there are two distinct positions that the Supreme Court has taken. The first position interprets equal protection as requiring that the same protection be given to every person regardless of race. The other position proposes that in order to treat some people equally, we must treat them differently (Rosenfeld 1991, p. 166) I intend to impress upon my students that affirmative action is not only a controversial, unresolved, divisive issue for average American citizens but also for the Supreme Court. This is evident by the close split decisions and the lack of unanimous decisions regarding affirmative action. It seems that the constitutionality of affirmative action will depend on the beliefs of the Supreme Court justices who presiding at the time.

I would like to devote the next part of my unit to examining several key cases involving affirmative action.

***Regents of University of California v. Bakke* , 438 U.S. 265 (1978)**

In 1969 the medical school at the University of California at Davis instituted an affirmative action plan that would ensure a higher admission of minorities. Allan Paul Bakke a mechanical engineer, who was at the time thirty-two years old, applied in the fall of 1972 to the medical school. He was rejected. Bakke had an excellent G.P.A. while an undergraduate at the University of Minnesota and had achieved distinguished marks on the Medical College Admissions Test. After learning of the special admissions program for minorities at Davis, Bakke felt that he was a victim of reverse discrimination. Allan Bakke reapplied in the fall of 1974; once again he was rejected. After this second rejection Bakke instituted a suit in Yolo County Superior Court accusing the University of California with having discriminated against him based on his race.

A closer look at the special admission program of the University of California at Davis is needed at this time. The admission program was reserving 16 of its 100 slots for this medical school class in question for minorities. The remaining 84 places would be competed for by minority and nonminority applicants on an equal basis. The university had four main reasons for its special admissions program. They were: 1. integrate the medical profession 2. counter discrimination 3. increase the number of physicians willing to work in underserved areas 4. obtain the educational benefits that flow from an ethnically diverse student body.

On June 28, 1978 the Supreme Court ruled five to four that Allan Bakke had been wrongly denied admission to Davis' medical school. There were two major aspects to the decision. One, the Supreme Court gave qualified approval to affirmative action. However, the Court rejected the rigid quota used by the medical school to determine admission. Rosenfeld states that the Justices who decided the Bakke case can be broken into three groups. The first group was comprised of four justices, they were Justices John Paul Stevens, William Rehnquist, Potter Stewart, and Chief Justice Warren Burger. This group refused to address the constitutionality of affirmative action at this time because they felt that the dual admission program violated statutory law (Title VII of the Civil Rights Act of 1964). The second group was also comprised of four justices. They were Justices William Brennan, Thurgood Marshall, Byron White, and Harry Blackmun. This group embraced the global equality position and formulated a fairly broad constitutional justification for affirmative action. The third group just consisted of Justice Lewis F. Powell, Jr. Powell felt affirmative action programs could be constitutional under certain circumstances. But, in the *Bakke* decision Powell sided with the first group because he felt that the affirmative action plan at stake in *Bakke* was too overly broad to pass constitutional muster. Consequently, he agreed with the first group of Justices that Bakke had been wrongly denied admission to the Davis medical school. It should be noted that according to Eastland and Bennett Powell based his decision that the Davis dual admission program was unconstitutional not on the fact that it was a violation of statutory law but that it was a violation of the Fourteenth Amendment. Justice Powell stipulates in his opinion that quotas are only acceptable in cases where wrongdoers are compensating the actual victims of their discriminatory actions. Powell goes on to state that preferential treatment can be constitutional if it is used to promote diversity among the student body and if it guarantees that each applicant regardless of race shall receive individual consideration with respect to each of the places that the state university has decided to allocate. One such plan Powell approved of based on the above criteria was the Harvard Plan. The Harvard Plan gave full consideration to each applicant with race counting as one among the many factors weighed to arrive at an admission decision.

Reaction to the *Bakke* decision fell into three camps. The first group was dismayed by the decision and believed that the Supreme Court had impeded if not halted minority progress by invalidating explicit racial quotas. African-American newspapers like New York City's *Amsterdam News* fell into this category. Their headline in response to the *Bakke* decision illustrates this point, it was—"Bakke—We Lost". Peter Cohn (co-counsel for the regional office of the NAACP in Washington), Tyrone Brooks (national field director for the Southern Christian Leadership Conference), Tom Wicker (of the *New York Times*), and Jose Medina (of the Chicano political group *La Raza*) expressed similar strong feelings that the Supreme Court decision had been a blow against affirmative action. The second group was made up of mostly journalists and legal scholars who considered the decision positive because affirmative action was not found unconstitutional. People such as A.E. Howard (of the Virginia Law School), Charles Allan Wright (of the Texas Law School), Lawrence Tribe (of the Harvard Law School) and Benno Schmidt (at the time, a faculty member of the Columbia Law School) were a part of this group. Newspapers such as the *Washington Post* and the *New York Times* also viewed the Bakke ruling as positive. The third group was made up of people who were responsible for administering and supervising affirmative action programs. These individuals believed that the *Bakke* decision would have little effect on what they did or were doing in regards to affirmative action. For example, Eleanor Holmes Norton of the E.E.O.C. commented, "My reading of the decision is that we are not compelled to do anything differently from the way we've done things in the past, and we are not going to ." (Eastland and Bennett 1979. p. 176) President of the American Council on Education, Jack Peltason, at the time felt that the Bakke ruling left options open to affirmative action programs. (ibid)

I agree with Justices Stevens, Rehnquist, Stewart, and Burger that the Davis's medical school special admission violated Title VII of the Civil Rights Act of 1964. I think students need to understand that the

medical school in establishing a quota for minority applicants directly violated Title VII. The medical school may have had valid reasons for developing its special admission policy, but its program did violate the law. Fortunately however, the *Bakke* decision did not find affirmative action to be unconstitutional; this point I intend to stress to my students.

***United Steelworkers v. Weber* , 443 U.s. 193 (1979)**

I found the *Weber* decision on the surface to be somewhat surprising in light of the Supreme Court ruling in *Bakke* . The Court upheld by five to four a private employer's voluntary racial quota under Title VII of the Civil Rights Act of 1964. For in the previous year the Court had ruled that the University of California at Davis medical school's special admission program was invalid because it had established a quota. Upon further reading of the Supreme Court's *Weber* decision it became clear to me how the *Weber* and *Bakke* cases were different and how the court was able to arrive at different decisions with the similar issue involved in each case. According to Rosenfeld *Weber* did not raise any constitutional equal protection issues and did not address what Title VII requires. The major question in *Weber* was whether Title VII forbade a private employer from voluntarily adopting a racial quota to remedy a racial imbalance on its workforce. The phrase 'the employer voluntarily adopting a racial quota' in the above statement can be misleading because the racial quota established in *Weber* was established as a result of a collective bargaining agreement between the employer and his employees' union. It must be stressed that prior to this affirmative action plan black workers had been excluded from the craft union, thus denying blacks access to skilled craft jobs. The employer at the time was subject to federal prosecution for its discriminatory practices at several of its plants other than the one involved in *Weber*. This combined with the fact it had reached an agreement with the union to stop its discriminatory practices against blacks, the company decided to establish an affirmative action program at the steel plant in question in the *Weber* litigation. The affirmative action plan called for the establishment of a training program for skilled craftworkers. Selection to this program would be based on seniority. There was a proviso in this program which stated that fifty percent of the trainees had to be black. *Weber*, a white worker was rejected by the program even though he had more seniority than several of the black workers who were accepted. It was at this point that *Weber* instituted a class action suit alleging that the plan violated Title VII. Justice Brennan wrote the opinion for the majority upholding the legality of the plan under Title VII. Brennan stated, "The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured 'to open employment opportunities for Negroes in occupations which have been traditionally closed to the them'"(these remarks he quoted from Senator Humphrey).(Rosenfeld 1991, p. 173) Justice Brennan believed that since this affirmative action program was a training program its major purpose was in pursuit of equality of opportunity and not equality of result. This being the case, the program was legal under the guidelines established by Title VII of the Civil Rights Act of 1964.

***Fullilove v. Klutznick* , 448 U.S. 448 (1980)**

The Supreme Court upheld in the *Fullilove* case six to three the constitutionality of an affirmative action program enacted by Congress to remedy present inequalities arising from the continuing effects of past discrimination. This was the first time that the Supreme Court dealt with the issue of the constitutionality of affirmative action and the harm preferential treatment causes nonminorities. *Fullilove* involved a challenge to the "minority set-aside" provision of the Public Works Employment Act of 1977. This act provided federal funds for state and municipal public works projects. The minority set-aside provision stated that no funds would be provided for a project unless at least ten percent of the grant is expended for minority business enterprises("MBE"). MBEs were to be awarded contracts even if their bids were not the lowest, provided that their higher bids reflected attempts to cover increased costs due to the present effect of past discrimination(Rosenfeld 1991, p. 175). This point here infers Rosenfeld lies the key to understanding in part

the Supreme Court ruling in *Fullilove*. The set-aside program approved in *Fullilove* appears to be distributive in nature. The intent of Congress was to increase the number of public works contracts awarded to MBEs even if their bids were not the lowest. Congress' language in this particular legislation indicates that the MBEs' higher bids are due to the present effects of past discrimination. According to Rosenfeld, when the Supreme Court interpreted this act they felt that it was the functional equivalent of a compensatory scheme applying only to those who were actual victims of discrimination. The Court based this on the fact that Congress was willing to accept the higher bids of MBEs if the bids were reflective of attempts to cover increased costs due to present effects of past discrimination. Thus, Rosenfeld contends the Court felt that it was justified in the partial setting aside of some contracts to the lowest bidders in order to compensate for past discrimination.

In regards to the effect that preferential treatment had on nonminority businesses, Chief Justice Burger stated: "It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is impermissible." (Rosenfeld 1991, p. 175) Burger went on to state that the nonminority businesses would only be excluded from 0.25 percent of the overall construction contracts. Justice Powell in a concurring opinion also elaborated on the lightness of the burden on nonminority businesses. Powell went on to say that the government interest in enacting the set-aside provision outweighed any "marginal unfairness" to the innocent nonminority businesses (Rosenfeld 1991, p. 175) The *Fullilove* decision addresses only the facts involved in affirmative action before it, leaving the constitutional contours of affirmative action vague and uncertain according to Rosenfeld.

Firefighters Local Union No. 1784 v. Stotts , 467 U.S. 561 (1984)

Stotts involved a consent decree entered in by the city of Memphis, Tennessee and its fire department after the city became a defendant in a class action suit alleging racial discrimination in the fire department's hiring and promotion practices. The consent decree mandated an affirmative action plan setting hiring goals to make the proportion of blacks in the department reflective of the proportion of blacks in the total population. Soon after this decree went into effect the fire department experienced a budget deficit necessitating layoffs. The rule of hand was the last hired are the first fired. As a result, many blacks were now targeted for layoffs. To stop this from happening the decree was modified and an amended layoff plan was adopted in which some nonminority firefighters with more seniority were laid off instead of the newly hired black firefighters. This action led to this modified layoff plan being reviewed by the Supreme Court via the *Stotts* case. The Supreme Court found the modified layoff plan impermissible for several reasons. First, the Court asserted that the initial decree only was supposed to provide a remedy for past hiring and promotion practices. Second, Title VII protected bona fide seniority systems. The only benefit the black firefighters received from this ruling was that the Court said that actual victims of past discrimination "may be awarded competitive seniority and given their rightful place in the seniority roster." (Rosenfeld 1991, p. 177) It seems that what the Supreme Court gave to blacks with one hand in the *Stotts* ruling it took away with the other hand. For the Court also said that an actual victim may not be entitled to be awarded a position similar to that wrongfully denied in the past, if the only way to make such a position available were to have an innocent nonminority employee laid off (ibid). I tend to wonder and question how innocent some of these nonminority employees could be, especially if they are close friends or relatives of the people who did the hiring.

Wygant v. Jackson Board of Education , 476 U.S. 267 (1986)

The *Wygant* case and the *Stotts* case are similar in nature because the central issue in each case was a controversial layoff provision. The outcomes for both cases were also similar in that the layoff provisions in each case was invalidated by the Supreme Court. One major difference between the two cases according to Rosenfeld is that in the *Stotts* case the Supreme Court resolved issues involving the relationship between the

individual and the group and the problem of the innocent third party in layoff situations in the context of the Civil Rights Act of 1964. Whereas, in *Wygant* these same issues were addressed in the context of the Fourteenth Amendment and its equal protection clause.

The *Wygant* case began when the Jackson Board of Education in Jackson, Michigan tried to implement a layoff provision that would maintain the percentage of minority teachers in the Jackson public school system. This provision resulted from a collective bargaining agreement between the Jackson Board of Education and the Jackson teacher's union. The impetus for this provision was the racial tension in the community that had extended into the schools. The Board wanted to maintain its current percentage of minority teachers because they provided positive role models for the minority students. The layoff provision called for layoffs to be based on reversed seniority except that at no time was there to be a greater percentage of minority teachers laid off than the percentage of minority teachers employed at the time of the layoff. The lower federal courts held that the Jackson layoff provision was constitutional under the equal protection clause because it was an attempt to remedy "societal discrimination" by providing role models to minority school children (Rosenfeld 1991, p. 179). The Supreme Court in a five to four decision reversed the lower courts decision and found the layoff provision unconstitutional. No majority on the Court could agree on any single opinion. Justice Powell who wrote the plurality opinion in this case felt that the Jackson Board of Education use of a race-conscious layoff provision to provide role models to its minority students in order to counteract the effects of "societal discrimination" violated the equal protection clause. Another reason why Powell felt that the provision should be invalidated stemmed from when he used the balancing test he announced in the *Fullilove* opinion in *Wygant* he concluded that the burden of innocent nonminority third parties that resulted from the layoffs was much heavier than the innocent nonminority third parties in *Fullilove*. Consequently, he felt the provision was constitutionally impermissible (Rosenfeld 1991, p. 181).

Local 28, Sheet Metal Workers International Association v. E.E.O.C. , 478 U.S. 421

In this particular case the Supreme Court ruled that it was valid to use race-conscious remedies under Title VII and under the Constitution in a case such as this when there was extreme resistance against all efforts, including judicial decrees, to put an end to systematic racial discrimination preventing blacks and Hispanics from union membership. One such race-conscious remedy the Court approved of in this instance was the use of numerical goals. After reviewing the history of Local 28 it is quite understandable why the Court took such a rigid posture. The Sheet Metals Union was founded in 1888 with the intent purpose of creating white local unions such as Local 28. Local 28 was established in 1913. Although the International Union formerly repealed its racial restrictions in 1946, Local 28 did not admit any blacks until 1969. Local 28 ran a apprenticeship program that was a prerequisite to union membership. Union membership was a requirement to secure employment in the New York City metropolitan area. Thus, blacks and Hispanics were denied employment in the construction industry because they could not become members of Local 28. As a consequence of this situation the state of New York took action against Local 28 in 1964. This led to a state court order requiring Local 28 to adopt a race-neutral procedure for selecting apprentices. (Students should note that litigation in this matter began in 1964 and that it was not until five years later in 1969 that the first black was admitted to Local 28!) When Local 28 refused to abide by the state court order the federal government (E.E.O.C.) brought suit against Local 28 in federal district court in 1971. The federal court found that Local 28 excluded minorities by requiring an entrance examination and the completion of an academic program not related to job performance. In addition, Local 28 provided union funds to subsidize special training sessions for friends and relatives of union members to help them prepare for the apprenticeship examination. Local 28 also restricted its membership at various times to exclude minorities. As a consequence, the federal court set a goal for Local 28 insisting that Local 28 have a 29% percent nonwhite membership by 1981. When Local 28 failed to comply with this order they were dragged back into federal court and ordered to have 29.23% of its members be

minority by 1987. Local 28 appealed this last decree, however it was upheld by the Circuit Court of Appeals for the Second Circuit. The Supreme Court affirmed the Second Circuit's decision. Justice Brennan in writing the plurality opinion in this case stated that the purpose of Title VII of the Civil Rights Act of 1964 was to provide equal opportunity. Brennan went on to state that preferential remedies are in order to make meaningful equality of opportunity possible. I am going to have my class compose a letter to be sent to Local 28 to find out their current status in regards to its minority membership.

Lesson Plan 3

The final four affirmative action cases I wish to cover in my unit I intend to have each of my classes break into four groups. Each group will be given excerpts from Michel Rosenfeld's book *Affirmative Action and Justice* covering each of the particular cases briefly discussed below. Each group will be asked to prepare a brief synopsis outlining the key aspects of the case. One student from each group will be responsible for reporting back to the class the major aspects concerning their case. Another student in the group will have the responsibility of looking up any words the group does not know from their excerpt. This student will compile a list of these words and share them with the class prior to their group report. After which, we will discuss each case and its Supreme Court decision. The four cases are as follows:

1. **United States v. Paradise** , 480 U.S. 149 (1987) The Supreme Court in a five to four decision decided that a preferential promotion plan benefiting minority individuals who were actual victims of past first-order discrimination could be justified under the equal protection clause. Excerpt-pp. 193-197
2. **Local No. 93, International Association of Firefighters v. City of Cleveland** , 478 U.S. 421 (1986) The Supreme Court ruled in the majority affirming a lower court's consent decree providing that a fixed number of already-approved promotions be awarded to minorities and that, for a limited period of time, a certain percentage of future promotions be reserved for minorities. Excerpt-pp. 192-193
3. **Johnson v. Thompson Agency, Santa Clara County, California** ,480 U.S. 616 (1987) This was the first time the Supreme Court addressed an affirmative action case which dealt with preferential treatment for women. It ruled six to three to uphold under Title VII the validity of a preferential promotion plan favoring women. Excerpt-pp. 197-204
4. **City of Richmond v. J. A. Croson Co.** , 109 S. Ct. 706 (1989) The Supreme Court decision in this case declared unconstitutional a MBE devised by the Richmond, Virginia City Council. Excerpt pp. 204—214

Before concluding my unit there are few things I would like to bring to the attention of my students at this time. I would like to let my students know that affirmative action is still a hotly debated and volatile issue in many venues in the United States. This is evident by the fact that the Supreme Court has never handed down an unanimous opinion in any of the legal challenges to affirmative action. Also, in several of the cases we have discussed in this unit the Supreme Court has showed the divisiveness that exists concerning affirmative action by several of its rulings being five to four. I hope at this point in the unit that my students have arrived at the

same answer that I have come to regarding the question of whether affirmative action is still necessary; and that is an unequivocal 'yes'.

I would like to conclude my unit with two activities. First, I intend to review the definitions my students obtained from their parents concerning the meaning of affirmative action and have my students discuss these definitions in light of what they have learned and heard about affirmative action. Second, I intend to have several speakers who are responsible for implementing or supervising affirmative action visit my class and discuss with my students their views and programs concerning affirmative action affiliated in their area of employment or education. I would like to have representatives from the New Haven Public School System, Yale , SCSU, and SNET talk to my students concerning affirmative action.

Teacher/Student Bibliography

**Recommended for student use.

**American Enterprise Institute for Public Policy Research, "Affirmative Action and the Constitution", Washington D.C., 1987. This is a transcript of a forum held on May 21, 1985. The moderator was John Charles Daly. The participants were William B. Allen, Drew S. Days III, Benjamin Hooks, and William Bradford Reynolds. During the forum the participants present valuable information regarding affirmative action that is of benefit to the teacher as well as the student.

**Eastland, Terry and Bennett, William J. *Counting By Race; Equality from the Founding Fathers to Bakke and Weber* . New York: Basic Books, Inc., Publishers, 1979. This book contains good accounts of the Bakke and Weber decisions. Students in 8th grade and high school would be able to read and understand the information in this book.

Fiss, Owen. "Groups and the Equal Protection Clause"—in *Equality and Preferential Treatment* . eds. Cohen, Nagel and Scanlon. Princeton: Princeton University Press, 1977. Excellent source on the standards and steps the Supreme Court uses in handling affirmative action cases.

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Greenawalt, Kent. *Discrimination and Reverse Discrimination* . New York: Alfred A. Knopf, 1983. This source provides insightful information on the reverse discrimination argument.

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some powerful arguments in favor of affirmative action.

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