

# 'REVERSE DISCRIMINATION': THE POLITICAL USE OF LANGUAGE

Philip L. Fetzer\*

"I don't know what you mean by 'glory,'" Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock down argument for you!"

But 'glory' doesn't mean 'a nice knock-down argument,' "Alice objected. "When I used a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I chose it to mean—neither more nor less."

"The question is" said Alice, "whether you can make words mean so many different things."

The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll, *Through the Looking Glass*

## I. INTRODUCTION

A battle is being fought over the issue of what is or is not an acceptable remedy to correct the historical exclusion of minorities in college admissions and employment practices. It is the thesis of this paper that the phrase "reverse discrimination" was adopted as a political weapon in this battle.

If one is opposed to "discrimination," then must one also oppose "reverse discrimination"? If the latter is simply a reverse of the former, then it should be equally unacceptable to all people who support equality of rights. But is it? Does it have a commonly understood meaning?

A few years ago a New York Times reporter noted:

In political Washington, it sometimes seems almost everybody likes 'affirmative action,' nobody likes 'reverse discrimination,' and hardly anybody likes 'quotas.' All of which may be confusing to people who think of 'affirmative action,' 'reverse discrimination,' and 'quotas' as different phrases meaning more or less the same thing. . . But each of these terms stands for something far different, depending on who is doing the defining.<sup>1</sup>

Words which do not appear to be political may have long-lasting effects upon political beliefs and perceptions. "The chief function of any political term is to marshal public support or opposition. Some terms do so overtly, but the more potent ones . . . do so covertly."<sup>2</sup> One such term is "reverse discrimination."

The goal of this paper is to demonstrate that "reverse discrimination" is a covert political term which should be removed from the vocabulary of any serious academician or lay-person. As it is currently used, it should be identified as an appeal to a particular political ideology or policy preference, rather

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\* California Polytechnic State University, San Luis Obispo. © 1992 Thurgood Marshall Law Review.

1. Stuart Taylor Jr., *A Job Is a Job, Is a Job, Until It's a Job Denied*, N.Y. Times, July 24, 1984, at 16, col.4.

2. Edelman, *The Political Language of the Helping Professions*, in *Language and Politics* 45, 47 (Michael Shapiro ed. 1984).

than accepted as an expression which is neutral in tone with a commonly accepted meaning.

## II. THE TRADITIONAL MEANING OF DISCRIMINATION

The traditional meaning of racial discrimination is rooted in American history. It is understood that slavery in the United States was based on race. After the Civil War settled the issue of slavery, three amendments were added to the Constitution to clarify the status of former slaves. The dominant goal of these amendments was to be "the freedom of the slave race. . .and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."<sup>3</sup>

In the latter part of the nineteenth century numerous states adopted "Jim Crow" laws. These segregation laws were used as a mechanism for excluding Blacks "because they were thought inferior and undesirable; and they were really discriminated against, because they were Black, and it was an insult of the most fundamental kind."<sup>4</sup> The effect of such laws was to place Black Americans in "a position of political powerlessness" that required "extraordinary protection from the majoritarian political process".<sup>5</sup>

The rise of the Ku Klux Klan, countless incidents of brutality directed at Black Americans, and the reluctance of Congress to adopt an anti-lynching law exemplify the continuing reality of discrimination in the aftermath of the Civil War. Black minorities found little sympathy from the White majority until well into the twentieth century. The landmark decision of the Supreme Court to outlaw segregation in the public schools in 1954 marked the beginning of a new era in race relations.<sup>6</sup>

The Civil Rights movement, which began with the Montgomery bus boycott in 1955, culminated in the adoption of major legislation affecting Black Americans. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 were the most important products of an era of social activism.

## AFFIRMATIVE ACTION

The term "affirmative action" originated with Executive Order No. 10925 issued by President Kennedy in 1962. Its main provisions include: (1) not discriminating against traditionally disfavored minorities; (2) advertising as an "equal opportunity employer"; and (3) making special efforts to recruit qualified Americans of color for admission and training programs.<sup>7</sup>

The Supreme Court has described the purpose of affirmative action as a method "to dismantle prior patterns of employment discrimination in the future." The relief is to be provided to the class as a whole rather than to individual members.<sup>8</sup> Goals, timetables or quotas may be part of an affirmative

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3. *The Slaughterhouse Cases*, 83 U.S. 36, 71 (1873).

4. *Equality and Preferential Treatment*, (Marshall Cohen & Thomas Nagel et al. eds., 1977).

5. *University of California Regents v. Bakke*, 438 U.S. 265, 357 (Brennan, J., dissenting)(quoting from *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)).

6. *Brown v. Board of Education, Topeka*, 347 U.S. 483 (1954).

*See, infra*, note 14.

7. Steven J. Witosky, *Beyond Reverse Discrimination: The Quest For a Legitimizing Principle*, 4 Nova L.J. 63 (1980).

8. *Martin v. Wilks*, 490 U.S. 755, 787 (1989).

action program.<sup>9</sup>

### DISCRIMINATION: ACTION OR CONDITION?

Discrimination not only has a historical component; it has distinctive meanings depending on whether it focuses on the perpetrator or the victim, the action or the consequences of the action.<sup>10</sup> From the perpetrator's point of view, discrimination describes what someone has "done" or "is doing" to someone else. If discrimination is an act, then the way to end it is to stop discriminating. The following dictionary definition of "discrimination" is action based: "discrimination: . . .1. the act of discriminating . . .3. prejudice or partiality in attitudes, actions, etc., discrimination against minorities."<sup>11</sup>

However, one's understanding of "discrimination" changes dramatically if viewed from the victim's point of view.

From the victim's perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass. This perspective includes both the objective conditions of life—lack of jobs, lack of money, lack of housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual.<sup>12</sup>

If one focuses on the results rather than the actions which lead to the results, then "discrimination" does not end until the conditions, which are a product of discriminatory actions themselves change.

The most important Supreme Court ruling on racial discrimination, *Brown v. Board of Education*,<sup>13</sup> stressed the results, not the actions. Chief Justice Warren described the effects of segregation on school children,

[T]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.<sup>14</sup>

The difference in these perspectives is vital to the debate over "reverse discrimination." From the perpetrator's view, if an action appears to be similar to what has been called discrimination in the past, then it too, is discrimination. However, if the focus is on conditions, it is clear that "reverse discrimination" is based on an illusion. Many Americans of color have lived as a "perpetual underclass" based on race which White Americans have never experienced.

### IS IT "DISCRIMINATION"?

Another way of understanding the meaning of discrimination is through logical analysis. Since "[a] white majority is unlikely to disadvantage itself for reasons of racial prejudice," and the overwhelming majority of legislators who adopted race conscious legislation in the 1960s were white men, then one might ask: "Is it conceivable that the white majority would choose to discrimi-

9. Kelly Conlin, *Minority Hiring Rulings Puts Concerns on Notice*, N.Y. Times, July 4, 1986, at D1.

10. Alan D. Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1052-1053 (1978).

11. *Funk and Wagnalls Standard College Dictionary*, 380 (1962).

12. Freeman, *supra* note 11, at 1052-1053.

13. 347 U.S. 483 (1954).

14. *Id.* at 494.

nate against itself?"<sup>15</sup>

In 1975, a New York woman argued that the University of North Carolina violated her rights because the university had a policy which favored children of alumni and state residents over out-of-state applicants.<sup>16</sup> Was that discrimination? Are colleges discriminating when they admit football players or musicians while rejecting students with higher SAT scores? Is it discrimination to give extra points to the scores of veterans who take civil service exams while providing no such benefits to non-veterans?<sup>17</sup>

No successful legal challenges nor allegations of "reverse discrimination" have been raised over admissions or hiring policies such as those just described. Why? Traditionally, a university is given wide latitude in determining which students to admit. Thus, legislation has been accepted which confers special benefits to veterans because of their prior service to the nation. It is only when race or gender are significant factors that the term "reverse discrimination" is used. What is meant by "reverse discrimination"?

### III. REVERSE DISCRIMINATION: POPULAR DEFINITIONS

The term "reverse discrimination" was first used in the popular media in 1974 after the Supreme Court rendered its decision in *DeFunis v. Odegaard*.<sup>18</sup> The case involved charges of racial bias in law school admissions. The conservative columnist, James Kilpatrick, wrote "[A] more familiar name for this abnormality is 'reverse discrimination.' The short and ugly word is racism."<sup>19</sup>

In 1976, U.S. News & World Report commented on "a practice known as reverse discrimination," without defining the term. The implication of the article could be readily inferred from the cartoon which accompanied it. Titled "that unwanted feeling," the cartoon showed a puzzled man looking at a blackboard. On the blackboard was written. "white male? forget it!"<sup>20</sup>

That same year, a leading Republican politician used the term. In his first bid for the presidency, Ronald Reagan commented, "[I]f you happen to belong to an ethnic group not recognized by the Federal Government as entitled to special treatment you are a victim of reverse discrimination."<sup>21</sup> Three years later, Republican Senator Orrin Hatch and former Texas Governor, John Connally also used the term.<sup>22</sup>

By the 1980s, "reverse discrimination" had lost its quotation marks and was accepted into popular language. In *Psychology Today*, for example, the term meant giving "somewhat more favorable treatment" to Black men over

15. John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723 (1974).

16. *University of North Carolina is Accused Of Favoring Children of Alumni*, N.Y. Times, Nov. 30, 1975, at 47.

17. Thompson, *Preferential Hiring*, in *Equality and Preferential Treatment* 34 (Marshall Cohen & Thomas Nagel et al. eds., 1977).

18. 416 U.S. 312 (1974).

19. James J. Kilpatrick, *The DeFunis Syndrome*, Nation's Business, June 1974, at 13.

20. *Court Turning Against Reverse Discrimination?* U.S. News & World Report, July 12, 1976, at 63.

21. Jon Nordheimer, *Reagan Attacks Carter as Vague*, N.Y. Times, July 7, 1976, at A14, col.2.

22. Orrin Hatch, *The Conservative Blues*, N.Y. Times, Aug. 1, 1979, A23, at col.3; Douglas E. Kneeland, *Connally Calls Affirmative Action Divisive and Harmful to Nation*, N.Y. Times, Nov. 11, 1979, A21, at col.5.

white men or women.<sup>23</sup> Attorney General Edwin Meese argued that affirmative action programs were "substituting one kind of discrimination for another."<sup>24</sup>

### LEGAL DEFINITIONS

In discussing "reverse discrimination" authors of law review articles have adopted a wide variety of explanations of the term. It may mean: (a) "discrimination against members of the white majority,"<sup>25</sup> (b) "[p]referential hiring policies" or "affirmative action,"<sup>26</sup> (c) "many different things to different people,"<sup>27</sup> (d) "code words to express emotional or ideological support or opposition,"<sup>28</sup> (e) "the removal of that benefit which American society has for so long bestowed without question, upon its privileged classes,"<sup>29</sup> and (f) "[p]rejudice or bias exercised against a person or class for the purpose of correcting a pattern of discrimination against another person or class."<sup>30</sup>

The definitions of "reverse discrimination" can be organized into three categories: (1) discrimination as "action" (a,b,f); (2) discrimination as a "condition" (e); and (3) no specific content (c,d).

### DISCRIMINATION AS "ACTION" OR "CONDITION"

The most popular use of the term "reverse discrimination," suggests that it is the same as traditional discrimination. Use of the term in this way focuses upon a particular act which provides a preference for persons disfavored by reason of race or gender. If this definition is accepted, then actions taken to benefit members of groups historically disadvantaged are themselves discriminatory.

The focus upon "discrimination" as a process removes attention from the results of discriminatory actions which are the only reasons discrimination is an issue of public policy in the first place. If discriminatory acts did not result in a disfavored social and political condition for racial minorities because of their race or women because of their sex, there would be no need for the preferential programs which have been criticized as discriminatory.

23. Carol A. Bridgewater, *Reverse Discrimination Is Helping Blacks But Not Women*, Psychology Today, March, 1982, at 20.

24. *Affirmative Verdict on Racial Hiring*, U.S. News & World Report, July 14, 1986, at 17.

25. Robert M. Elliot, *Reverse Discrimination: The Balancing of Human Rights*, 12 Wake Forest L. Rev. 852 (1976); See also, Comment, *The Use of Racial Preference in Employment: The Affirmative Action/Reverse Discrimination Dilemma*, 32 Vand. L. Rev. 783 (1979); David E. Robertson & Ronald D. Johnson, *Reverse Discrimination: Did Weber Decide the Issue?* 31 Lab. L.J. 693 (1980).

26. Elliot, *supra* note 26 at 853; See, Comment, *Affirmative Action and Reverse Discrimination: Where Do We Stand Now?*, 4 U. Ark. Little Rock L.J. 311 (1981); Daniel Steiner, *Trying A Reverse Discrimination Case*, 21 How. L.J. 573 (1978); Mert Buckley, *Reverse Discrimination - A Summary of the Arguments with Further Consideration of its Stigmatizing Effect*, 16 Washburn L.J. 421 (1977); Comment, *The Case Of Minority Participation in Reverse Discrimination Litigation*, 67 Calif. L. Rev. 191 (1979).

27. Steiner, *supra* note 27 at 573.

28. Steven J. Witosky, *What Is the Law of the Land on Reverse Discrimination?*, 54 Fla. Bar J. 196 (1980).

29. Comment, *The Myth of Reverse Race Discrimination: An Historical Perspective*, 23 Clev. St. L. Rev. 319, 322 (1974).

30. *Black's Law Dictionary*, 1186 (6th Ed. 1990).

Two sections of the Civil rights Act of 1964 are also relevant to the discussion. Title VI reads in part:

No person in the United States shall, on the ground of race. . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>31</sup>

Title VII includes the following language:

Nothing contained in this subchapter shall be interpreted to require any employers. . . to grant preferential treatment to any individual or to any group because of the race. . . [or sex] of such individual or group.<sup>32</sup>

Title VI language is another example of the "discrimination as action" approach as opposed to "discrimination as a condition."<sup>33</sup> The actions to be prohibited by this law are not readily apparent. One may infer, however, that the "discrimination" addressed by Title VI was that which was systematically practiced prior to the adoption of the legislation.

No employers could be required to grant preferential treatment on the basis of race or gender under provisions of Title VII. Title VII did not prohibit preferential treatment programs but simply said they could not be required.

Why the critics of affirmative action focus on the process rather than the historical conditions which generated the programs is clear. Former national labor director of the NAACP, Herbert Hill, argued:

There is no such thing as reverse discrimination. Those who complain of it are engaging in a deliberate attempt to perpetuate the racial status quo by drawing attention away from racial discrimination to make the remedy the issue. The real issue remains racial discrimination.<sup>34</sup>

If "reverse discrimination" removes a benefit that the "privileged classes" have enjoyed for a long time, then the result would be to change the conditions for members of that class. The historical economic and political domination of members of the white race and, particularly, white males, in American society is well known. Any effective preferential action program would necessarily effect their dominant position. Justice Stevens recently commented, "[I]t is inevitable that nonminority employees or applicants will be less well off under an affirmative action plan than without it no matter what form it takes."<sup>35</sup>

#### "REVERSE DISCRIMINATION" AS IDEOLOGY

If the term simply "means different things to different people," it certainly cannot function as a conveyor of meaning. That view would return us to the "Alice In Wonderland" example with which the paper begins. If "reverse discrimination" represents "code words" which convey an ideological position against preferential treatment programs, then the words themselves are the issue.

#### IV. QUALIFICATIONS

The most common criticisms of preferential treatment programs focus on

31. 42 U.S.C. 2000d (1988).

32. 42 U.S.C. 2000c-2(j) (1988).

33. See, *supra* text accompanying notes 5-6.

34. *Reverse Discrimination: Has it Gone Too Far?* U.S. News & World Report, March 29, 1976, at 26, 29.

35. *Martin v. Wilks*, 490 U.S. 755, 792 (Stevens, J., dissenting).

two issues: (1) qualifications; and (2) quotas. Close examination of both issues is necessary in order to demonstrate the fundamental weakness of these critiques.

First, the complaints. Writing in 1977, one author stated, "I want to ask whether, and if so under what conditions, past acts of discrimination against members of a particular group justify the current hiring of a member of that group who is less than best qualified applicant for a given job."<sup>36</sup>

Another author argued that a distinction could be made between "weak" and "strong" types of "reverse discrimination." In the former category, he placed programs that gave preference to candidates that were "as well qualified" as those who weren't benefitting from the program. In the latter group were those "to some degree less qualified."<sup>37</sup>

A third popular conception of "reverse discrimination" suggests that qualification examinations are "slanted" and that "double standards" are applied in rating candidates for university admissions or employment opportunities. Although "[d]iscrimination is a fact of history which no fair person can deny," a distinguished professor wrote, "those times are gone." Now, admissions and employment decisions must be based on "fundamental merit, of ability, and of equality of opportunity, and of equality before the law."<sup>38</sup>

The popular media also published such claims. James Kilpatrick argued in 1974 that recent court decisions "virtually compelled" employers "to hire minority applicants willy-nilly, qualified or not, simply to placate the judges or the bureaucrats."<sup>39</sup> The next year, the New York Times reported that "an increasing number of complaints" that "minorities are being given preference in jobs and schools, regardless of their comparative qualifications."<sup>40</sup>

Allegations of "reverse discrimination" based on "inferior qualifications" for positions shifted from the theoretical to the particular in the 1970s and 1980s. In "The Furor Over Reverse Discrimination,"<sup>41</sup> Newsweek described the 1978 *Regents of the Univ. of California v. Bakke*<sup>42</sup> decision. The article suggested that admission of the "less qualified" or the "unqualified" was a fundamental issue in the case. Senator Orrin Hatch described *United Steelworkers v. Weber*<sup>43</sup> in a similar way. In Senator Hatch's view, Brian Weber had suffered from "reverse discrimination" because Kaiser Steel had systematically selected Blacks less senior than Weber for the training program.<sup>44</sup> In the Fall of 1989, a group of White San Francisco police officers filed suit alleging "reverse discrimination" against policies which selected minority colleagues who were "less qualified."<sup>45</sup>

36. Sher, *Justifying Reverse Discrimination in Employment*, in *Equality and Preferential Treatment* (Marshall Cohen & Thomas Nagel et al. eds., 1977).

37. Goldman, *Affirmative Action*, in *Equality and Preferential Treatment* (Marshall Cohen & Thomas Nagel et al. eds., 1977).

38. Henry J. Abraham, *Some Post Bakke and Weber reflections on "Reverse Discrimination"*, 14 U. Rich. L. Rev. 376, 382 (1980).

39. Kilpatrick, *supra* note 20 at 14.

40. *Bias Comes Full Circle: Reverse Bias*, N.Y. Times, Jan. 12, 1975, sec. IV., at 7, col.1.

41. Footlick, *The Furor Over Reverse Discrimination*, Newsweek, Sept. 26, 1977, 52, 58.

42. 438 U.S. 265 (1978).

43. 443 U.S. 193 (1979).

44. Hatch, *supra* note 23. See, *infra* notes 64-68 and accompanying text.

45. Martin Halstuk, *White Cops' Suit Alleges Bias in S.F. Promotions*, San Francisco Chronicle, Sept. 26, 1989, at 1, col.4.

A brief listing of the criticism of preferential treatment programs on the issue of "qualifications" is appropriate. It is alleged that such policies result in the admission, hiring or promotion of those who are: (1) "as well qualified;" (2) "less qualified;" (3) "much less qualified;" and (4) "not qualified."

The first criticism requires only a brief response. Suppose that two individuals of equal qualifications apply for a position and the only distinguishing characteristic between them is race. A company chooses to hire the Black applicant because it desires to increase its number of minority employment. In what way is this action discriminatory? The company must choose. Inevitably, any choice entails discrimination between applicants. At the same time, it is evident that the choice of the Black applicant is not similar to the historical discrimination that the Civil Rights Act was meant to overcome. No "feeling of inferiority" comparable to that described in *Brown* is generated by such action.

A more popular and potent criticism is that "less qualified" individuals have received preferences in admissions or employment. University admissions will be examined first and then employment issues.

In the first "reverse discrimination" case to reach the Supreme Court, *DeFunis v. Odegaard*,<sup>46</sup> Marco DeFunis argued that the admissions committee at the University of Washington Law school had "invidiously discriminated against him on account of race" in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>47</sup> The Court held that issue was moot on the grounds that DeFunis was going to graduate with his class regardless of any legal action.<sup>48</sup> Four Justices dissented. Justice Douglas was one of them. He examined the qualifications issue in detail.

In making comparisons among applicants, the University of Washington used two quantifiable factors: (1) the applicant's score on the Law School Aptitude Test (LSAT); and (2) his grade-point-average during his last two years of college.<sup>49</sup> The "predicted first year average" was computed on the basis of these two criteria. Of 37 minority candidates admitted in the class for which DeFunis applied, 36 had averages below his. An additional 48 non-minority applicants with lower averages than DeFunis' were also admitted that year. Twenty-three were returning veterans. Twenty-five others also entered the class with lower "objective qualifications."<sup>50</sup> By the tests given, Justice Douglas argued, the university did admit minority students who "seemed less qualified than some white students who were not accepted" to the law school.<sup>51</sup>

But what about the tests given? Most of those who scored in the bottom 20% of the LSAT did better than that in law school. In fact, six of each 100 who scored in the lowest quintile ended up in the top quintile of their law school class.<sup>52</sup> Furthermore, wrote Justice Douglas, "[N]o one knows how many of those who were not admitted because of their test scores would have in fact done well were they given the chance".<sup>53</sup> He then went on to say,

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46. 416 U.S. 312 (1974).

47. 416 U.S. 312, 321 (1974) (Douglas, J., dissenting).

48. *Id.* at 319-320.

49. *Id.* at 321.

50. *Id.* at 324.

51. *Id.* at 326.

52. *Id.* at 329.

53. *Id.*



There are many relevant factors, such as motivation, cultural backgrounds of specific minorities that the test cannot measure, and they inevitably must impair its value as a predictor.<sup>54</sup>

What about grades as a predictor? "The grades have their own problems, one school's A is another school's C," he wrote.<sup>55</sup> The predictive value of grades combined with LSAT scores is minimal. Certainly when arguing that one candidate is "less qualified" than another, it is valid to ask "What are your standards?" Justice Douglas concluded that the law school was correct in considering minority admissions separately from non-minority admissions. He particularly stressed the view that LSAT was not an appropriate standard for minority admissions because the examination "reflects questions touching on cultural backgrounds" which operate to the disadvantage of members of minority groups.<sup>56</sup>

Erwin Griswold, Dean of Harvard Law School, commented on the DeFunis case one year after it was decided. He was particularly interested in "relevant and proper factors in the selection of law students".<sup>57</sup> What about benign preferences based on race, gender, residence, health, extra-curricular activities, alumni or veteran's status?

One of the problems of admissions is that the only standard that appears to be "objective" is the LSAT previously discussed. If the test scores alone were used to determine law school admission, Griswold wrote, "[t]his would be thoroughly unsound, and a great mistake".<sup>58</sup> Not only does statistical theory demonstrate that there is a large margin of error in any test score but the correlation between such scores and success in law school "is not high," he commented.<sup>59</sup> The usual range was between 0.30 and 0.50 which meant that conformity was less than half.<sup>60</sup> Additionally, "success in law school," normally only refers to grades in law school. Dean Griswold then went on to note that the relationship between law school grades and a person's future "usefulness" as an attorney is virtually non-existent.<sup>61</sup> He concluded,

To state categorically, therefore, that the higher the combined LSAT and college grade average is, the 'better qualified' the applicant necessarily is, even for law school 'success,' is clearly unwarranted.<sup>62</sup>

Another important preferential treatment program challenged as "discriminatory" involved a voluntary agreement between Kaiser Steel and United Steel Workers. In 1974, Kaiser and the union agreed to reserve 50% of the openings in a local craft-training program until the percentage of Black craft-workers was similar to that of Blacks in the local labor force.<sup>63</sup> Kaiser had a history of excluding Blacks from craft unions such that before 1974 less than 2% of the craft-workers at Louisiana's Gramercy plant were Black while they

54. *Id.*

55. *Id.* at 330.

56. *Id.* at 334-335.

57. Erwin N. Griswold, *Some Observations on the DeFunis Case*, 75 Colum. L. Rev. 512, 513 (1975).

58. *Id.* at 514.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 515.

63. *United Steel Workers v. Weber*, 443 U.S. 193, 197 (1978).

comprised about 39% of the area work force.<sup>64</sup>

During the first year that the voluntary plan was in operation, 13 craft trainees (seven Black and six White) were selected for the program.<sup>65</sup> Brian Weber, a White production worker who was not selected, challenged the agreement in court. Because two of the Blacks selected had less seniority than him, Weber alleged that the company and the union had acted to discriminate against him.<sup>66</sup>

The qualifications argument in *Weber* is based on the fact that some Blacks selected for the craft program were of lesser seniority than those not selected. Since the local Kaiser plant had a history of discrimination in its hiring policies, it was not surprising that fewer Blacks than Whites would have accumulated the seniority that results from being hired in the first place. The seniority argument in *Weber* parallels the use of the "Grandfather clause" adopted in many southern states in the late nineteenth century. Ostensibly neutral, the clause based voting qualifications on whether or not one's grandfather could vote in the past. Not surprisingly, few Black Americans met this test. In rejecting Weber's challenge in 1979, Justice Brennan commented,

It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious, efforts to abolish traditional patterns of racial segregation and hierarchy.<sup>67</sup>

In rejecting the "reverse discrimination" suit of a male who was not appointed to a position as a road dispatcher in 1987, the Supreme Court again addressed the issue of qualifications.<sup>68</sup> Seven applicants for a road dispatcher position were certified as eligible for the job. Both Paul Johnson and Diane Joyce were in this group. Johnson had tied for second with a score of 75 while Joyce ranked third with a score of 73. After a second interview and review of the applications by the Affirmative Action Coordinator, the Director of the Transportation Agency of Santa Clara County chose Joyce. Johnson argued that he was a victim of gender discrimination because Joyce was quantifiably "less qualified."<sup>69</sup>

Out of 238 skilled craft worker positions which were in the job classification relevant to the case at the time Joyce applied, none was held by a woman. Both Johnson and Joyce were viewed as "well qualified" for the position.<sup>70</sup>

In supporting Joyce, the Court cited the amicus brief for the American Society for Personnel Administration which stated, "[I]t is a standard tenet of personnel administration that there is rarely a single 'best qualified' person for the job."<sup>71</sup> This is especially the case where the position is: (1) "unexceptional;" (2) without need for "unique work experience or educational attainment;" and (3) one for which "several well-qualified candidates are

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64. *Id.* at 198-199.

65. *Id.* at 199.

66. Steve Roberts, *The Bakke Case Moves to the Factory*, N.Y. Times Magazine, Feb. 25, 1979, at 37.

67. *Weber*, *supra* note 64 at 204.

68. *Johnson v. Transportation Agency Santa Clara County*, 480 U.S. 616 (1987).

69. *Id.* 623-24.

70. *Id.* at 624.

71. *Id.* at 641 n.17.

available."<sup>72</sup> Under these conditions judgements, as to the "best qualified are at best subjective."<sup>73</sup>

By definition, most jobs, including promotions, fall into the "unexceptional" category. The 1989 lawsuit by White members of the San Francisco Police Department is typical of "reverse discrimination" cases which fit this standard.<sup>74</sup> The White officers alleged that the "less qualified" minorities had been promoted to sergeant and assistant inspector. After a 1983 test, the city changed the scoring method to increase the number of minorities and females that could be promoted.<sup>75</sup> The oral interview was given more weight than the written portions of the test. The original results of the examination would have given promotions to 99 White officers, 12 minorities and 9 women. Under the new guidelines, 76 White officers, 28 minorities and 16 women received promotions.<sup>76</sup>

In *Martin v. Wilks*,<sup>77</sup> the Supreme Court allowed White firefighters to sue the city of Birmingham several years after the terms of the consent decree had been implemented. The firemen alleged that "less qualified" Blacks received promotions under the terms of the consent decree.<sup>78</sup> In dissent, Justice Stevens noted that both the federal district court and the Fifth Circuit Court of Appeals agreed that Black police officers and firefighters had been discriminated against by the tests used by the Personnel Board to screen applicants.<sup>79</sup> Furthermore, the district court had found in 1985 that as a matter of fact the city had not promoted any Black officers who were "not qualified" or who were "demonstrably less qualified" than the Whites who were not promoted.<sup>80</sup>

The most prominent example of admissions (or hiring) of someone apparently "much less qualified" is *University of California Regents v. Bakke*.<sup>81</sup> Allan Bakke was denied admission to the University of California at Davis Medical School even though disadvantaged, minority applicants were accepted under a separate admissions process with grade point averages Medical College Admissions Test (MCAT) scores, and "benchmark" scores "significantly lower" than his.<sup>82</sup>

Interview summaries, candidate's overall grade point average, grade point average in science courses, scores on the MCAT, letters of recommendation and other biographical data were "added together" to determine each candidate's "benchmark score."<sup>83</sup> Those with the highest "benchmark scores" were admitted to the program. One hundred students were admitted in 1974 out of 3,737 applicants.<sup>84</sup> Sixteen of the one hundred were accepted under the special admissions program for disadvantaged minorities.<sup>85</sup> Justice Powell

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72. *Id.*

73. *Id.*

74. Halstuk, *supra* note 46.

75. *Id.* at A16.

76. *Id.*

77. 490 U.S. 755 (1989).

78. *Id.* at 758.

79. *Id.* at 772.

80. *Id.* at 777.

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

82. *Id.* at 277.

83. *Id.* at 274.

84. *Id.* at 273.

85. *Id.* at 275.

noted that those admitted under the separate process had "significantly lower" benchmark scores "even though the special rating system apparently gave credit for overcoming 'disadvantage.'"<sup>86</sup>

In weighing quantifiable data, such as MCAT scores and GPA indexes, it is clear that disadvantaged minority candidates were admitted who were "much less qualified" than Bakke.<sup>87</sup> But were they?

Justice Douglas and Dean Griswold addressed the quantitative aspects of college admissions program with particular attention to minority candidates. It may be recalled that Justice Douglas argued that the LSAT should not be used in law school admissions because of cultural bias. He also noted that grades cannot be fairly compared due to the different standards which are used for grading by different colleges.<sup>88</sup> Similarly, Dean Griswold also rejected use of such "objective" criteria as a sound method for deciding who is "better qualified" for law school.<sup>89</sup> Parallel reasoning can be applied to the "qualifications" posed in *Bakke*.

The *Bakke* opinion does not reveal what percentage of the benchmark score was derived from personal interviews, extra-curricular activities, or "overcoming disadvantage" as opposed to the clearly quantitative factors. Allan Bakke was much stronger than disadvantaged minority applicants admitted under the special program in both grades and test scores. What cannot be determined from the opinion is the comparative strength of candidates such as Bakke and those of special admittees in the non-quantifiable areas. That the minority candidates admitted under the terms of the separate program were "much less qualified" than Bakke or others in a similar situation, then, has not been and is unlikely to be, substantiated.

Finally, the allegation that "unqualified" individuals have been admitted, hired or promoted under affirmative action programs needs to be addressed. In *Bakke*, special candidates to the medical school at UC Davis did not have to meet the minimum 2.5 GPA required of regular applicants.<sup>90</sup> Nonetheless, the candidate could be rejected for failure to meet course requirements or "other specific deficiencies."<sup>91</sup> However, there is no recorded instance of individuals who were in fact not qualified for admission, hiring or promotion that were admitted, hired or promoted under terms of a bona fide affirmative action or preferential treatment program.

### QUOTAS

The second major aspect of "reverse discrimination" is what is commonly referred to as quotas. Legal scholars have been at the forefront of this criticism. What is "reverse discrimination," asked Henry Abraham,

It is, above all, what in the final analysis the Bakke and Weber cases fundamentally were all about, namely the setting aside of quotas, be they rigid or quasi-rigid . . . on behalf of the admission or recruitment or training or employment or promotion of groups identified and classified by racial, sexual,

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86. *Id.* at 277 n.7.

87. *Id.*

88. *Id.* at 273-276.

89. Griswold, *supra* note 58.

90. However, the average grade point for the special admittees was 2.62 for the class of 1974. *Bakke*, 438 U.S. at 274.

91. *Id.* at 275.

religious, age or nationality characteristics.<sup>92</sup>

Another legal critic focused his attack on preferential hiring practices.

A typical vehicle for the granting of such preferences has been the establishment of quota which designates fixed percentages of minority applicants to be hired in the future, thereby precluding free competition between the races in employment. Such a system questions an underlying assumption upon which American capitalism is founded—that unimpaired competition between individuals on the sole basis of merit is economically and socially desirable in a free society.<sup>93</sup>

The popular media also discussed quotas. As early as 1976, US News called hiring quotas “drastic remedies” and commented, “[T]o critics of affirmative action this action this means that goals have become rigid quotas” which treat White males unfairly.<sup>94</sup> In the same year, Governor Reagan attacked what he called the “quota system” that the federal government was using to eliminate discrimination.<sup>95</sup> Albert Shanker, president of the American Federation of Teachers, also described quotas as “reverse discrimination” and “unconstitutional.”<sup>96</sup>

Sensitive to the popular outcry against quotas in the 1970s, the Carter administration attempted to distinguish between quotas and “‘reasonably selected numerical targets for minority admissions’”.<sup>97</sup> Then, in 1978, *Bakke* was decided.

At the center of the case was the fact that the medical school at Davis had set aside sixteen out of a hundred seats for “special admissions” candidates. All of these candidates were deemed to be “disadvantaged minorities.”<sup>98</sup> Writing the majority opinion, Justice Powell rejected the Davis plan because White applicants could only compete for eighty-four seats in the entering class as opposed to the 100 open to minority applicants. “Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status,” he wrote.<sup>99</sup>

In Justice Powell’s view, the special admissions program at Davis was unconstitutional because applicants such as Bakke were placed at a disadvantage, even though they were not responsible for “whatever harm the beneficiaries of the special admissions program are thought to have suffered.”<sup>100</sup> Furthermore, Bakke had been denied his right to “individualized consideration without regard to race.” That was the “principal evil” of the program, he wrote.<sup>101</sup>

Less than a year after the decision, the *New York Times* reported: “The Bakke decision in the United States Supreme Court turns out to be a critical threshold event in changing White attitudes toward affirmative action pro-

92. Abraham, *supra* note 39 at 375-376, n.37.

93. Elliot, *supra* note 26 at 852-853, n.24.

94. *Has It Gone Too Far?*, *supra* note 35 at 28.

95. Nordheimer, *supra* note 22 at A14, col. 2.

96. Ari L. Goldman, *Teachers Union Refuses to Support Hiring and Admissions Quotas*, N.Y. Times, Aug. 19, 1977, at A13, col. 2.

97. Robert Reinhold, *U.S. Backs Minority Admissions But Avoids Issue of Racial Quotas*, N.Y. Times, Sept. 20, 1977, at 34, col. 2.

98. *Regents of University of California v. Bakke*, 438 U.S. 265, 274-75 (1978).

99. *Id.* at 289.

100. *Id.* at 310.

101. *Id.* at 318 n.52.

grams for blacks in both the jobs and higher education areas.’”<sup>102</sup> The Harris poll found that as long as there were no “rigid quotas” the public supported preferential treatment programs.<sup>103</sup>

Why, then, does the issue of “quotas” generate such criticism of affirmative action programs? In what way do they exemplify “reverse discrimination?” To summarize: (1) they unfairly classify on the basis of race, sex, religion, age or nationality and, therefore, deny “individualized consideration without regard to race;” (2) they are counter to the “unimpaired competition between individuals on the sole basis of merit;” (3) they punish people who are not responsible for the historical discrimination that affirmative action programs are designed to overcome.

The argument that quotas are used to give an unfair advantage on the basis race or gender merits heightened analysis, not generally accorded to preferential treatment programs applied on the basis of religion, age or nationality. There is no evidence that affirmative action has been used to either admit, hire or promote people because of their religious beliefs, age or nationality nor deny opportunities.

The special admissions program at the University of California, Davis, is a prime example of the use of quotas in a manner which is classified by race. To begin with, classifications on the basis of race are not *per se* invalid. The Supreme Court has upheld numerous affirmative action programs which classify on the basis of race.<sup>104</sup> In what way, then, does a quota for admissions directed toward disadvantaged minorities constitute a form of “reverse discrimination?” What similarities exist between this program and the historical discrimination which quotas are designed to overcome?

Dissenting in *Bakke*, Justice Brennan noted that Whites had not been “subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>105</sup> Furthermore, there was no evidence that the purpose of the Davis program was to “stigmatize” or to treat one race as “inferior to another” as was the case when Blacks or other racial minorities were subject to unconstitutional race discrimination.<sup>106</sup> While rejecting quotas, Justice Powell accepted the so-called “Harvard Plan” which used race as a “plus” factor in admissions.<sup>107</sup> He found this plan acceptable because it did not “insulate the individual from comparison with all other candidates for the available seats.”<sup>108</sup> However, as the minority in *Bakke* noted, the Harvard Plan approved by Justice Powell cannot be constitutionally distinguished from the Davis plan which he rejected.<sup>109</sup> If race is a “plus” factor, then a college may use this classification to meet whatever numerical

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102. Thomas Johnson, *White Majority Found to Favor Affirmative Action for Blacks if Quotas Are Not Rigid*, N.Y. Times, Feb. 19, 1979, at A12, col.2.

103. *Id.*

104. See, *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Local 28 of the Sheetmetal Workers Int'l Assoc. v. EEOC*, 478 U.S. 421 (1986).

105. *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J. dissenting).

106. *Id.* But see, Justice Powell's perspective: “All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened.” *Bakke*, 438 U.S. 265, 294 n.34 (emphasis in original).

107. *Id.* at 316-17.

108. *Id.* at 317.

109. *Id.* at 378 (Brennan, J., dissenting).

objectives it may have in mind simply by adjusting the weight it gives to race in the admissions process. The primary factor distinguishing the special admissions program at Davis that held to be unconstitutional and the Harvard Plan praised by Justice Powell, was that Davis openly engaged in what Harvard was doing surreptitiously. As one astute observer of college admissions noted:

Even the fanciest colleges employ some sort of quota system when deciding who shall be admitted and who turned away. The admissions office usually recognizes, for example, that the college needs some heavily muscled young men who can play football and a few extremely tall young men who can play basketball. If the band's tuba player has just been graduated, the admissions office will be sensitive to the need for a replacement.<sup>110</sup>

Given these situations, arguments against quotas per se appear both ludicrous and disingenuous.

The belief that quotas violate traditional standards of "merit" and "free competition" is in reality another version of the qualifications argument previously examined. This belief resonated with the public at the height of the controversy over quotas. For example, a Gallup poll taken in 1977 indicated that by a margin of 83-10% Americans believed "ability, as determined by examination" should be the main criteria in choosing applicants for jobs or college admissions.<sup>111</sup> The argument about "qualifications," however, has been thoroughly examined earlier in the paper.

An additional criticism of quotas is that they place an unfair burden on those not responsible for the historical discrimination first rejected by the Supreme Court in *Brown* in 1954 and later by Congress in the civil rights legislation of the 1960s. It is certainly true that any preferential treatment program will inevitably burden past beneficiaries of discrimination. But in what way is the burden "unfair?" In what sense is this "reverse discrimination?"

The reason racial or gender discrimination has been rejected is because of the *consequences* of discriminatory actions. Black children had carried in their hearts and minds a "badge of inferiority" which affected their achievements in every aspect of their lives. That is why the Court rejected racial segregation in 1954. Women as well as members of racial minorities were denied employment simply because of their gender or race not because of obvious lack of qualifications. Mr. Bakke was not denied admission to the medical program at Davis because he was White or male. He was denied because in competition for the eighty-four positions available, he was not found to be as strong as those admitted. The quota did limit the spaces open for competition, but no "badge of inferiority" was attached to Bakke by his failure to be admitted to the medical school.

The political advantage of criticizing quotas is obvious. A New York Times writer described the "war over words" this way:

The pursuit of linguistic leverage is especially intense in the area of affirmative action and quotas . . . polls have indicated that the word 'quotas' has a grating, negative connotation to most people, redolent of techniques used in earlier times to hold down the number of Jews allowed to pursue various

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110. Russell Baker, *Nobody Sues About A Fullback*, N.Y. Times, Oct. 15, 1977, at A23, col.1.

111. Johnson, *supra* note 103 at A12, col. 1.

opportunities.<sup>112</sup>

The Reagan administration proclaimed support for affirmative action while strongly opposing quotas. How could that be? As one writer explained: "The trick is the defining."<sup>113</sup>

When an organization has a history of constitutionally unacceptable racial discrimination, the Court has accepted very specific quotas. In *Sheetmetal Workers v. EEOC*, decided in 1986, for example, the Supreme Court allowed a nonwhite membership goal of 29.23% ordered by a lower court to stand.<sup>114</sup>

## VI. CONCLUSION

The term "reverse discrimination" was first used in the mid-1970s at the time Marco DeFunis was filing his suit against the University of Washington Law School. It has retained its popularity into the 1990s.<sup>115</sup> Why is this so? What does it matter?

Writing in *Politics and Language*, Murray Edelman observed, the language we use is never "simply a tool for description."

By naively perceiving it as a tool, we mask its profound part in creating social relationships and in evoking the roles and the 'selves' of those involved in the relationships.<sup>116</sup>

It is the central argument of the article that the words "reverse discrimination" have been and are currently used to evoke a particular political response to the social phenomenon known as "affirmative action." Herbert Hill noted:

Because affirmative action programs go beyond individual relief to attack patterns of discrimination, and if enforced by Government agencies over a sustained period have potential of becoming a major instrument for social change, a powerful opposition has developed from diverse groups committed to the status quo.<sup>117</sup>

The opponents to such changes have included many of the most influential individuals in the country: Ronald Reagan, Albert Shanker, and Orrin Hatch, for example.

But what exactly is meant by "reverse discrimination?" The term is not rooted in the historical discrimination rejected by the Supreme Court in 1954. The term does not address the disfavored conditions which have resulted from the discriminatory actions which millions of women and Americans of color have experienced for centuries.

Instead, "reverse discrimination" is meant to focus attention on the *remedy* to historical discrimination. It implies that discrimination represents a type of action which must be rejected *not because of its effects* but because of its superficial similarity to the actions which resulted in the denial of basic rights to millions of Americans because they were not male or Caucasian.

Under scrutiny, the argument that "reverse discrimination" leads to ad-

112. Taylor, *supra* note 2 at A16, col.3.

113. *Id.*

114. *Local 28 of the Sheetmetal Workers Int'l. Assoc. v. EEOC*, 478 U.S. 421 (1986).

115. See, e.g., Barry Siegel, *Battling to Climb the Ladder*, L.A. Times, Feb. 7, 1990, at A1, col.1. "On a fire department roster in Alabama, the debate over reverse discrimination is framed in very personal terms that could change legal history." *Id.*

116. Edelman, *supra* note 3 at 45.

117. Alan Finder, *Court's Quota Ruling Ends a 38-Year Battle*, N.Y. Times, Jul. 3, 1986, at B9 col.5.



mission of students or hiring or promotion of employees with "less qualifications" does not hold up. When examined, the qualifications issue is not actually a dispute over who is "better qualified" than someone else, but rather over what qualifications are relevant whether one can meaningfully distinguish between candidates for a particular job. If Law School Admissions Tests or other "objective criteria" are found to be biased or misleading, then why focus attention on those topics when college admissions or hiring practices are the issue?

The criticism of preferential treatment programs predicated on the use of "quotas" is equally questionable. It is true that quotas may lead to classifications based on race or gender. However, the argument that a quota *necessarily* classifies in an unfair manner has been rejected by the Supreme Court. The merit argument on quotas is simply a different version of the issue of qualifications that was previously examined.

In the University of California at Davis admissions program discussed in *Bakke*, sixteen seats for students who were "disadvantaged" racial minorities were guaranteed out of one hundred spaces available. Did Davis "unfairly classify on the basis of race" because of its use of quotas? The purpose of the special admissions program was to bring in historically underrepresented minorities; it was not developed to stigmatize one race as inferior to another. The program did not bring in "unqualified" students. Discrimination is not inherent in the use of quotas. The fact that quotas were used in the past as a means of discriminating against people because of irrelevant characteristics, such as religion, has no bearing on the use of quotas to overcome historical discrimination in the present. That is neither the purpose nor the result of their use today.

The conditions which led to the creation of affirmative action programs in the 1960s have not changed significantly. *Money Magazine* noted that by the end of 1989, Black Americans were earning between 10% and 26% less than their White counterparts with similar educational backgrounds.<sup>118</sup> Why? "Some of the most lucrative and influential fields remain largely closed to Blacks" to this day.<sup>119</sup> The proportions of minorities in law schools and medical schools is virtually unchanged in the last decade.<sup>120</sup> The college participation rates for Black Americans have dropped sharply since the mid-1970s.<sup>121</sup>

In the final analysis, allegations of "reverse discrimination" are primarily based on the desire to maintain the status quo. The evidence suggests that in many respects little has changed since affirmative action programs first began in the 1960s. On the other hand, Diane Joyce did become a road dispatcher and there are a higher percentage of minority police officers and fire fighters, sheet metal workers and skilled craftsmen than there were prior to the adoption of preferential treatment programs.

Former Dean of Harvard Law School, Erwin Griswold, went to the heart of the reasoning behind preferential treatment programs when he wrote:

The color of a man's skin in our society still leads to the kinds of prior

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118. Updegrave, *Race and Money*, *Money Mag.*, Dec. 1989, at 152.

119. *Id.* at 159.

120. See, Joseph Berger, *The Bakke Case 10 Years Later: Mixed Results*, *N.Y. Times*, July 13, 1988, at B6, col.3.

121. *Rate of Minorities Attending College on Decline*, *L.A. Times*, Jan. 15, 1990, at A18, col.1.

experience which can result in differing perceptions of fact, for we can perceive 'fact' only through the lenses of our own experience and training. So, too, sex differences result in differential perceptions. These two categories, normally constitutionally suspect, are also categories whose use is essential to the creation of a law school class which can see and walk around and understand legal problems and solutions in the round. They are as important differential providers as poverty or wealth, urban, rural or small town, veteran or non-veteran, athlete or spectator, or any other factor which adds to the overall group consciousness and diversity of experience. We are a diverse society and law school classes should be diverse.<sup>122</sup>

Dean Griswold's ideas can be broadly applied to society today. The contemporary relevance of his words to the programs which foster social and economic change today is clear. Removal of the term "reverse discrimination" from the vocabulary of contemporary politics would remove one small obstacle to change in the lengthy struggle for shared power in American society. As Martin Luther King, Jr. said, "Now is the time."

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122. Griswold *supra* note 58 at 516 n.17.