Twenty-five years after *Brown v. Board of Education*, the Supreme Court has assured us that the answer to the "American dilemma" will not come through the first Mr. Justice Harlan's "color blindness" but rather by acknowledging differences between blacks and whites as the basis for "affirmative action." That is the cumulative message of *Weber*, *Columbus*, and *Dayton*, all handed down in the waning days of the 1978 term. Their remedies focus not on racial

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**Author's Note:** I have benefited greatly from my discussions with my colleagues and particularly Douglas Laycock and Bernard D. Meltzer. I have also had the benefit of reading papers by Meltzer and Philip B. Kurland relating to aspects of the subject matter of this article which were in the process of publication when this was written. Meltzer, *The Weber Case: Double Talk and Double Standards*, 3 REGULATION No. 5, p. 34 (Sept./Oct. 1979), treats the reasoning of the *Weber* opinions and examines in detail their implication for affirmative action in private employment. Kurland, "*Brown v. Board of Education Was the Beginning*": *The School Desegregation Cases in the United States Supreme Court, 1954–79*, 1979 WASH. U. L. Q. 309 traces the history of school desegregation in the Supreme Court. I acknowledge with gratitude the research assistance of Roger Patterson and Ruth Hahn, members of the Class of 1981 at The University of Chicago Law School.

discrimination but on redressing racial imbalance in the work force and the school population. They acknowledge that separate but unequal treatment under law is warranted by our history, because they deal with classes of persons and not with individuals.

I. United Steel Workers of America v. Weber

Weber was a white employee of a Kaiser plant located in the Deep South who sought, but was not eligible for, admission to the in-plant craft training program. Admission to the program is based on two seniority lists—one for minorities (blacks) and one for whites—with the selections for the program to be made alternately from each of them. Weber had less seniority than required for admission from the white list and more seniority than those on the black list. He brought a suit because several employees with less seniority than his were admitted to the program. The lower courts held that the racial quota involved violated the terms of the Civil Rights Act of 1964. The Supreme Court reversed, holding that Kaiser's voluntary affirmative action program did not violate the statute. Both the Supreme Court and the lower courts reasoned from the premise that Kaiser had not itself previously engaged in racial discrimination in employment.

Weber's argument was that the use of a racial classification to determine access to the training program was discrimination by race in violation of the statute. The Court rejected this argument on the ground that, although it was in accord with a "literal" construction of the statute, it was not in accord with the legislative "spirit" of the law. As Mr. Justice Rehnquist's persuasive dissent clearly demonstrates, the spirit on which the Court relies was not that...

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6 563 F.2d 216 (5th Cir. 1977), aff'g 415 F. Supp. 761 (E.D. La. 1976). The minority category was open to all groups designated as minorities by the Office of Federal Contract Compliance including women. As the plan actually operated in the plant involved, only blacks benefited, and the courts treated the plan as an affirmative action plan for blacks.

7 Thus the opinions did not address the question of the scope of remedies for illegal discrimination. After the holding in Weber that a nondiscriminating employer can grant quota preferences to blacks, it is difficult to believe that the Court will now hold that a discriminating employer cannot be ordered to do the same thing. Justices Brennan, Blackmun, Marshall, and White seem to agree. Mr. Justice Stewart thinks that that question is independent and unrelated because such an order would not result in a "voluntary" plan.

8 99 S. Ct. at 2736-53.
of the Congress but of a few sponsors of the legislation. The Court simply invalidated the political compromise that led to the Civil Rights Statutes of 1964—that the law was to enact not a special program of relief and assistance to blacks but a general principle of racial, sexual, religious, and ethnic neutrality.

The Court's opinion is brief; its reasoning enigmatic. It was joined by the four Justices who, in the previous Term, had written a separate opinion in University of California Regents v. Bakke arguing that a medical school admissions preference quota was constitutional and legal under Title VI of the statute, plus Mr. Justice Stewart, who in Bakke had joined an opinion that said that such a preference quota violated the statute. The structure of the Court's argument in Weber is the same as that of the separate opinion in Bakke—reverse discrimination is justified by the need to remedy past discrimination. The distinction that seems to have moved Mr. Justice Stewart was that the Kaiser plan was private and voluntary. But the Court pointedly ignored the fact that the training program in Weber had been adopted by Kaiser and the Steelworkers Union under the threat of federal sanction. The argument, most clearly spelled out in a footnote of the Weber opinion, is that Congress, in formulating the standard applicable to private bodies in Title VII, had greater discretion than in formulating the standard applicable to public bodies under Title VI, which was the controlling law in Bakke.

The Court's textual basis for its tenuous distinction is section 703(j) of Title VII, applicable to private employers, which has no analogue in Title VI, applicable to recipients of governmental funds. Section 703(j) had been added to the statute to allay fears that enforcement officials would use the threat of enforcement ac-

11 438 U.S. at 408.

Kaiser, as a government contractor, was subject to Executive Order 11246, which imposes an affirmative action obligation. Inspectors from the Office of Federal Contract Compliance Programs had raised the question of Kaiser's compliance. 99 S. Ct. at 2731. The provisions of the plan were nationally negotiated for the aluminum industry and an identical plan was subsequently imposed on the steel industry by consent decree and approved by the Fifth Circuit. United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975).

13 99 S. Ct. at 2729 n.6.
tions to demand preferential employment practices. In relevant part, it reads: "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . because of the race . . . of such individual . . . on account of an imbalance which may exist with respect to the total number . . . of persons of any race . . . employed by any employer . . . in comparison with the total number . . . of such race in any community . . . or in the available work force. . . ."

The Court argues that the absence of the phrase "require or permit" means that the statute does permit but not require. Mr. Justice Rehnquist points out the lack of force in this argument. Since there was no reason to believe that the statute did not interdict such preferential treatment outside the context of a remedy to correct a statutory violation, there was no reason for the Congress to provide that it would not permit what it did not permit.

The most striking feature of the opinion in Weber is its relentless focus on a single ethnic minority—blacks—in its explanation of the meaning of the statute. The statute reads: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin." The discrimination at issue in Weber was discrimination in favor of blacks, so one might argue that no other statutory minorities were, in fact, involved in the case. But because the statute treats ethnic and other classifications as part of a parallel construction, one test that any construction of the statute should meet is whether it is workable in relation to all of the proscribed classifications. Indeed, the most powerful practical argument for a color-blind interpretation of the statute is that it is impossible to discriminate benevolently by means of a prohibited classification without injuring others by means of the same classification. But Weber held that one group—blacks—are entitled to be the beneficiaries of affirmative action. Are any other groups similarly entitled? If so, who are they? There are many candidates: e.g., Jews, Catholics, Chicanos, American Indians, women, Irish, and so

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15 The section is set forth in 99 S. Ct. at 2728 n.5.
16 99 S. Ct. at 2748-49.
on, but the group of largest practical significance, because of its size, is women. If the size and position of blacks justifies a one-to-one ratio between blacks and whites, and the position of women would justify a similar preference ratio proportionate to their number in the workforce, either there will be little room left for young white males, or the relative advantage accorded to blacks will have to be significantly reduced. Do blacks have a special status under the statute or do they have to share this status with other significant groups? The Court must now be prepared to undertake that inquiry, group by group and classification by classification.

The opinion is Janus-faced. The legislative history marshalled in support of the Court’s “legislative spirit” is black in its focus, and no similar legislative history exists for any other groups.\footnote{99 S. Ct. at 2727.} Congress’ primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with “the plight of the Negro in our economy,” said the Court. That phrase is followed by a discussion of worsening black unemployment as of 1964 and the observation that:\footnote{Id. at 2727–28.}

Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. . . . Accordingly, it was clear to Congress that “the crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,” . . . and it was to this problem that Title VII’s prohibition against racial discrimination in employment was primarily addressed.

There are nevertheless grounds to argue that the Court will, in due course, extend the special status recognized in \textit{Weber} to many other groups. The Court leaves the question open by limiting its quotations from the legislative history to the “racial discrimination” prohibition. Because of their parallel position in the statute, there is an implication that each other prohibition has its own favored group (or groups)—Jews, Catholics (and Hindus?) for religion, women for sex, Latinos for national origin, and non-Negro, non-white races for color. The Court’s reasoning from the structure of section 703(j) suggests that the “permit” logic applies to every
proscribed classification. Indeed, one could imagine that under the Court's logic, the statute may be converted into a pervasive dispersion program. In any occupation where a group has been underrepresented, the statute would permit affirmative action to increase that group's representation. Thus affirmative action for men would be appropriate in the flight attendant, telephone operator, and elementary school teacher classifications, while affirmative action for women would be appropriate in the airlines maintenance, line repairman, and university teaching fields. Affirmative action for blacks would be appropriate in crafts, professional, and management fields, while affirmative action for whites would be appropriate for urban hotel services, urban bus drivers, parts of the postal service, and so on. But it would be difficult to reconcile such a sweeping program of social dispersion with the Court's emphasis in Weber on blacks as special beneficiaries of the statutory program.

II. COLUMBUS AND DAYTON II

The opinions in these cases seem to hold only that the long and complex records support the determination of the courts below that school officials had long engaged in intentional racial segregation of the schools. That innocuous appearance is deceptive. The Court endorses an approach to the "factual" question that makes proof of a neighborhood school policy into proof of racial discrimination. It then approves a remedy which, by implication, assumes that a neighborhood school policy, when combined with any significant residential segregation, is unconstitutional. It seems unlikely that the Court is so confused that it was unaware of what it was doing. The opinion was successful, however, in avoiding

20 Section 703(j) itself repeats each of the proscribed classifications. Another reason that the special status is likely to be extended is the practical considerations emphasized by Mr. Justice Blackmun in his concurring opinion. He argued that employers must be able to settle charges of past discrimination by adopting affirmative action plans without fear that they will incur further liability. How an employer can escape liability for discrimination against some individuals in the past by undertaking to discriminate in favor of other individuals in the future is not clear. See Meltzer, The Weber Case: Double Talk and Double Standards, 3 Regulation No. 5, p. 34 at 38–39.

21 Columbus, 583 F.2d 787 (6th Cir. 1978), aff'd 429 F. Supp. 229 (S. D. Ohio 1977); Dayton II, 583 F.2d 243 (6th Cir. 1978), reversing the unreported decision of the district court.
headlines such as "Supreme Court Holds All Northern Schools Unconstitutionally Segregated."

The Dayton decision has distinctive interest for two reasons. First, the Supreme Court had earlier in the same case held that a system-wide remedy was inappropriate on the state of the record and remanded for further hearings. In Dayton II, with no new evidence worthy of mention by the Court, it affirms such a remedy. Second, the district judge, unlike the district judge in Columbus, had concluded on the basis of his review of the record that there was no constitutional violation with any continuing effect requiring a remedy. The Court of Appeals reversed and it is the "factual" determination of the Court of Appeals, not the District Court, that the Supreme Court affirms.

The approach to de facto school desegregation that the Supreme Court endorses, reflecting the approach worked out by the Sixth Circuit, from which both cases came, has four elements: first, the existence of identifiably black schools in the school system in 1954. These are the schools in black neighborhoods. Their black character is confirmed by the fact that they were referred to at the time as the "negro schools" and by the fact that they had all black faculties and administration. The presence of significant black enrollment in other, "white," schools in the system is not relevant to this determination. "[T]he District Court found that the 'Columbus Public Schools were officially segregated by race in 1954.'" Second, a legal determination that the existence of such schools in 1954 put the school system in precisely the same constitutional posture as the southern schools as of the same date: the school system had a continuing constitutional duty to eliminate identifiably black schools. "[T]he Board's duty to dismantle its dual system cannot be gainsaid." Third, an intensive and detailed examination of school system actions since 1954 in order to determine whether the school

24 99 S. Ct. at 2946, quoting the district court, emphasis added by the Supreme Court.
25 Id. at 2947.
system has taken all feasible actions to eliminate the identifiably black schools. The inevitable conclusion is that the school system has not, as any student of northern school politics could have predicted. Fourth, the conclusion that the only way to eliminate the identifiably black character of some schools is to modify the neighborhood school policy through appropriate racial transfers (busing) so that no school has a distinctly black enrollment or faculty. "Petitioners also argue that the District Court erred in requiring that every school in the system be brought roughly within proportionate racial balance. We see no misuse of mathematical ratios... especially in light of the Board's failure to justify the continued existence of 'some schools that are all or predominantly of one race.'"  

In Dayton, the Court summed up as follows:  

The basic ingredients of the Court of Appeals' judgment were that at the time of Brown I, the Dayton Board was operating a dual school system, that it was constitutionally required to disestablish that system and its effects, that it had failed to discharge this duty, and that the consequences of the dual system, together with the intentionally segregative impact of various practices since 1954, were of systemwide import and an appropriate basis for a systemwide remedy.  

The problem with this approach is that there is a simple explanation for many of the facts the Court considers so important, namely, a neighborhood school policy. In standard equal protection analysis, a neighborhood school attendance policy would not be a suspect classification. Rather the Court would have to consider the reasonableness of the policy, and only if it found no legislative rationality for the classification might it declare it unconstitutional. There are substantial reasons for a neighborhood school attendance policy. They include: (1) minimizing travel costs, (2) the development of sustaining ties between a school and its surrounding community, and (3) the development of a partial market in school services through the tie between residential location and school

20 Id. at 2948-49.  
27 Id. at 2945 n.3.  
28 99 S. Ct. at 2977.  
29 The district court decision in Columbus which the court treats with a deference that will make it a model concluded that "Substantial adherence to the neighborhood school concept with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." 429 F. Supp. at 255.
attendance rights. Because the last point is infrequently made, it merits some elaboration. A stable neighborhood school attendance policy means that individuals can shop for school services through their selection of residential location. This attenuated property right generates the benefits that flow from market organization. On the supply side, it puts pressure on schools to provide services that are attractive to prospective residents or else face declining enrollment and budget. On the demand side, it enables many families to select the type of school service that fits their particular needs and preferences.

The constitutional argument against a neighborhood policy is weak. It is that the use of a neighborhood school policy, when combined with residential segregation, results in the educational segregation of blacks, and that the harm of such segregated education upon blacks outweighs the social considerations favoring a neighborhood school policy. The logic requires a rather unattractive premise, that blacks suffer from the singular disability that it is harmful to them to be educated in schools where the other students are of their own race. The California Supreme Court has not shrunk from saying so explicitly, but more thoughtful analysis shows that there is little to support such a premise.

The constitutionality of a neighborhood school policy does not mean that a school system might not administer such a policy in an unconstitutional manner. A neighborhood school policy can, through racial gerrymandering, be used as a cover for a policy of racial separation indistinguishable from de jure segregation. Even stripped of the pervasive affirmative duty which the Court places on the school officials of Columbus and Dayton, some of their actions would have been unconstitutional under such a standard. But if a neighborhood school policy is constitutional, then the remedy should be confined to correcting the abuses of that policy. School boundaries can be redrawn. The school construction program can be closely monitored. Faculty assignment procedures can

59 "Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be." Crawford v. Board of Education, 17 Cal.3d 280, 295 (1976), quoting U.S. Commission on Civil Rights, Racial Isolation in the Public Schools 193 (1967).

be revised. But the Court leaps from its system-wide violation to the conclusion that the only appropriate relief is system-wide racial balancing. That leap can be made only if it is assumed that a good-faith neighborhood school policy is an unconstitutional stopping point.

Brown I, which the Court repeatedly cites as a symbol for its 1954 desegregation decisions, was enigmatic. The opinion of Brown I itself said the Court had found that separate education was inherently unequal. This suggested that the Court had retained the separate but equal formulation of Plessy v. Ferguson but had changed its mind about what was equal. The immediate extension of the doctrine without further explanation to a whole range of public facilities put that proposition into doubt. And in Brown's companion case of Bolling v. Sharpe, holding the federally segregated school system of the District of Columbia unconstitutional, the Court stressed the impermissibility of racial classification, appearing to follow the color-blind constitution of the first Harlan dissenting in Plessy.

The separate but equal formula of Plessy was supported by a theory of social welfare no longer acceptable. Separation of the races was then viewed as a reasonable social policy because blacks were said to be different:

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

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32 Kurland, Brown v. Board of Education Was the Beginning: The School Desegregation Cases in the United States Supreme Court, 1954-79, 1979 Wash. U. L. Q. 309, shows that the Court has never developed a theory of what the constitutional violation is in the school desegregation cases but has gone forward to sweeping remedies for constitutional violations it has never explained.

33 347 U.S. at 495.

34 163 U.S. 537 (1896).


37 163 U.S. at 551-52.
Under the Court’s new theory, blacks must not be separated because they are, in fact, different, the differences being the consequence of social discrimination. This requires the arrangement of school and workplace so that blacks will associate with whites. The Court camouflages this theory with concepts of class liability and careful inattention to the critical and revealing question: How is the remedy related to the wrong? In *Weber*, young white workers must be accorded lower status because craft unions to which they never belonged, once, in a manner then thought legal, discriminated against blacks. In *Dayton* and *Weber* school children and their families must accept the burdens of busing because of long-ago and then legal actions of school boards. The methodology of the Court is to find unconstitutional but not necessarily malevolent acts on the part of a school official, a craft union, the society, and then order relief the adverse effects of which fall only on those—the young family, student, or worker—who have no demonstrable connection to the wrong being redressed. Meanwhile, the individuals responsible—the former school board officials, the former members of craft unions, the former members of the Court itself—remain unaffected, protected by the scope of their official immunities or the passage of time.

The Court has implemented its program in an evasive manner. *Weber*, the reader is told, simply reflects the “spirit” of a Congress of long ago. *Columbus* and *Dayton* only require the exercise of the chancellor’s informed discretion to remedy proven constitutional violations. In the short run this is effective politics because it confuses the latent political opposition. In the long run, it is unwise. The advantage of covenants openly negotiated, openly arrived at, is that the very process of debate and consideration can educate the public and mobilize its support. An example is the debate over the Civil Rights Act of 1964, a debate that both exposed the divisiveness of a civil rights program based on a system of preferences and the broad base of support for the principle of nondiscrimination. It was the discovery and mobilization of that support that generated the growth and vigor of the enforcement program and the extent of voluntary compliance. The Court has now, deviously, fractured that compromise. That, in turn, will affect the politics of the program.

In the short run the Court’s program may be modestly helpful to blacks. *Weber*, combined with the zeal of the enforcement agen-
cies, should cause a substantial increase in the amount of pro-black affirmative action as management seeks what appears to be a safe harbor from the uncertainties of litigation. The competition of firms to fill their quotas will in turn, lead to an improvement in the market for employable blacks. The school cases seem less likely to have any effect, but it is conceivable that the number of blacks attending adequate schools might increase.

The kindest view one can take of the Court's program is that it is a system of covert reparations—transferring wealth to blacks from nonblacks through the job market and school bureaucracies. When compared to a system of direct reparation—for instance a head tax upon all nonblacks, proceeds payable to blacks—its only advantage is its covert nature. The Court's program suffers from all the disadvantages of regulation-induced service transfers. First, the program reduces the efficiency of the institutions captured to administer the program. Business personnel decisions and school administration and planning are made complex and costly. Reporting requirements with their ministering personnel must mushroom. Second, the Court's path to its results assures substantial legal costs. Even though Columbus and Dayton II seem to command the outcome, every city remains entitled to a massive factual hearing about every feature of its school system from the founding of the public schools to the present. The amount of time that will be required to work out systems of affirmative action acceptable to the enforcement agencies, courts, employers, unions, and the affected protected groups staggers the imagination. Third, the services transferred are in-kind, and because the black recipients cannot sell to others their right to preference or to attend a particular school, the value of the service to the recipient will in many cases be less than its cost to those taxed. Most of the effect of the program will be on the cost, not the benefit side.

In the longer run, the Court is taking frightful risks. (1) Can the Court insist on such intrusive use of racial classification without teaching the country that policies based on racial classification are legitimate? (2) Will those who are asked to step aside for the bene-

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88 The case for an explicit program is discussed in Bittker, The Case for Black Reparations (1973). An explicit program does not appear to be politically viable, although some aspects of the war on poverty had characteristics of a service reparations program. The legislative programs, however, made use of less divisive classifications—classifications with relevancy to the legislative objectives—such as poor, urban, or disadvantaged.
fit of blacks not harbor ill will against them? Will this not be a particular problem for the young, who, having grown up on this side of the civil rights revolution, disassociate themselves from the racism of the old America, and may be surprised to learn that they are asked to pay for it? (3) Will the effect of pervasive affirmative action for blacks—combined with an equal pay principle—be to ensure that blacks are systematically promoted to the level just above their competence and cause affirmative action to become an engine of group defamation? (4) Is it possible to weaken the ability of families to select schools for their children through residential location without weakening support for public education? (5) What will the extent of white flight to private schools and suburban enclaves be, and what can the Court do about it? Will the school cases simply isolate blacks in decaying central cities? Will affirmative action create incentives for employers to locate jobs away from black labor? The logic of Columbus and Dayton II suggests that the Court will soon have little trouble finding the interdistrict violation necessary under the standard of Milliken I to require interdistrict pupil transfer. But as the federal courts reach across school districts to achieve integration, the increased complexity and scope of the program will strain the resources of the courts and the symbolic hold of the rule of law.

Choices between short-run gains and long-run costs are easy to make if there is a strategy for enjoying the short-run gains and avoiding the costs. The Court, after all, can uninvent what it has invented. If the Court stresses that the burden of proof is on the plaintiff, that illegal discrimination requires proof not simply of effects but of intent, and limits remedies to correction of proved violations, the program quickly shrinks. In the school cases, that is the way the Court had began to talk in Milliken I, Pasadena, and Dayton I, although a close reader of the Dayton I opinion might notice that the Court left in effect the system-wide remedy it said

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40 The Third Circuit has already done so on the basis of reasoning similar to that of the Court in Columbus and Dayton II. Petitions for certiorari have been filed. Delaware State Board of Education v. Evans, No. 78-671; Alexis DuPont School Dist. v. Evans, No. 78-672.


was unsupported by the evidence. In the employment area, *Washington v. Davis*\(^{43}\) and the separate opinions of a majority of Justices in *Bakke*\(^{44}\) pointed in the same direction. In light of *Weber*, *Columbus*, and *Dayton II*, some future historian will have to inquire whether those opinions really reflected doctrinal confusion or were instead a tactical feint, designed to delay and complicate the implementation of quotas and busing in the light of public opposition.

The Court's recent opinions suggest no theory as to how the program might end. In a footnote in *Weber* the Court cites the present disparity in white and black unemployment rates, observing that "[t]he problem that Congress addressed in 1964 remains with us."\(^45\) The implication is that if that disparity disappeared, then the program might end.\(^46\) In light of the federal minimum wage, the incentives created by the federal welfare system, and the impotence of the urban public schools, it seems unlikely that the disparity will disappear within the next several generations. *Weber*-sanctioned affirmative action will probably continue indefinitely unless Congress chooses to repudiate its newly discovered "spirit."

The emphasis in *Columbus* and *Dayton II* on the "continuing constitutional duty" to desegregate, if taken literally, would mean that the school systems must be perpetually operated in a way that eliminates identifiable black schools each school year. In *Pasadena City Board of Education v. Spangler*,\(^47\) the Court held such an order improper, but that case can be distinguished on the ground that the district court had not found that the school system operated a dual school system in 1954, and hence was not under what the Court calls the continuing constitutional duty to desegregate.

The future, however, is not entirely in the hands of the Court. The Court's program creates a set of expectancies and social dependencies that will not be easily set aside. Even now, the affirma-

\(^{43}\) 426 U.S. 229 (1976).

\(^{44}\) 438 U.S. 265 (1978).

\(^{45}\) 99 S. Ct. at 2728 n.4.

\(^{46}\) The Court described the affirmative action program in *Weber* as temporary, 99 S. Ct. at 2730, but did not explain how or when it would end. See id. at 2738 n.3. Pervasive affirmative action in employment will create odd racial age patterns in various subgroups of the work force which will have to be offered by future quotas if the target ratios are to be maintained. If, for instance, affirmative action causes heavy black hiring in particular jobs for the period 1979-85, there will be a heavy rate of black retirement when those workers reach retirement age as much as fifty years from now.

tive action bureaucracies inside and outside of government would not lightly accept obsolescence of their function. The wall that the Court has built against public aid to church education means that church schools can gain from the erosion of support for public education. The dilemma for the Court in Brown was not that Plessy had outlived its time, but that reliance on the Plessy doctrine had generated a host of social expectations in the South that were not easily frustrated. How much more difficult will be the position of some future Court faced with the need to arrest a program so directly set in motion by the divided Court in Weber (5–2), Columbus (7–2), and Dayton (5–4).