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"Reverse Discrimination" and Higher Education Faculty

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“REVERSE DISCRIMINATION” AND HIGHER EDUCATION FACULTY

Joyce A. Hughes*

In this Article, the author critiques the use of “reverse discrimination” claims by White plaintiffs to challenge the hiring of Blacks in institutions of higher education. The author argues that “reverse discrimination” is a myth since no such claim is possible when one White candidate is selected over another; assumptions of inferiority are implicit where such a claim is made when a Black candidate is selected over a White candidate. In other words, allowing such a claim, even if ultimately unsuccessful, implies a presumption of superiority on the part of the White candidate. For this reason, the author argues that it is improper to assume that “reverse discrimination” occurs any time a Black candidate is chosen over a White candidate. If both are equally qualified, no such claim exists. The term “reverse discrimination” is not neutral in tone and therefore should not be treated as if it is neutral in application. The author concludes that institutions of higher education must not allow fears of unfounded “reverse discrimination” claims to prevent them from hiring, promoting, and granting tenure to Black faculty.

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INTRODUCTION

[T]he view of affirmative action as reverse discrimination that destroys the careers of white . . . professors is not supported by the evidence There is an ever-widening gap between the reality of continuing racism and the myth of reverse discrimination.¹

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1. John K. Wilson, *The Myth of Reverse Discrimination in Higher Education*, J. BLACKS HIGHER EDUC., Winter 1995/1996, at 88, 88.

This Article focuses on suits by White faculty members against predominantly White institutions² of higher education where a Black or African American person³ receives a benefit and "reverse discrimination"⁴ is claimed. Such claims have not aided plaintiffs in any of the cases discussed. Of course, many complaints of employment discrimination are never presented to a court. Moreover, ninety percent of employment discrimination cases are resolved before trial.⁵

Even among reported cases in all industries and occupations, few involve "reverse discrimination," and still fewer are judged "meritorious."⁶ If the disposition of claims by the Equal Opportunity

2. Subsequent references will not specifically qualify institutions with the phrase "predominantly White." However, institutions still classified as Historically Black Colleges and Universities (HBCUs) "by the Department of Education due to their initial charter and mission [but which] have now become predominantly white institutions" are not included. *The Current State of America's Black Colleges and Universities*, J. BLACKS HIGHER EDUC., Winter 1996/1997 at 75, 78; see also *The Whitening of Public Black Colleges and Universities*, J. BLACKS HIGHER EDUC., Autumn 1996, at 26 (discussing increased enrollment at public HBCU's).

3. In this Article, Black with a capital B can be synonymous both with color and race or only one of these. The term is problematic as a person can be black (small b) in color but not Black (capital B) meaning African American. For example, "[i]n the United States, any degree of African ancestry makes a person black, while in Latin America and the Caribbean any degree of non-African ancestry means that person is not black." PETER WINN, *AMERICAS—THE CHANGING FACE OF LATIN AMERICA AND THE CARIBBEAN* 277 (1992); see also Tom Morganthau, *What Color is Black?*, NEWSWEEK, Feb. 13, 1995, at 63 (discussing the "blurring of the color line" and the definition of Blackness); F. JAMES DAVIS, *WHO IS BLACK?* (1991) (discussing problems and policy issues surrounding defining who is Black). For the reasons the *Journal of Blacks in Higher Education* decided to use the word 'Blacks' in the title, see *Why "Black" and Not "African American"?*, J. BLACKS HIGHER EDUC., Spring 1994, at 18.

4. See *infra* Part II (discussing the meaning of the phrase "reverse discrimination").

5. *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997). The only out-of-court complaint based on White racial discrimination for failure to hire as faculty that this author was able to locate was by a White man who was one of 64 applicants for a teaching position at the University of Maine. He received an out-of-court settlement. *Race Relations on Campus*, J. BLACKS HIGHER EDUC., Autumn 1995, at 125. Between 1985 and June 1993 there were no allegations of higher education faculty discrimination based on being White brought before the U.S. Equal Employment Opportunity Commission (EEOC). B. Denise Hawkins, *Race Rulings a Reality at Black Colleges*, BLACK ISSUES HIGHER EDUC., Aug. 26, 1993, at 15. David Donaldson, president of the National Association of College and University Attorneys (NACUA), noted that "[o]ften when privileged white male professors have been passed over for promotions and tenure they are reluctant to bring suits and legal action because they know they can simply go somewhere else." *Id.* at 16.

6. *Myths and Realities about Affirmative Action*, COMMITTEE REP. (Lawyers' Comm. for Civil Rights Under Law, Wash., D.C.), Spring/Summer 1996, at 4, 4. The *Committee Report* referred to a Department of Labor study of over "3000 bias opinions in federal district courts from 1990-94," *id.*, and noted that only 100 involved claims of reverse discrimination, and of those, "only six cases were meritorious." *Id.*

Employment Commission (EEOC) in 1994—less than two percent of complaints filed alleged “reverse discrimination” and only 0.2% of these survived review⁷—are representative, “reverse discrimination” is indeed a myth. Of course, when a White person is discriminated against merely because he/she is White, then redress ought to be available. Often privilege is claimed solely on the basis of Whiteness, however. To the extent that a “reverse discrimination” claim is premised upon the *assumption* of White superiority/Black inferiority, then such claims should be rejected. But it is important to note what is *not* a thesis of this Article, either explicit or implicit: it does *not* contend that actual discrimination against the White majority should ever be condoned.

The concept of “reverse discrimination” in employment is linked to Title VII of the Civil Rights Act of 1964⁸ (“Title VII”) and affirmative action. If, whenever such efforts are undertaken or a Black person is selected for a position, one is met with complaints of “reverse discrimination,” then inclusory efforts could lead to reduction of the minuscule number of Black faculty in higher education. The number of Black faculty in all higher education is minute, but it is even smaller in predominantly White institutions. As of 1991 there were 520,324 full-time instructional faculty in institutions of higher education, of which only 24,516 were Black.⁹ Thus, Blacks were 4.7% of full-time higher education instructional faculty. But less than 2.5% of faculty members at predominantly White colleges and universities are Black, and they are spread among approximately 3000 institutions.¹⁰ Of course, not all institutions have even one Black faculty member.¹¹

The tiny percentage of Black faculty at White institutions contradicts the idea of widespread “reverse discrimination” based on the presence of African American faculty. Any effort to diminish the

7. *Id.* at 5.

8. 42 U.S.C. § 2000e-17 (1994).

9. NATIONAL CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 230 (1994).

10. Blacks are only 4.7% of *all* higher education faculty but about half are at HBCUs, leaving approximately 2.35% at White institutions. DEBORAH J. CARTER & REGINALD WILSON, MINORITIES IN HIGHER EDUC., AM. COUNCIL ON EDUC., 1994 ANN. STATUS REP. 4 (1995).

11. In 1996, the 25 highest-ranked universities had 1084 full-time Black faculty out of a total 35,414 full-time faculty. This means that at these institutions—in total—Blacks made up 3.1% of the full-time faculty. On an individual university basis, the percentage of Black full-time faculty ranged from a low at California Institute of Technology (0.3%) to a high at Emory University (5.1%). The number of *tenured* Black faculty is very small in this group—343 out of 14,194 tenured faculty, with three institutions declining to provide information. *The Status of Black Faculty at America's Highest-Ranked Universities*, J. BLACKS HIGHER EDUC., Spring 1996, at 32.

fragile¹² presence of African Americans in the Academy¹³ would detract from the benefits brought to all students by diversity of faculty.¹⁴ Also, it is probable that African American faculty can help minimize

[o]ne frustrating aspect of being [a] black [student] on a predominantly white campus . . . [T]he chronic inability of many white faculty members and administrators to see black students as individuals rather than as representatives of their racial group . . . fail[s] to give them the kind of academic and professional advice they are due as students.¹⁵

“Reverse discrimination” claims—actual or threatened—should not be allowed to prevent the hiring and retention of Black faculty in higher education. The term “reverse discrimination” ought to be avoided as it is a value-laden concept which can and has been used to denigrate African Americans.

Part I of this Article discusses Title VII and its relationship to institutions of higher education. Part II considers development of the “reverse discrimination” concept and Part III examines cases filed by White faculty. Although White faculty may be the statistical norm in higher education, that fact should not lead one to conclude that any time a Black person is favored over the White “norm” that “reverse discrimination” has occurred.

12. The word fragile is designed to highlight that African American faculty have a tenure rate of only 42.9%. MINORITIES IN HIGHER EDUCATION, AM. COUNCIL ON EDUC., 1996-97 ANN. STATUS REPT. 34. Thus the continued presence in higher education of more than half of the African American faculty is not protected by tenure.

13. “Academy” refers to institutions of higher education and is derived from the name of “the school for advanced education founded by Plato.” WEBSTER’S COLLEGIATE DICTIONARY 6 (10th ed. 1993).

14. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the Supreme Court considered an affirmative action admissions policy; writing for the court, Justice Powell stated that student diversity “clearly is a constitutionally permissible goal for an institution of higher education.” *Id.* at 311-12. Faculty diversity is also necessary if students are to be fully educated and not to be allowed to wallow in the misguided idea that reality is homogeneous.

15. Joe R. Feagin & Melvin P. Sikes, *How Black Students Cope with Racism on White Campuses*, J. BLACKS HIGHER EDUC., Summer 1995, at 91, 93. Although HBCUs are less than five percent of all colleges and universities, “16% of all black college students in the United States” were enrolled in such institutions in 1996. *Vital Sign: The Current State of America’s Black Colleges and Universities*, J. BLACKS HIGHER EDUC., Winter 1996, at 75, 78. In HBCUs students get “more people who provide Black students with positive feedback, support and understanding, and who communicate that they care about the students’ welfare.” Walter R. Allen, *The Color of Success: African American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26, 40 (1992).

I. TITLE VII AND HIGHER EDUCATION

[One] cannot imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.¹⁶

Title VII proscribes employment practices that discriminate because of race, color, religion, sex, or national origin. The statute makes it unlawful to discriminate on "compensation, terms, conditions or privileges of employment"¹⁷ or to do things that "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."¹⁸ By its explicit terms, the statute seeks to eliminate discrimination in employment opportunities. However, a number of authors have argued that Title VII has failed to address adequately the employment needs of African Americans¹⁹ who tend to lose reported Title VII cases.²⁰

16. Susan L. Pacholski, *Title VII In the University: The Difference Academic Freedom Makes*, 59 U. CHI. L. REV. 1317, 1331 (1992) (citing H.R. REP. NO. 92-238, at 19-20 (1971), reprinted in 1972 U.S.C.C.A.N. 2136, 2155).

17. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1982).

18. *Id.* Under the statute it is unlawful

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

19. See, e.g., Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965 (1993) (discussing the obstacles to success posed by judicial assumptions about racial realities and restrictive interpretation of Title VII); Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) (discussing how application of negative anti-discrimination laws according to a principle of racial neutrality replicates rather than revises the status quo); Ronald Turner, *A Look at Title VII's Regulatory Regime*, 16 W. NEW. ENG. L. REV. 219 (1994) (discussing the impossibility of effective enforcement posed by judicial interpretation of the scope and importance of the governing principles of Title VII). For example, "[w]hen asked to identify the type of cases that fell outside the 'important' case category, [federal district court] Judge Stanley Sporkin identified . . . actions brought under Title VII of the Civil Rights Act of 1964 . . ." *Id.* at 219 (citations omitted).

20. See, e.g., Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination*

Initially, the Civil Rights Act of 1964 exempted colleges and universities from Title VII's prohibition on employment discrimination.²¹ When the exemption was eliminated in 1972,²² Congress noted that "[t]here is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees"²³ Further, it noted the "common knowledge" that "black scholars have been generally relegated to all-black institutions, or have been restricted to lesser academic positions when they have been permitted entry into white institutions"²⁴ Colleges and universities are now subject to judicial scrutiny under Title VII.²⁵ Despite congressional focus on the paucity of Blacks and women in higher education, Title VII has not been particularly effective in the university setting.²⁶ By implication, courts have not accepted the "common knowledge"—that Blacks have

Doctrine, 7 YALE J.L. & FEMINISM 195, 197 (1995) (discussing the 'winners' and 'losers' of anti-discrimination cases); Culp, *supra* note 19, at 985 (arguing that Blacks are not likely to win Title VII cases). Of course, Title VII complaints can be resolved before action; the claim may be compromised after an EEOC investigation, or an out-of-court settlement of a lawsuit is reached before any record of the case appears in a written compilation of cases.

21. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1969) (amended 1972).

22. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-2 (1988)). The statute continues to exempt employers that discriminate on the basis of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" *Id.* The statute further allows educational institutions to hire on an otherwise discriminatory basis if the institution is "in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious . . . society, or if the curriculum . . . is directed toward the propagation of a particular religion." *Id.* Race is never a bona fide occupational qualification. *See id.*

23. H.R. REP. NO. 92-238, at 19 (1971).

24. *Id.*

25. In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the Supreme Court concluded that the elimination of the exemption

was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members. Petitioner therefore cannot seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption for educational institutions.

Id. at 190 (citations omitted).

26. *See* GEORGE R. LANOUE & BARBARA LEE, *ACADEMICS IN COURT* 23 (1987). The authors document Title VII cases involving faculty members under the 1972 amendments.

difficulty in obtaining faculty positions in the Academy—to which Congress referred in eliminating the exemption for higher education.²⁷

The Supreme Court has not addressed the merits of a Title VII discrimination claim in the academic arena.²⁸ Consequently, there are no Supreme Court standards specifically governing the employment practices of academic institutions. However, the Court has developed two modes of analysis applicable to Title VII claims: disparate treatment and disparate impact. Although disparate treatment and disparate impact are alternate theories,²⁹ the method of analysis chosen can have significant ramifications on an aggrieved employee's prospects of success.³⁰ "Disparate treatment" is the descriptive term for the approach to Title VII violations developed in *McDonnell Douglas Corp. v. Green*.³¹ The crux of this analysis involves a discriminatory difference in the treatment of similarly situated applicants. To establish a prima facie case of disparate treatment discrimination, the plaintiff must show that: 1) he/she is a member of a protected group; 2) he/she applied for and was qualified for the position; 3) he/she was rejected by the employer; and 4) the position remained open while the employer continued to seek applicants with the plaintiff's qualifications.³² Once a plaintiff establishes a prima facie case

27. See *supra* notes 22–24 and accompanying text. For discussion of Black and women faculty in higher education, see generally Derrick A. Bell, Jr., *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L. REV. 319 (1986) (discussing the reasons behind a decline in the number of Black and female faculty at institutions of higher learning); Len Biernat, *Subjective Criteria in Faculty Employment Decisions Under Title VII: A Camouflage for Discrimination and Sexual Harassment*, 20 U.C. DAVIS L. REV. 501 (1987) (discussing the need to use subjective criteria in faculty employment decisions); Lynn S. Muster, *A Proposal for the Hire and Tenure of Faculty of Color in Higher Education*, 20 T. MARSHALL L. REV. 45 (1995) (critiquing the faculty hiring process in higher education and its impact on non-Whites); Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67 (1994) (discussing gender discrimination in higher education); Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625 (1990) (discussing the need for faculty integration in law schools).

28. The sole academic case addressed by the Supreme Court involved a sex discrimination claim, *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978). In *Sweeney*, the sole issue for review by the Supreme Court was the standard applied by the Court of Appeals in determining the employer's burden of proof to dispute a prima facie showing of disparate treatment. *Id.* at 24–25. The Supreme Court did not discuss the validity of the plaintiff's claim. See *id.*

29. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

30. See George R. Kramer, *Title VII on Campus: Judicial Review of University Employment Decisions*, 82 COLUM. L. REV. 1206, 1208 (1982).

31. 411 U.S. 792 (1973).

32. *Id.* at 802. Although *McDonnell Douglas* was a hiring case, variants of its four factors apply in the contexts of discharge, contract non-renewal, and tenure. See, e.g., *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1995) (involving an employee who

of discrimination, the employer must “articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”³³ The employer’s reason “must be clear and reasonably specific” to raise a genuine issue of fact.³⁴ The burden remains on the plaintiff to show that discrimination was the real reason for the decision—that there are no other nondiscriminatory reasons, even those unmentioned by the defendant.³⁵ Although the burden of producing evidence shifts to the employer once a prima facie case is established, the burden of persuasion remains on plaintiff. Thus even if the employer can articulate some legitimate nondiscriminatory reason for the decision, the plaintiff still must show that the offered reason is a mere pretext for unlawful discrimination.

The “disparate impact” approach, first recognized by the Supreme Court in *Griggs v. Duke Power Co.*,³⁶ does not require a showing of discriminatory intent. It applies when facially neutral employment factors have a disproportionately negative impact on a protected group by effectively excluding its members.³⁷ Under *Griggs* an employer could justify disparate impact by demonstrating business necessity and job relatedness.³⁸ The Civil Rights Act of 1991³⁹ enshrined a similar standard in legislation.⁴⁰ As in the case of disparate treatment, after a prima facie case is established and following the employer’s satisfaction of its burden of production,

was demoted and then discharged). In *Smith v. University of North Carolina*, 632 F.2d 316, 332 (4th Cir. 1980), the Fourth Circuit adapted the *McDonnell Douglas* prima facie requirements to fit a university.

33. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

34. *Id.* at 258.

35. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 510–11, 515–16 (1993).

36. 401 U.S. 424, 431–32 (1971).

37. In *Griggs*, a high school diploma requirement would have excluded 88% of Black state residents but only 66% of White residents. *Id.* at 430 n.6 (citation omitted). *Griggs* also used tests that, in another case, the EEOC found to have a 94% exclusion rate for Blacks but only a 42% exclusion rate for Whites. *Id.* (citations omitted); see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (holding that employment tests are impermissible unless shown to correlate with relevant job skills).

38. The *Griggs* Court found no justification for the measures employed. *Griggs*, 401 U.S. at 426. It was argued that they predicted success in the jobs to be filled but there was no proof that the criteria were effective predictors. *Id.* at 431 n.7, 436.

39. Pub. L. No. 102-166, 105 Stat. 1074 (1991) (codified as amended at 42 U.S.C. § 2000e-2 (1994)).

40. This section provides that defendants have the burden of proving “that the challenged practice is job related for the position in question and consistent with business necessity . . .” 42 U.S.C. § 2000e-2(k)(1)(A)(i). See generally Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 391–93 (1996) (showing how disparate impact analysis developed through the application of the 1991 Civil Rights Act).

then the plaintiff must show that the stated reason is merely a pretext for discrimination.⁴¹

Title VII prohibits discrimination because of color. Thus, a "reverse discrimination" plaintiff claiming intentional discrimination would allege adverse treatment because of being White. If disparate treatment under Title VII is alleged, then it would be claimed that the White is more qualified than a Black. Where Whiteness itself is what arguably makes a person better qualified, the White person is *presumed* superior. Although not the explicit rationale of "reverse discrimination," this notion can undergird such claims.⁴² Indeed, in careless language, the Eleventh Circuit stated the *prima facie* requirements for "reverse discrimination" so that a White person can complain when a minority group member is selected over him or her.⁴³ If one is permitted to *assume* that "reverse discrimination" occurs any time a Black person is chosen over a White person, a concomitant *assumption* is that the Black is inferior to the White. That suggests Whiteness *per se* is automatically entitled to privilege.⁴⁴

II. "REVERSE DISCRIMINATION": A MISLEADING TERM

*[T]he limitations . . . created by using the same language to describe discrimination against Blacks and charges of reverse race discrimination made by whites . . . hinder the determination of an appropriate remedy for intentional discrimination against African Americans.*⁴⁵

41. *Smith v. University of North Carolina*, 632 F.2d 316, 335-36 (4th Cir. 1980) (modifying disparate treatment to accommodate the circumstances of academic employment decisions). In *Smith*, the court concluded that a female assistant professor who was denied promotion, rehire, and tenure was unsuccessful in her discrimination claims based on age, sex, and religion where she could not establish that the university's proffered reasons for its actions were pretextual. *Id.*

42. See *infra* notes 99, 138, 139 and accompanying text.

43. In *Shealy v. Albany, Georgia*, 89 F.3d 804, 805 (11th Cir. 1996) and *Wilson v. Bailey*, 934 F.2d 301, 302 (11th Cir. 1991) the court indicated what a plaintiff must prove to state a *prima facie* "reverse discrimination" case: (1) that she or he belongs to a class; (2) she or he applied and was qualified for a job; (3) she or he was rejected; and (4) the job was filled by a minority group member. The last item should have been limited to *unqualified* members of minority groups to eliminate the implicit assumption that any minority group member is less qualified than a White person.

44. Cf. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707 (1993) (arguing that Whiteness has evolved into a protected property right).

45. Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1, 19 (1994).

The term "reverse discrimination"⁴⁶ was a conceptual outgrowth of affirmative action, a term which can be traced back to a 1961 presidential executive order.⁴⁷ One definition describes affirmative action as

any measure, beyond simple termination of a discriminatory practice, that permits the consideration of race, national origin, sex, or disability, along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities and/or to prevent the recurrence of discrimination in the future.⁴⁸

Thus affirmative action refers to efforts to "include in" those who have historically been "excluded out."

One idea behind "reverse discrimination" is that the traditional pattern of discrimination against oppressed groups is "reversed" to be discrimination in their favor.⁴⁹ This view of "reverse discrimination"

46. See generally Philip L. Fetzer, 'Reverse Discrimination': The Political Use of Language, 12 NAT'L BLACK L.J. 212 (1993) (discussing the use of the term "reverse discrimination" as a weapon in the battle over an appropriate remedy for the historical exclusion of minorities from education); David Michael McConnell, Title VII at Twenty—the Unsettled Dilemma of "Reverse" Discrimination, 19 WAKE FOREST L. REV. 1073 (1983) (discussing the trend of using Title VII to bolster claims of reverse discrimination).

47. By an order of President Kennedy signed in March 1961, the pledge of nondiscrimination required to appear in federal contracts was to be supplemented by a clause restating the prohibition in positive terms: "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." Exec. Order No. 10,925, 3 C.F.R. 448, 450 (1959-1963). In part, contractors were directed to advertise as equal opportunity employers and make special recruiting efforts. *Id.*; see also GIRARDEAU A. SPANN, RACE AGAINST THE COURT (1993):

Stated simply, affirmative action is the use of race-conscious classifications for the reallocation of societal resources in a way that benefits minorities. In theory, affirmative action and traditional antidiscrimination laws are analytically distinct. Antidiscrimination laws promote race neutrality by prohibiting the adverse treatment of individuals or groups based upon their race, while affirmative action departs from the immediate goal of race neutrality in order to channel resources to disadvantaged minorities in a way that is designed to advance the long-term objective of racial equality.

Id. at 121.

48. U.S. Commission on Civil Rights Briefing Paper on Affirmative Action [1995], Daily Lab. Rep. (BNA) No. 147, S-87 (Aug. 1, 1995), cited in Wendy Brown-Scott, Unpacking the Affirmative Action Rhetoric, 30 WAKE FOREST L. REV. 801, 801 n.4 (1995).

49. KENNETH GREENAWALT, DISCRIMINATION AND REVERSE DISCRIMINATION 16 (1983) (" 'Reverse discrimination' . . . reverses the pattern of earlier discrimination. Typically, more favorable treatment . . . is given to members of groups that have been discriminated against in the past.").

sees it as "[p]rejudice or bias exercised against a person or class for the purpose of correcting a pattern of discrimination against another person or class."⁵⁰ Another aspect of "reverse discrimination" is the notion that the race of the victim of discrimination is reversed from what is usual—Black—to what is unusual—White. In this respect the concept focuses upon alleged discrimination against those who historically have been free from it. Consequently, "reverse discrimination" is commonly thought of as "discrimination against members of the white majority."⁵¹

Title VII applies to all persons, Black or White, male or female, and requires the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[s]."⁵² However, politicizing Title VII by reliance on the concept of "reverse discrimination" is detrimental. But a fundamental problem lies in the degree to which "reverse discrimination" has redirected the discrimination dialogue. Our current challenge is to "overcome the more subtle forms of discrimination that actually masquerade as race neutrality."⁵³ Moreover, concern should be focused on actual situations of discrimination rather than immediately assuming that when a White person is denied a benefit that a Black receives it must be because of "reverse discrimination." But even if that were the assumption of White faculty bringing "reverse discrimination" claims against institutions of higher education, in none of the cases discussed in the next section were they successful.

50. Fetzer, *supra* note 46, at 216 (quoting BLACK'S LAW DICTIONARY 1186 (6th ed. 1990)). Fetzer chronicles the development of "reverse discrimination" in the popular media:

A conservative columnist, James Kilpatrick, wrote "[A] more familiar name for this abnormality is 'reverse discrimination.' The short and ugly word is racism." In 1976, U.S. News & World Report commented on "a practice known as reverse discrimination," without defining the term 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." Three years later, Republican Senator Orrin Hatch and former Texas Governor, John Connally also used the term. By the 1980s, "reverse discrimination" had lost its quotation marks and was accepted into popular language.

Id. at 215.

51. *Id.* at 216.

52. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Five years after *Griggs*, in *McDonald v. Santa Fe Trail Transportation Co.*, the Supreme Court concluded that discrimination against Whites is prohibited by Title VII and section 1981 of the Civil Rights Act of 1866. *McDonald*, 427 U.S. 273, 285, 296 (1976) (citations omitted).

53. SPANN, *supra* note 47, at 6.

III. WHITE FACULTY VERSUS PREDOMINANTLY WHITE UNIVERSITIES

*When one deals with a sensitive topic, one must be as careful as one can about the use of related terms, since variant connotations can themselves be the source of serious misunderstanding.*⁵⁴

Cases in which White faculty members at predominantly White institutions filed "reverse discrimination" complaints to challenge employment decisions favoring Blacks have arisen in Arkansas,⁵⁵ Florida,⁵⁶ Illinois,⁵⁷ Michigan,⁵⁸ New York,⁵⁹ Ohio,⁶⁰ and Pennsylvania.⁶¹ However, *none* of the plaintiffs in any of these cases prevailed, which suggests the unstable foundations of such claims. In the Arkansas case, plaintiffs abandoned their claims of "reverse discrimination" before the court ruled.⁶² In both cases involving Cleveland State University in Ohio, the decisions are unreported,⁶³ and a Sixth Circuit Court of Appeals rule disfavors citations of such decisions, which undermines their precedential value.⁶⁴ In the Florida case, the White plaintiff received his initial appointment without having to compete with any Blacks and claimed "reverse discrimination" when a Black was selected in later competition.⁶⁵ Cases in New York⁶⁶ and Michigan⁶⁷ involved retrenchment where a White person relieved of a position claimed "reverse discrimination" when a Black obtained a position. The respective qualifications of White and Black contenders were alleged to be at issue in the Illinois case.⁶⁸ Comparative reviews of Black and White faculty were actually undertaken in

54. GREENAWALT, *supra* note 49, at 15.

55. *Rollins v. Farris*, No. 86-1367, 1986 WL 8879 (E.D. Ark. Feb. 18, 1986), *aff'd*, 822 F.2d 1093 (8th Cir. 1987).

56. *Palmer v. District Bd. of Trustees of St. Petersburg Junior College*, 748 F.2d 595 (11th Cir. 1984).

57. *Hein v. Board of Trustees of Community College Dist.*, No. 90-C5372, 1992 WL 80546, at *3 (N.D. Ill. Apr. 10, 1992).

58. *Reisman v. Regents of Wayne State Univ.*, 470 N.W.2d 678, 680 (Mich. Ct. App. 1990).

59. *Solomon v. New York Human Rights Appeal Bd.*, 417 N.Y.S.2d 805 (App. Div. 1979).

60. *Day v. Cleveland State Univ. Bd. of Trustees*, No. 94-3403, 1995 WL 355672 (6th Cir. June 13, 1995); *Evans v. Cleveland State Univ. Bd. of Trustees*, No. 90-3759, 1991 WL 93094 (6th Cir. June 3, 1991).

61. *Cohen v. Community College of Phila.*, 484 F. Supp. 411 (E.D. Pa. 1980).

62. *Rollins*, 1996 WL 8879.

63. *Day*, 1995 WL 355672; *Evans*, 1991 WL 93094.

64. 6th Cir. R. 24 (c).

65. *Palmer*, 748 F.2d 595.

66. *Salomon*, 417 N.Y.S.2d 805.

67. *Reisman*, 470 N.W.2d at 680.

68. *Hein*, 1992 WL 80546, at *3.

both a New York case involving an honorific designation⁶⁹ and in a Pennsylvania case involving appointment to a regular faculty position.⁷⁰ Several of these cases are discussed at length below.

In *Palmer v. District Board of Trustees of St. Petersburg Junior College*,⁷¹ a White male vocal music teacher, who held a one time nine-month appointment, claimed "reverse discrimination" when subsequently he was not appointed to a permanent position.⁷² The school's affirmative action plan mandated that anyone hired to a position would be given only a temporary appointment if Black candidates had not been considered.⁷³ Because there were no Blacks in the pool when the plaintiff Palmer was hired, he was appointed only to a temporary position.⁷⁴ He did not later gain a permanent position because a Black man was deemed to be more qualified.⁷⁵ The court found that the affirmative action plan did not bar White persons from being hired nor did it require or result in the hiring of unqualified Black persons.⁷⁶ In fact, the Black man selected remained in the position for only one academic year, as the position of vocal music instructor was abolished the year after his appointment;⁷⁷ when the plaintiff's suit was adjudicated, the position did not even exist.

In *Salomon v. New York Human Rights Appeal Board*,⁷⁸ a tenured White male Associate Professor of History and African Studies in the African Studies Program at the State University College at New Paltz, New York was dismissed because of retrenchment.⁷⁹ Subsequently, he

69. *Silver*, 767 F. Supp. 494.

70. *Cohen*, 484 F. Supp. 411.

71. 748 F.2d 595 (11th Cir. 1984).

72. *Id.* at 597-98.

73. *Id.* at 597. In 1973, the United States Department of Health, Education, and Welfare (HEW) and the U.S. District Court for the District of Columbia found that "the State of Florida maintained a racially segregated system of higher education." *Id.* at 596 (citations omitted). As a result of these findings, Florida adopted an affirmative action plan which was approved by HEW. *Id.* at 596. This plan was at issue in *Palmer*. Under the Plan, at least one qualified Black person had to be included in four candidates recommended by the College's Search and Screening committee. *Id.* at 597. If a Black person was not included among those recommended, the person hired for the position would receive only a nine-month temporary appointment. *Id.*

74. *Id.* at 598.

75. *Id.*

76. "The plan was designed to result in the hiring of a sufficient number of qualified minority applicants so that the racial balance of the College's faculty would approximate 10% of the total number of faculty, which was the balance that would have been achieved absent the past discrimination." *Id.*

77. *Id.* at 598 n.11.

78. 417 N.Y.S.2d 805 (App. Div. 1979).

79. *Id.* at 806. Dismissing either tenured or nontenured faculty can be justified where there is legitimate retrenchment.

applied to be an Assistant Professor in Black Studies, a completely separate department.⁸⁰ The vacancy was filled by a Black man, and Salomon alleged he was a “victim of a continuing policy against hiring qualified professors who are white in the Black Studies Department”⁸¹ The University argued that retrenchment caused the plaintiff to be discharged because of his low seniority and he was not hired in the Black Studies Department because there were no courses being offered in his field of expertise, African History.⁸² The Black male hired taught Introduction to Black Studies and History of Slavery and *not* African History.⁸³ Also, the Black man appointed to head the Black Studies Department was a historian who had administrative experience and had previously taught political science courses, while the plaintiff had no administrative experience and had never taught any courses in political science.⁸⁴ The court found both of the Black persons hired to be more qualified than plaintiff.⁸⁵

Like *Salomon*, *Reisman v. Regents of Wayne State University*⁸⁶ involved retrenchment. In *Reisman*, the plaintiff, a professor in the Division of Theoretical and Behavioral Foundations of the College of Education of Wayne State University, claimed “reverse discrimination.”⁸⁷ She was initially employed as an associate professor for a two-year term and her contract was renewed twice for one-year terms.⁸⁸ Before her fourth year, plaintiff applied for tenure.⁸⁹ Plaintiff was notified that her contract would not be renewed and that her employment would terminate near the end of the academic year.⁹⁰ The Michigan Court of Appeals noted that plaintiff conceded that a budget crisis required work force reductions and said “the evidence overwhelmingly supports a finding that the decision not to renew plaintiff’s contract was motivated by economic necessity.”⁹¹ But the plaintiff also claimed “reverse discrimination” because at the time her contract was terminated, the contract of a Black male professor who had been hired about the same time as she was in the same area of guidance and counseling, but at a lower rank, was renewed.⁹² Both

80. *Id.*

81. *Id.* at 807.

82. *Id.* at 806.

83. *Id.*

84. *Id.*

85. *Id.*

86. 470 N.W.2d 678 (Mich. Ct. App. 1990).

87. *Id.*

88. *Id.* at 681.

89. *Id.*

90. *Id.*

91. *Id.* at 682.

92. *Id.* at 680.

had two-year contracts beginning in 1979 and both had their contracts twice renewed for one year.⁹³ Around the time that plaintiff applied for tenure and then had notice of non-renewal, the contract of the Black male was renewed for another one-year term.⁹⁴ The plaintiff apparently believed that the Black male should have been cut by the retrenchment instead of her.

The court said it was not enough to merely show that race was a factor in non-renewal.⁹⁵ Under the circumstances, the court held that "plaintiff must present sufficient evidence to establish that race was a determining factor in the decision not to renew her contract."⁹⁶ Although a jury awarded plaintiff damages for "reverse discrimination," apparently based on Michigan's Civil Rights Act,⁹⁷ an erroneous jury instruction led to reversal.⁹⁸ The reported case gives no information from which one can conclude that the plaintiff was more entitled to the position than the Black male.⁹⁹

In *Hein v. Board of Trustees of Community College District*,¹⁰⁰ a federal district court judge granted summary judgment to all defendants.¹⁰¹ Like *Salomon*, the *Hein* case was not based on Title VII but on Section 1983.¹⁰² In a deposition, plaintiff said the basis of his complaint was that "I was teaching, and there were no complaints about me. And a

93. *Id.* at 681.

94. *Id.*

95. *Id.* at 686.

96. *Id.*

97. MICH. COMP. LAWS § 37.2101 (1979).

98. *Reisman*, 470 N.W.2d at 682.

99. Cf. *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (en banc), cert. granted, 117 S. Ct. 2506, cert. dismissed, 118 S. Ct. 595 (1998). In *Taxman*, economic necessity required that the Board terminate either the Black or the White female high school teacher, both of whom were hired on the same day. The Board determined that the White teacher should be terminated. It is important to note that, although the Black teacher had a Master's degree and the White teacher had only a Bachelor's degree, the Board deemed the teachers equally qualified. Jan Crawford Greenburg, *Civil Rights Groups Pay Teacher to Avoid Court*, CHI. TRIB., Nov. 22, 1997, § 1, at 1; Steven A. Holmes, *A Dilemma Led to a Deal over Hiring Tied to Race*, N.Y. TIMES, Nov. 23, 1997, at 37. The parties reached a settlement with financial assistance from civil rights groups that "were concerned that the conservative 5-4 majority of the [Supreme] Court might further weaken affirmative action The High Court then dismissed the appeal, precluding a sweeping opinion based on this flawed and inappropriate case." Yvonne Scruggs-Leftwich, *Understanding the Piscataway Settlement*, FOCUS, Dec. 1997, at 4. See Barry Bearak, *Settlement Ends High Court Case on Preferences*, N.Y. TIMES, Nov. 22, 1997, at A1; Greenburg, *supra*, at 1; see also *infra* notes 133-40 and accompanying text.

100. No. 90-C5372, 1992 WL 80546, at *3 (N.D. Ill. Apr. 10, 1992).

101. *Id.* Defendants included trustees of a city college district as well as the Dean of Adult Continuing Education and Assistant Dean of Continuing Education at Olive-Harvey College, one of the Chicago, Illinois, city colleges. *Id.*

102. *Id.* at 1.

black female replaced a white male. My credentials far exceeded hers."¹⁰³ *Hein* provides no information about relative qualifications of the plaintiff and the Black faculty who received the position. However, where comparisons have to be made, there should be no assumption of automatic superiority of Whiteness. Nor should undue weight be given to "credentials" associated with Whiteness while denigrating attributes associated with non-Whites.

In *Silver v. City University of New York*,¹⁰⁴ a White male economics professor challenged City University of New York's (CUNY) selection of a Black woman for the designation of Distinguished Professor.¹⁰⁵ The district court held that CUNY had legitimate non-discriminatory reasons for failure to select him and that the plaintiff had failed to show that these reasons were pretextual.¹⁰⁶ At the time that plaintiff applied for the Distinguished Professorship, CUNY instituted an affirmative action policy that specified that the group of Distinguished Professorship *nominees* presented to the board of trustees " 'should include a very significant representation of minorities and females.' "¹⁰⁷ Silver was considered by a committee that recommended both him and a Black woman.¹⁰⁸ A Review Committee consisting of all College Deans, the Chair of the Faculty Senate, and the Provost failed to recommend Silver for the Distinguished Professorship.¹⁰⁹ Instead, it recommended the posthumous appointment of a Black woman candidate who had died before the Committee's vote.¹¹⁰

After losing at a grievance proceeding and failing in his claim before the EEOC, Silver filed suit against CUNY alleging that he did not win the honor "because he is a victim of . . . reverse discrimination against white male candidates . . ." ¹¹¹ CUNY admitted that Silver was qualified for the position of Distinguished Professor¹¹² but contended that whether he was the most qualified person at the time of appointment was a question of fact, and

103. *Id.*

104. 767 F. Supp. 494 (S.D.N.Y.), *aff'd*, 947 F.2d 1021 (2d Cir. 1991).

105. Of the approximately 2300 full professors on the CUNY system faculty, CUNY honors a small number of truly extraordinary scholars as Distinguished Professors. Applicants for the honor "must be a Full Professor and 'a person of outstanding merit and accomplishment in his/her field.'" *Id.* at 495.

106. *Id.* at 499.

107. *Id.* at 496.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 497. At the time of the trial, 79% (68 of 87) of the distinguished professor seats were held by White men. *Id.* at 496.

112. *Id.* at 497.

CUNY considered the woman to be the most qualified.¹¹³ CUNY's President stated in his affidavit that once minorities and women were identified for the honor, "they must be judged on merit."¹¹⁴ Thus, the claim of "reverse discrimination" did not assist the White male plaintiff, and the defendant was granted summary judgment.¹¹⁵

In *Cohen v. Community College of Philadelphia*,¹¹⁶ a case in which the court reviewed the candidates' comparative credentials and concurred in the hiring committee's determination that the White candidates less qualified than the Black candidates.¹¹⁷ Such a judgment may push the idea of "reverse discrimination" to the forefront, prompted by the frequent *assumption* that Whites are automatically more qualified than Blacks. *Cohen* concerned the selection of Black faculty for the Music and Art Departments of a two-year public college in which the White plaintiffs claimed "reverse discrimination." Three Black persons were selected by the Music Department, one of whom the White plaintiffs, Sokolsky and Coward, themselves had "joined with the other members of the music hiring committee in unanimously recommending" for a faculty position.¹¹⁸ The court observed that "[i]n light of this fact, it is difficult to understand how the plaintiffs can now argue that the decision to hire [the Black candidate] was motivated by racial discrimination."¹¹⁹ Although the White candidates both had Masters degrees,¹²⁰ one of the Black candidates had a Ph.D.¹²¹ and another had both a Masters degree in piano and a special talent for performance, an area in which the college had expressed a particular need.¹²² The White complainants had taught at the college part-time and in guest lectureships but were not offered full-time positions as were the Black persons selected for the Music Department.¹²³ The court found that the three Black faculty

113. *Id.*

114. *Id.* at 498. The court found no discriminatory motive and noted that, "since CUNY's minority policy went into effect, [President] Harleston made 10 distinguished professor nominations, five of whom were white males and five minorities and/or women." *Id.*

115. *Id.* at 500.

116. 484 F. Supp. 411 (E.D. Pa. 1980).

117. *Id.* at 424-26.

118. *Id.* at 425.

119. *Id.*

120. *Id.*

121. *Id.* at 426.

122. *Id.*

123. Plaintiffs lost their part-time positions and guest lectureships as a result of their complaints. Thus, they prevailed on their retaliation claim even though the institution prevailed against their "reverse discrimination" charges. *Id.* at 428.

members appointed in the Music Department "were not in any way 'less qualified.'" ¹²⁴

In the Art Department, the Black candidate was judged to be more qualified than the White candidate who, the school could reasonably conclude, "did not satisfy the hiring committee criteria," ¹²⁵ given that what the institution needed was "a person with the specific ability to teach a course in African and Afro-American art." ¹²⁶ The White candidate, plaintiff Cohen, "never even made the claim that she was prepared to teach Afro-American art courses until after she learned that [the Dean] had recommended another candidate for the position." ¹²⁷ Although a hiring committee for the Art Department position made Cohen its first choice, one member "conceded that Ms. Cohen would have to teach the African/Afro-American field to herself before she could present any courses to students." ¹²⁸ Moreover, the court noted that even if the plaintiff had been qualified for the position, she still could not have prevailed because the Black candidate selected was also qualified for the position. ¹²⁹ The court's conclusion that equal qualifications of Black and White candidates does not entitle the White to be chosen is a clear rejection of the idea that the color White is a qualifier. Nevertheless, color consciousness remains a significant factor.

CONCLUSION

[R]acism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities. ¹³⁰

American culture is so saturated with racial myths that one must make a concerted effort to separate the real from the unreal. Because of those myths, the observations of one author ought to be

124. *Id.* at 425.

125. *Id.* at 416.

126. *Id.* at 422.

127. *Id.* at 423.

128. *Id.*

129. The court specifically noted that even the "plaintiff's brief refers to [the successful Black candidate] as 'a specialist in the area of African art.'" *Id.* at 423-24.

130. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987).

kept in mind when dealing with "reverse discrimination": "If racial stereotyping is deeply embedded in American culture, then it is simply implausible that negative assumptions by whites do not influence their judgments of black workers."¹³¹ Negative assumptions may well play a role in "reverse discrimination" allegations. For example, there is no basis for a racial discrimination claim when White candidate X is selected over White candidate Z. To conclude that candidate Z should have been selected when candidate X is Black suggests, in the language of the rhyme, familiar to African Americans, that "White is all right"—i.e., that a White is always more qualified than a Black. However, when there is a choice of whom to select for a benefit, if the Black candidate who ultimately is selected, is as qualified as the White complainant, he or she should have no basis for complaint. The *Cohen* court made this point when it noted that the Black person selected for a faculty position was qualified.¹³² Decision-makers should neither deliberately nor inadvertently prompt claims of "reverse discrimination" by simply relying upon the color black as a shorthand way of expressing particular attributes or qualifications that a successful Black possesses.

While the *Piscataway* case does not involve higher education, it is instructive, for it helps to illustrate how racial considerations may affect one's view of qualifications because a White *without* a graduate degree was thought to be equally qualified as a Black *with* a graduate degree.¹³³ In *Piscataway*, a New Jersey school district had to cut its business staff of ten teachers by one.¹³⁴ The two teachers with the least seniority had been hired on the same day, but one was Black and the other White.¹³⁵ The school board defended its decision to retain the Black on diversity grounds.¹³⁶ The plaintiff claimed "reverse discrimination" because the school board had deemed both teachers equally qualified.¹³⁷ The matter was settled before the United States Supreme Court could decide the case.¹³⁸ This resolution prompted sobs by Williams, the Black teacher, who disagreed with the conclusion that the teachers were equally qualified as she had a

131. T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 343 (1992).

132. *Cohen*, 484 F. Supp. at 425.

133. *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (en banc), cert. granted, 117 S. Ct. 2506, cert. dismissed, 118 S. Ct. 595 (1998).

134. 91 F.3d at 1551.

135. *Id.*

136. *Id.*

137. *Id.*

138. Actually, the plaintiff already had been rehired before the suit reached the Supreme Court. For a general discussion of the *Taxman* case, see *supra* note 99.

masters degree while the White plaintiff had no graduate degree.¹³⁹ "The lower courts were unaware of Williams' claim that her master's degree made her better qualified than Taxman who only had a bachelor's degree."¹⁴⁰

In addition to influencing decisions regarding qualifications, color consciousness may also lead to suspicion of any decision where a Black is favored over a White. Moreover, since White faculty are the statistical norm in the Academy, some may come to expect that a White person should always prevail in decisions about higher education faculty. The cases above contradict the notion that "reverse discrimination" allegations will aid White faculty against White institutions of higher education. The deference¹⁴¹ given to predominantly White academic institutions¹⁴² may also operate to benefit colleges or universities faced with "reverse discrimination" claims. It is critical that these institutions not allow fears of unfounded "reverse discrimination" claims to prevent them from hiring, promoting and granting tenure to Black faculty. The term is "covert[ly] . . . political [and] . . . should be removed from the vocabulary of any serious academician As it is currently used, it should be identified as an appeal to a particular political ideology or policy preference, rather than accepted as an expression which is neutral in tone" ¹⁴³ The odds that one will encounter a Black professor

139. Greenburg, *supra* note 99, at 14.

140. Scruggs-Leftwich, *supra* note 99, at 4.

141. Judicial deference to university decision-makers is considered to be part of an overall doctrine of academic abstention, which is tied to some vague concept of autonomy. HARRY T. EDWARDS & VIRGINIA DAVIS NORDIN, *HIGHER EDUCATION AND THE LAW* 14-17 (1979); see also John J. Byrnes, *Academic Freedom vs. Title VII: Will Equal Employment Opportunity Be Denied on Campus?*, 42 OHIO ST. L.J. 989 (1981) (arguing for less judicial deference to academic institutions); Barbara A. Lee, *Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation*, 9 J.C. & U.L. 279 (1982-83) (proposing that courts be less deferential when examining the procedural integrity of the academic peer review process); Harry F. Tepker, Jr., *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. DAVIS L. REV. 1047 (1983) (discussing how judicial deference to higher educational institutions does not mean tolerance of discrimination).

142. In contrast to the 2.35% of Black faculty at White institutions, approximately 40% of the faculty at the HCBUs supported by the United Negro College Fund are not Black, with the vast majority being White. Robert Bruce Slater, *White Professors at Black Colleges*, J. BLACKS HIGHER EDUC., Autumn 1993, at 67, 68. In cases by White faculty against HCBUs, courts do not give the usual deference to academic institutions. See, e.g., *Fisher v. Dillard Univ.*, 499 F. Supp. 525 (N.D. Fla. 1980) (suggesting that the institution had an obligation to help a White faculty member adjust to an HBCU). The plaintiff in *Fisher* was frequently absent when scheduled to teach and "defied a university-wide order to cancel all classes [for an] inauguration ceremony and instead scheduled an exam for her students." *Hawkins*, *supra* note 5, at 18; see also *Lincoln v. Board of Regents*, 697 F.2d 928 (11th Cir.) *cert. denied*, 464 U.S. 826 (1983) (involving HBCU Savannah State College).

143. Fetzer, *supra* note 46, at 212-13.

teaching "at the thousands of predominantly white institutions are about 50 to 1."¹⁴⁴ The politically charged idea of "reverse discrimination" should not be allowed to prevent those odds from being lowered.

144. *Why the Shortage of Black Professors?*, J. BLACKS HIGHER EDUC., Autumn 1993, at 25, 25.