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## Three Views of Equal Protection: A Backdrop to *Bakke*†

J. Frederic Voros, Jr.\*

### I. INTRODUCTION

The facts of *Regents of the University of California v. Bakke*<sup>1</sup> are common knowledge among lawyers and laymen alike. Briefly, the University of California at Davis Medical School operated two separate admissions programs: a preferential admissions program for members of certain minority groups, and a regular admissions program for all other applicants. Minority applicants competed only against each other for sixteen of the one hundred available places. As a result, the qualifications of certain minority admittees as measured by undergraduate grades and test scores were significantly inferior to those of nonminority admittees.<sup>2</sup> The University argued that the admissions program was necessary to achieve its goal of filling at least sixteen of the one hundred seats of each class with minority students. Allan Bakke applied to Davis in 1973 and 1974, but was not accepted either year even though his test scores and grades were substantially superior to the averages of the minority admittees.<sup>3</sup> He subsequently brought suit alleging that the University,

by virtue of its maintenance and operation of the special admission program, prevented him solely because of his race from competing for all of the available places at the medical school and thereby discriminated against him in violation of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of the California Constitution . . . as well as the Civil Rights Act of 1964 . . . ; and . . . that because of this unlawful discrimination, [the University] denied him admission to the medical school.<sup>4</sup>

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1. 438 U.S. 265 (1978).

2. Brief for Respondent at 13, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The University insisted that all the admittees—including minority applicants—were fully qualified to study medicine at Davis. Brief for Petitioner at 6, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

3. Brief for Respondent at 13.

4. *Id.* at 15.

The California Supreme Court held that Bakke was entitled to admission to the Davis Medical School and that the preferential admissions program offended the equal protection clause of the fourteenth amendment to the United States Constitution.<sup>5</sup>

The United States Supreme Court affirmed in part and reversed in part. The major issue before the Court was whether a racial classification that is designed to aid minority applicants, but which incidentally disadvantages nonminority applicants on account of their race, violates the equal protection clause of the fourteenth amendment. The Court's answer to that question was less than decisive. Like the nation, the Court found itself deeply divided on the question of the legality of preferential admissions programs. Justices Brennan, White, Marshall, and Blackmun took the position that the preferential admissions program of the Davis Medical School was entirely constitutional.<sup>6</sup> On the other hand, Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger saw the University's program as a simple violation of title VI of the Civil Rights Act of 1964, and would therefore have affirmed the California court's decision on statutory grounds.<sup>7</sup> Justice Powell agreed in part with the Stevens-Burger-Stewart-Rehnquist position, and held that Bakke should have been admitted.<sup>8</sup> On the other hand, he also agreed in part with the Brennan-White-Marshall-Blackmun position, and held that race-conscious admissions programs are not categorically unconstitutional.<sup>9</sup> Justice Powell distinguished between programs assigning a prescribed number of seats for minority applicants, which he ruled unconstitutional, and those merely taking race into account as one of many factors in the admissions process, which he ruled constitutional.

The outpouring of scholarly and popular opinion on the issue of preferential admissions, as well as affirmative action generally,

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5. *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *aff'd in part, rev'd in part*, 438 U.S. 265 (1978).

6. 438 U.S. at 355-79. (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). Justices White, Marshall, and Blackmun also contributed separate opinions, Justice White's focusing on the question of a private right of action under title VI, *id.* at 379-87 (White, J., separate opinion); Justice Marshall's on the need to dissipate the effects of black slavery and its vestiges, *id.* at 387-402 (Marshall, J., separate opinion); and Justice Blackman's on the need to allow universities to consider race just as they do other differences, *id.* at 402-08 (Blackmun, J., separate opinion).

7. *Id.* at 408-21 (Stevens, J., concurring in part and dissenting in part). Chief Justice Burger and Justices Stewart and Rehnquist joined Justice Stevens' opinion.

8. *Id.* at 271.

9. *Id.* at 272.

has been even more sharply divided than the Court's decision in *Bakke*. Widely divergent views on the Constitution, justice, and the role of the judiciary have created the appearance of a philosophical free-for-all.<sup>10</sup> And while *Bakke* has by no means quieted the donnybrook, the case did succeed in crystallizing some of the questions at the heart of the debate. That fact alone makes the decision worthy of close attention.

Moreover, the fundamental and historical disagreement over the meaning of equal protection was not resolved in *Bakke*. Because of this, almost no one endorses the decision without qualification. Indeed, only one member of the Court that produced it subscribes to it in its entirety. The inability of the Court to adopt a single view of the equal protection clause virtually ensured that its decision could not be definitive.

## II. EQUAL PROTECTION AND RACIAL CLASSIFICATIONS

The ambiguity of the wording of the equal protection clause<sup>11</sup> and the unevenness of its application have caused scholars and judges to differ sharply as to what the clause means or ought to mean.<sup>12</sup> Three philosophical views of equal protection have been advanced, and nearly all arguments dealing with preferential admissions are based on one or more of these views. The following subparts attempt to explore the principles and assumptions underlying the major views of the equal protection clause.

### A. *The Utilitarian View: Protection for Socially Useful Characteristics*

In its extreme form, the "utilitarian view" does not regard race as a category to be accorded especially vigilant protection, but instead requires courts to treat racial classifications just as they treat classifications based on age, occupation, height, or any other characteristic. That is, courts should decide first whether

10. "No case in recent memory has so fractured the community of human rights proponents as this one." Margolis, *The Aching Bakke: Is There a Cure?*, 51 CONN. B.J. 417, 418 (1977) (footnote omitted). A total of 58 amicus curiae briefs were filed. *Id.* at 418 n.6. See Comment, *The Constitutionality of Preferential Minority Admissions Programs in State Professional Schools*, 45 U.M.K.C. L. REV. 343 (1977).

11. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

12. "One can advance cogent arguments, buttressed by an impressive array of case analysis and significant socio-political or economic theory, both for and against the reverse discrimination inherent in preferential minority admissions." Renfrew, *Affirmative Action: A Plea for a Rectification Principle*, 9 SW. U.L. REV. 597, 598 (1977).

the classification will aid or frustrate society's attempts to achieve its goals, and then allow or invalidate the classification based on that decision.

The suggestion that the equal protection clause does not afford race any special protection initially seems so unreasonable as to be unworthy of serious consideration. The utilitarian view is, however, at least plausible in instances where society's majority attempts to aid a previously disadvantaged minority by creating classifications that are to the majority's own detriment. A number of commentators have advanced arguments implicitly founded upon such a view. For example, some have suggested that racial and ethnic backgrounds are relevant factors to be considered in evaluating an applicant, and that they may be considered by state-supported universities along with such qualifications as letters of recommendation, community service, interviews, leadership capacity, sex, home state,<sup>13</sup> "athletic or musical ability, personality,"<sup>14</sup> and other special needs.<sup>15</sup> This view is represented, at least in the case of benign discrimination, by Justice Blackmun's comment finding it "ironic" that we should be more disturbed "over a program where race is an element of consciousness," i.e., a basis for selection, than we are over the fact that universities have traditionally "given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful."<sup>16</sup>

Professor Terrance Sandalow has presented what is by far the most cogent and persuasive defense of this position: "Legislation that employs racial or ethnic criteria is not subject to a special constitutional rule. Its validity depends upon a judgment about whether it will lead us toward or away from the kind of society we want."<sup>17</sup> In leading toward "the kind of society we

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13. O'Neil, *Preferential Admissions Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 702-04 (1971).

14. O'Neil, *Racial Preferences and Higher Education: The Larger Context*, 60 VA. L. REV. 925, 945 (1974).

15. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1176-77 (1969).

16. 438 U.S. at 404 (Blackmun, J., separate opinion).

It cannot be said, however, that Justice Blackmun totally adopted the utilitarian view of equal protection, since he joined Justice Brennan's opinion based on the preferential view. See note 29 and accompanying text *infra*.

17. Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 682 (1975).

want," equal protection requires two things.

The first requirement of equal protection under Sandalow's analysis is that every statute be applied to all violators without reference to personal differences not specified in the statute. For example, a statute forbidding sleeping on park benches, to comport with equal protection guarantees, must be enforced against all violators without regard to race, sex, position, wealth, or any other consideration not mentioned in the statute. Thus, equal protection consists of adherence to the terms of the statute.<sup>18</sup>

However, if the equal protection clause is to be preserved as an instrument capable of invalidating discriminatory legislation, it must be invested with a second, broader meaning. "What the equal protection clause does require," writes Sandalow, "is that government treat similarly all those who are similarly situated."<sup>19</sup> The weakness of this prescription is that it does not of itself provide any guide to determining when two persons are similarly situated. To an extent it is "value free" because it leaves "the material principles which determine whether individuals are similarly or differently situated" to "rest upon [unspecified] value choices."<sup>20</sup> For example, the question of whether a state may treat illegitimate children differently from legitimate children for purposes of intestate distribution cannot be solved by resort to the phrase "treat similarly those similarly situated." Some theory of concrete values must be applied to determine whether legitimate and illegitimate children are similarly situated. Yet the Supreme Court has frequently invoked equal protection analysis without reference to any specific theory. "The Court's failure to develop such a theory, during a period of intense use of the clause, has left the law of equal protection in intellectual disarray."<sup>21</sup>

If application of the equal protection clause requires reference to some substantive set of values, a question arises as to what values should be recognized. In the context of university admissions this question might be phrased, "What characteris-

18. *Id.* at 656.

19. *Id.* at 655. "[A]ll persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

20. Sandalow, *supra* note 17, at 655. "Now, that similar particular cases, as defined by a practice, should be treated similarly as they arise, is part of the very concept of a practice; it is involved in the notion of an activity in accordance with rules." Rawls, *Justice as Fairness*, 67 *PHILOSOPHICAL REV.* 164, 166 (1958), reprinted in H. BEDAU, *JUSTICE AND EQUALITY* 78-79 (1971). See also Lucas, *Against Equality*, 40 *PHILOSOPHY* 296 (1965), reprinted in H. BEDAU, *supra*, at 138.

21. Sandalow, *supra* note 17, at 662 n.27.

tics may be legitimately considered by a state-supported university in evaluating applicants?"

Race is probably not a legally permissible consideration because it is generally accepted that applicants equal in all respects other than race are similarly situated. But Sandalow argues that the touchstone for evaluating applicants' qualifications should be social utility: "To the extent social utility is served, race and ethnicity may even be seen as measures of competence."<sup>22</sup>

One objection to the social utility standard has been voiced by Professor Richard Posner. Rejecting that standard in favor of a rule prohibiting "the distribution of benefits and costs by government on racial or ethnic grounds,"<sup>23</sup> he claims that only such a *per se* rule "is sufficiently precise and objective to limit a judge's exercise of personal whim and preference."<sup>24</sup> Sandalow counters by insisting that Posner's principle holds no special claim to objectivity:

Value choices necessarily underlie the selection of one or another principle, and, absent societal agreement upon either the values or the source from which they are to be derived, there is no escape from the risk that the principle selected will reflect values personal to the judge. The principle Posner would have the Court adopt is, thus, neither more nor less "objective" than a principle which would sanction minority preferences.<sup>25</sup>

In other words, Sandalow argues that Posner's standard is also based on subjective valuations, and that there are other principles than the one Posner suggests that are no less objective, but that still sanction minority preferences. A rule requiring state universities to prefer qualified blacks to equally or better qualified whites would be such a rule. Adopting this rule would limit judicial capriciousness in a way similar to the way Posner's *per se* rule would. However, no matter how objective the rules are, the question of *which* rule to apply is, Sandalow asserts, necessarily subjective. The social utility standard is thus intended to be transmaterial: its function is to provide some benchmark by which the judge can select among material principles.

There are at least two difficulties with the social utility standard. Firstly, the standard itself is not a material principle,

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22. *Id.* at 674.

23. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 22 (1975).

24. *Id.*

25. Sandalow, *supra* note 17, at 677.

but rather a hollow form into which each individual must pour his own values. Whenever a formula which is not itself a material principle is appealed to as an evaluative standard, some other concrete set of values—a material principle—must implicitly be invoked. Sandalow's solution is therefore circular. He recommends the social utility standard as a means by which a judge can select one material principle from a pool of equally objective material principles. However, the judge must first implicitly or explicitly invoke one of the material principles because until he does the social utility standard is meaningless. Sandalow would therefore insist that the judge select a principle in order to know which principle to select. For example, "race is irrelevant" and "minorities ought to be preferred" are both material principles. To the judge who must decide which to apply, Sandalow recommends the one that will lead to the desired kind of society. And what kind of a society is desired? The answer to that question depends on the judge's subjective preferences.

The second difficulty with the social utility standard as a guide by which to select a material principle is that, even while it does not of itself favor any material principle, it seems to foreclose certain types of arguments that might be made for or against the selection of a particular material principle. The very term "social utility" implies that the judge engaged in the selection process must justify his ultimate choice in utilitarian terms. Nearly any material principle, certainly Posner's *per se* rule, can and perhaps ought to be defended on utilitarian grounds. But why must courts refuse to entertain or offer justifications based on other grounds? For example, fairness and justice are also reasonable justifications for selecting a material principle. Unquestionably, the problem of preferential admissions has a very pronounced moral dimension, and whatever disposition courts make of the matter ought to comport with generally held notions of justice and fairness. Ignoring the moral dimension of the problem puts one in the position of the utilitarian who, as John Rawls observes, may argue "that slavery is unjust on the grounds that the advantages to the slaveholder as slaveholder do not counterbalance the disadvantages to the slave and to society at large."<sup>26</sup> By insisting that whatever rule is adopted be adopted on the ground that it will lead toward the desired kind of society, Sandalow overlooks one of the premises of moral action: the end cannot

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26. Rawls, *supra* note 20, at 188, reprinted in H. BEDAU, *supra* note 20, at 96.

justify the means. Justice requires that the means be scrutinized independently of the ends, and that no end, however laudable, be pursued by unjust methods. It is this notion that lies at the heart of most of the safeguards of criminal procedure.

While Sandalow's analysis is useful in explaining judicial behavior, it cannot direct or restrain a court attempting to interpret the Constitution. A constitutional guarantee based on social utility is too fluid a guarantee; an aggrieved party is at the mercy of the court's subjective judgment, unrestrained by any material principle, as to the social utility of the alleged constitutional violation. Although today it may serve social utility to include minorities in professional schools, not long ago many believed that it served social utility to exclude them. In that day, a social utility standard would have permitted unrestrained discrimination. Such a standard inevitably countenances official capriciousness, especially in close cases, and thereby reduces a constitutional right to a systematically applied judicial whimsy.<sup>27</sup>

#### *B. The Preferential View: Enhanced Protection for Minority Races Only*

This second view of the equal protection clause dictates that only "invidious" racial classifications are subject to the Court's "strict scrutiny" test; "benign" discrimination need only meet some lower standard of review. Under traditional two-tier equal protection analysis, this lower standard would be the "rational basis" test, which validates any classification for which a rational basis can be found.<sup>28</sup> An intermediate standard has also been suggested for use in benign discrimination cases. The Brennan opinion in *Bakke*, for example, argued that "benign" racial classifications, in order to pass constitutional scrutiny, "must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>29</sup>

27. Or, put another way, the view is reminiscent of Ambrose Bierce's definition of "lawful": "Compatible with the will of a judge having jurisdiction." A. BIERCE, *THE DEVIL'S DICTIONARY* 75 (1958).

28. That standard has been recommended for reverse discrimination cases. Willey, *The Case for Preferential Admissions*, 21 *How. L.J.* 175, 201-08 (1978).

29. 438 U.S. at 359 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). This brand of review would be "strict and searching," though not "'strict' in theory and fatal in fact." *Id.* at 362 (quoting Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 80 *HARV. L. REV.* 1, 8 (1972)).

Others have advanced such an intermediate standard. For example, the New York

Regardless of which lower standard is adopted for nonpreferred groups, the key feature of the "preferential view" is that it applies the highest level of judicial review only to "invidious" discrimination. Invidious is used to characterize discrimination directed toward certain racially or ethnically defined groups that is accompanied by "stigmatization." The legal result of this formulation is to accord members of stigmatized minority groups preferred status in equal protection cases.

### 1. *Indicia of suspectness*

One theory upon which the preferential view of equal protection is based may be described using the term "indicia of suspectness." This theory holds that the reason the Court has policed and invalidated governmental actions evidencing racial discrimination with such vigor is not because racial discrimination is in itself illegal or unconstitutional, but rather because the groups discriminated against bear certain marks of victimization. Under this theory, establishing the existence of those marks is a prerequisite to the Court's applying its strictest scrutiny. The following statement is typical of this position:

There are three traditional explanations for the suspectness of racial classifications provided by Supreme Court decisions. First, such classifications are the product of pervasive and historic discrimination. Second, their effect is to stigmatize and stereotype individuals belonging to groups identifiable because they share immutable characteristics. Lastly, the groups so classified have been politically powerless and, thus, unable to protect sufficiently their interest.<sup>30</sup>

Such arguments can often be traced to a statement in *San Antonio Independent School District v. Rodriguez*:

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is

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Court of Appeals, in *Alevy v. Downstate Medical Center*, ruled that "benign" classifications must serve a "substantial state interest" which "need not be urgent, paramount or compelling." 39 N.Y.2d 326, 335-36, 348 N.E.2d 537, 545, 384 N.Y.S.2d 82, 90 (1976). See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 565-79 (1975); Project, *Preferential Admissions to Professional Schools: The Equal Protection Challenge*, 22 VILL. L. REV. 983, 1004-07 (1977).

30. Case Comment, *Bakke v. The Regents of the University of California: Preferential Racial Admissions, An Unconstitutional Approach Paved with Good Intentions?*, 12 NEW ENG. L. REV. 719, 739 (1977) (footnotes omitted) [hereinafter cited as *Preferential Racial Admissions*].

not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.<sup>31</sup>

In *United Jewish Organizations v. Carey*,<sup>32</sup> Justice Brennan referred to these indicia as the "considerations that historically led us to treat race as a constitutionally 'suspect' method of classifying individuals."<sup>33</sup>

The approach is fraught with difficulties. First of all, it ascribes to the reasoning in the Court's previous discrimination cases a major premise which differs from that historically employed by the Court. Many commentators and some justices<sup>34</sup> argue that the Court's decisions invalidating racially discriminatory practices have been based on a syllogism such as this: (1) the Constitution prohibits state action that discriminates by stigmatizing members of victimized, discrete, and powerless minorities; (2) the state action in question discriminates by stigmatizing members of a victimized, discrete, and powerless minority; and therefore, (3) the Constitution prohibits the state action in question.

Brennan's opinion in *Bakke* cited a number of cases supporting the proposition that "[only] racial classifications that stigmatize . . . are invalid without more," which he called "our prior analytic framework."<sup>35</sup> Those cases do not, however, establish the

31. 411 U.S. 1, 28 (1973). Justice Stone's famous footnote in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), is also commonly cited in support of this position. See, e.g., Broderick, *Preferential Admissions and the Brown Heritage*, 8 N.C. CENT. L.J. 123, 148 n.116 (1977); Maltz, *Justice Rehnquist at the Crossroads—Principle, Politics, and the Bakke Case*, 30 OKLA. L. REV. 922, 923 (1977); Renfrew, *supra* note 12, at 603; 28 CASE W. RES. L. REV. 238, 263 n.169 (1977).

The extraordinary popularity of the footnote in the race area has come about despite the fact that it is found in a case dealing with the interstate shipment of "filled milk" and also the fact that it never reached a conclusion: "Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

32. 430 U.S. 144 (1977).

33. *Id.* at 174 (Brennan, J., concurring in part). He also referred to them in *Bakke*. 438 U.S. at 356-60 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

34. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 357-58 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

35. *Id.* It has been suggested that "[w]ith the exception of Justice Rehnquist, all current members of the Court have demonstrated a degree of commitment to [the indicia of suspectness test]." Maltz, *supra* note 31, at 923. However, none of the cases Maltz cites in support of the proposition were race cases.

proposition that stigmatization or invidiousness is necessary to trigger strict scrutiny. Most often, those factors are mentioned to demonstrate that the racial classification under consideration had no legitimate purpose (*i.e.*, a compelling interest independent of the classification itself). Because all racial discrimination that is not necessary to achieve a legitimate purpose is unconstitutional, and no invidious purpose is ever legitimate, invidious racial discrimination is always unconstitutional. But it is the absence of a legitimate purpose, and not the presence of an invidious one, that fatally flaws a racial classification. This interpretation is borne out by an examination of the cases cited by the Brennan opinion in *Bakke*.

In *Yick Wo v. Hopkins*,<sup>36</sup> for example, the Court declared:

The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is . . . illegal.<sup>37</sup>

The discrimination was illegal because "no reason for it [was] shown." The Court mentioned hostility only to demonstrate that no justifiable reason for the discrimination existed. *Korematsu v. United States*<sup>38</sup> presented a similar situation. When the Court wrote, "[o]ur task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice,"<sup>39</sup> they could not have meant that strict scrutiny applies only where the discriminatory classification is the result of racial prejudice. If that were what they believed, they would not have applied strict scrutiny in the case before them, since—as demonstrated by the language quoted—they did not consider the classification in that case to be the result of prejudice.<sup>40</sup> In other words, the use of the strict scrutiny standard indicates that the Court believed this standard should apply even when the classification was not invidious. By referring to racial prejudice they were merely restating what the

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36. 118 U.S. 356 (1886).

37. *Id.* at 374.

38. 323 U.S. 214 (1944).

39. *Id.* at 223.

40. Indeed, the *Korematsu* Court's own statement of the standard belies Justice Brennan's interpretation: "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Id.* at 216 (emphasis added).

*Yick Wo* Court had declared: if the purpose of the classification is to malign, the case is easy because no further scrutinization of the purpose is necessary. Likewise, *Strauder v. West Virginia*<sup>41</sup> did not establish that only discrimination victims who are members of stigmatized minorities are entitled to the strictest judicial scrutiny. The discrimination victims in *Strauder* were denied the right to serve on juries. That they were black evoked the following language from the Court, which seems to support the *Rodriguez* model:

[T]he words of the [fourteenth] amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.<sup>42</sup>

However, the Court went on to say, “that the West Virginia statute . . . is such a discrimination ought not to be doubted. *Nor would it be if the persons excluded by it were white men.*”<sup>43</sup>

Brennan’s opinion in *Bakke* also referred to a passage in Justice Murphy’s concurring opinion in *Oyama v. California*,<sup>44</sup> a case dealing with an alien’s right to transfer land. Justice Murphy used rational basis language to describe the “rare cases” in which a state may

single out a class of persons, such as ineligible aliens, for distinctive treatment. . . .

Such a rational basis is completely lacking where, as here, the discrimination stems directly from racial hatred and intolerance. The Constitution of the United States . . . insists that our government . . . shall respect and observe the dignity of each individual, whatever may be the name of his race, the color of his skin or the nature of his beliefs.<sup>45</sup>

The only language in this passage that seems to indicate a special rule for invidious discrimination is Justice Murphy’s reference to racial hatred, a purpose that is insufficient to withstand strict or

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41. 100 U.S. 303 (1879).

42. *Id.* at 307-08.

43. *Id.* at 308 (emphasis added).

44. 332 U.S. 633 (1948).

45. *Id.* at 663.

any other sort of scrutiny. On the other hand, the last passage quoted implies that all discrimination victims are entitled to literally "equal" protection.

Brennan's *Bakke* opinion also cited *Brown v. Board of Education*<sup>46</sup> to bolster its view that only those classifications that stigmatize minorities are subject to strict scrutiny. A close reading of the case reveals, however, that the Court resorted to the stigma concept not as a prerequisite to applying strict judicial scrutiny, but for a very different purpose. In that case, Chief Justice Warren wrote the following:

In the instant cases . . . there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors . . . . We must look instead to the effect of segregation itself on public education.<sup>47</sup>

Why could the Court's opinion not turn on the mere fact that the schools were segregated? Why did the Court feel that it had to look elsewhere for a foothold from which to invalidate the segregation? In 1954 the "separate but equal" doctrine of *Plessy v. Ferguson*<sup>48</sup> had been well established for over half a century. *Brown* did not, in principle, repudiate it.<sup>49</sup> Instead, the Court used the *Plessy* analysis to show that where the separation was racially motivated equality was impossible. What the "separate but equal" doctrine required was something akin to standing: the complainant had to show that he was in fact harmed, or in other words, that his facilities were not equal. Thus, if the school he attended was as well equipped and staffed as any other school, he could show no harm, and so was not entitled to relief. *Brown* fell squarely within that framework.<sup>50</sup> *Brown* differed from *Plessy* only by finding, in the very fact of segregation, a harm; because the *Brown* Court found that harm, it granted relief. The harm it

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46. 347 U.S. 483 (1954).

47. *Id.* at 492 (footnotes omitted).

48. 163 U.S. 537 (1896).

49. "The Court dodged a direct challenge to *Plessy* by holding that segregated public schools are, as an empirical matter, 'inherently unequal.'" Zimmer, *Beyond DeFunis: Disproportionate Impact Analysis and Mandated "Preferences" in Law School Admissions*, 54 N.C.L. Rev. 317, 354 (1976).

50. Indeed, the slogan-like sentence which crystallized the meaning of *Brown*—"Separate educational facilities are inherently unequal," 374 U.S. at 495—is cast in terms of the *Plessy* formula.

found was, of course, the psychological debilitation allegedly suffered as a result of the stigma implied in segregation. There is no implication in the case that the finding of stigma was in any way prerequisite to strictest scrutiny; on the contrary, the stigma was the harm against which the Constitution protected the plaintiffs. *Brown* does not support the Brennan opinion's thesis that only stigmatizing classifications are subject to strict scrutiny.

The racial classifications invalidated in the above cases were expressions of racial animus. It does not follow, however, that the purpose behind a statute defines the reviewing court's level of scrutiny. It cannot be said that an invalid racial classification that was based on prejudice was invalidated *only* because it was based on racial prejudice. Nor can one conclude that the Court ought to validate all classifications that are not based on invidious racial prejudice. None of the cases from Brennan's *Bakke* opinion discussed to this point forecloses the Court from consistently invoking strict scrutiny in a reverse discrimination case.<sup>51</sup>

Finally, the Brennan opinion cited *United Jewish Organizations v. Carey*.<sup>52</sup> The case is admittedly problematical. The State of New York was required under the Voting Rights Act of 1965 to reapportion the voting districts in three counties and to secure the U.S. Attorney General's approval of the redistricting plan. Voting district lines under the plan were drawn to ensure that blacks and Puerto Ricans, as a group, would constitute a 65% majority in a predetermined number of districts. The purpose of the reapportionment was to allow the relative political strength of the minorities to be reflected in the state senate and assembly. An incidental result of the redistricting plan was the splitting of an enclave of Hasidic Jews, whose community had previously been contained in a single voting district, into two districts. Had the Jews remained in a single district, the goal of 65% would have been missed by 1.6% in one of the districts.<sup>53</sup> The Jewish community, whose voting strength had thus been diluted, raised an equal protection challenge. The Supreme Court, in a majority opinion by Justice White, upheld the plan.

The Court did not deal with the Jewish community as a minority group (although it was apparently "discrete and insu-

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51. The Brennan opinion in *Bakke* also cited three other cases which yield to the same analysis: *Loving v. Virginia*, 388 U.S. 1 (1967); *Reitman v. Mulkey*, 387 U.S. 369 (1967); and *McLaughlin v. Florida*, 379 U.S. 184 (1964). 438 U.S. at 358.

52. 430 U.S. 144 (1977).

53. *Id.* at 182 (Burger, C.J., dissenting).

lar”<sup>54</sup>); rather, the Court treated the complainants merely as members of the white population. As a result, it found no harm:

There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment . . . . [T]here was no fencing out of the white population from participation in the political processes of the county.<sup>55</sup>

Justice White’s language is critical. Although he mentions “racial slur” and “stigma,” those elements are not treated as necessary components of an equal protection challenge. Had he written, “its plan represented no racial slur or stigma with respect to whites or any other race, and so we discern no discrimination violative of the Fourteenth Amendment,” the opinion would have provided considerable support for Justice Brennan’s position in *Bakke*.

Nevertheless, the fact remains that the voting plan easily withstood the fourteenth amendment attack. There are, however, at least two critical factors present in *United Jewish Organizations* that were absent in *Bakke*. The first is the essentially remedial action taken under the Voting Rights Act. The provision of the Act requiring New York’s reapportionment plan to be submitted to the U.S. Attorney General was applied “whenever it was administratively determined that certain conditions which experience had proved were indicative of racial discrimination in voting had existed in the area.”<sup>56</sup> Furthermore, there was evidence that voting in the counties “was racially polarized and that the district lines had been created with the purpose or effect of diluting the voting strength of nonwhites (blacks and Puerto Ricans).”<sup>57</sup> *United Jewish Organizations* is, therefore, “properly viewed” as a validation of a “remedy for an administrative finding of discrimination.”<sup>58</sup> There was no such finding of past discrimination in *Bakke*.

Secondly, as Justice White observed, “there was no fencing out of the white population from participation in the political processes”<sup>59</sup> in *United Jewish Organizations*. Even the complain-

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54. *Id.* at 174 (Brennan, J., concurring).

55. *Id.* at 165 (White, J., separate opinion).

56. *Id.* at 156-57. Here, those conditions were an English literacy test and less than a 50% voter turnout in the 1968 presidential election. *Id.*

57. *Id.* at 149-50.

58. 438 U.S. at 305.

59. 430 U.S. at 165.

ants argued only that the state had *diluted*, not destroyed, their voting strength. On the other hand, under preferential programs like the one in *Bakke*, "some individuals are excluded from a state-provided benefit—admission to the Medical School—they otherwise would receive."<sup>60</sup>

In short, while Justice Brennan's attempt to establish the *Rodriguez* indicia of suspectness test as the "analytic framework" within which all equal protection cases are decided seems to find more support in *United Jewish Organizations* than in the other cases cited in his opinion, that case too falls far short of demonstrating that stigma or the other elements mentioned in *Rodriguez* are necessary preconditions to the invocation of strict scrutiny. Taken as a whole, the cases cited in the Brennan opinion are less susceptible to neat categorization than the opinion's treatment would suggest. Indeed, Justice Powell challenged the characterization:

This rationale . . . has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. . . . Racial and ethnic classifications . . . are subject to stringent examination without regard to these additional characteristics.<sup>61</sup>

As Justice Powell pointed out, the legacy of the Court's decisions describes a syllogism more like this: (1) the Constitution prohibits unjustified state action that discriminates against individuals on the basis of race; (2) the state action in question unjustifiably discriminates against individuals on the basis of race; and therefore, (3) the Constitution prohibits the state action in question. Landmark cases support this model.<sup>62</sup> Several pronouncements are significant. "What is [the equal protection clause] but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white,

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60. 438 U.S. at 305.

61. *Id.* at 290.

62. It may be argued that *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and its progeny demonstrate that "racial classifications are apparently not invalid per se." Project, *Preferential Admissions to Professional Schools: The Equal Protection Challenge*, 22 VILL. L. REV. 983, 993 (1977). Justice Powell, in *Bakke*, pointed out that these cases, as well as the employment discrimination cases, are "inapposite," primarily because they all "involved remedies for clearly determined constitutional violations." 438 U.S. at 300. Brennan disagreed strenuously. *Id.* at 362-66 (Brennan, White, Marshall & Blackmun, JJ., concurring in part, dissenting in part).

shall stand equal before the laws."<sup>63</sup> "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."<sup>64</sup> "The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."<sup>65</sup> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people."<sup>66</sup> "Racial classifications are 'obviously irrelevant and invidious.'"<sup>67</sup> "At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny.'"<sup>68</sup>

These statements are all dicta, but there were, after all, no precedents for *Bakke*.<sup>69</sup> The argument for preferential admissions programs based on statements like the one from *Rodriguez* is similarly an attempt to impute meaning to the equal protection clause by examining cases interpreting it in other contexts. The statements quoted above demonstrate that the Court has also recognized another analytical strand: the state should treat all persons without regard to their race.

Of course, even if the indicia of suspectness model does depart from the Court's historical view, it can reasonably be argued that part of the role of the Supreme Court is to fashion new ways of dealing with constitutional problems in order to accommodate society's changing needs. The indicia of suspectness formula was, however, not so fashioned. Indeed, *Rodriguez*, which set forth the indicia, was not a race case at all, but a case dealing with an equal protection challenge based on poverty. There the Court looked to the race cases for a rationale to transplant into the poverty context. The three-prong test it finally set forth was not, however, borrowed from the race cases, for they applied no such test. The *Rodriguez* formulation merely described the groups that had re-

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63. *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880).

64. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

65. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

66. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

67. *Goss v. Board of Educ.*, 373 U.S. 683, 687 (1963) (quoting *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 203 (1944)).

68. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

69. Hence, it is not at all evident that "[t]he case law is clear," as is argued by one commentator. Baldwin, *DeFunis v. Odegaard, The Supreme Court and Preferential Law School Admissions: Discretion is Sometimes Not the Better Part of Valor*, 27 U. FLA. L. REV. 343, 360 (1975).

ceived the protection of the equal protection clauses in the race cases.

Although the *Rodriguez* formulation is often invoked without explanation,<sup>70</sup> its value as a threshold hurdle that the plaintiff must surmount in order to obtain strict judicial scrutiny is not self-evident. It is not self-evident, for example, why a plaintiff who has been victimized by discriminatory state practices ought to be required to show that his progenitors were similarly victimized. Nor is it evident why a plaintiff who can demonstrate he has suffered a material harm as a result of state discrimination ought to be required to demonstrate that he also suffered a psychological harm, such as stigmatization or stereotyping. Finally, it is not evident why a plaintiff who has been denied a benefit on account of his race ought also to be denied judicial redress simply because he belongs to a group that does not generally lack political power.

The first two prongs of the test, historic discrimination and stigmatization, are rarely defended at length. However, Professor John Hart Ely has offered a reason for making membership in a group that is politically powerless a prerequisite to full equal protection.<sup>71</sup> Ely proposes that strict scrutiny should not apply "[w]hen the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself," since

[a] White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally extended to Blacks.<sup>72</sup>

Ely's point is thus twofold. First, strict scrutiny ought to apply where the rulemaking body acts out of prejudice, underestimates the needs of the racial group deprived of a benefit by the classification, or overestimates the costs of alternative classifications. Second, rather than investigating those three factors each time the Court is faced with a racial classification, the Court would be justified in applying the majority-minority formulation, which is

70. 438 U.S. at 357 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part); *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 1183, 132 Cal. Rptr. 680 (1976) (Tobriner, J., dissenting); Broderick, *supra* note 31, at 164-65; Willey, *supra* note 28, at 210-12; 28 CASE W. RES. L. REV. 238, 263 (1977).

71. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

72. *Id.* at 735.

really a short-hand method for presuming the answers to the three questions without further investigation. Ely's formulation is not an argument explaining why only cases where one or more of the three factors are present ought to be strictly scrutinized; indeed, he assumes that proposition (although the Court has not). Even if he is correct in his assumption, there is still some question about the ability of the majority-minority rule to locate the offending classifications.

The majority-minority rule will work only if whites formulate laws and policies with the view that they ought to be looking out for other whites; if, in other words, the sympathies of white policymakers may be defined primarily in racial terms. Kent Greenawalt has indicated that that conclusion is not justified, at least in the law school setting. "As most law teachers have done very well academically at the undergraduate level as well as in law school," he writes, "they may have trouble identifying themselves with marginal applicants." He goes on to say, "Many intellectuals [in and out of law schools] may actually find it easier to identify with the plight of the 'oppressed' than the problems of the 'Philistine' middle and lower middle classes."<sup>73</sup> Faculty members also will be likely to serve their own interests in minimizing time spent in administering admissions programs.<sup>74</sup> This faculty interest may conflict with the interest of certain marginal white applicants who might be benefited by a more time-consuming "alternative classification that would extend to certain Whites the advantages generally extended to Blacks."<sup>75</sup>

Finally, the majority-minority prescription relies on the assumption that majority policymakers generally will share whatever burden the majority race is forced to bear. Sharing this burden will prevent the policymakers from overestimating the costs of devising alternative classifications, which they would otherwise presumably be likely to do. Again, as Greenawalt has pointed out, this assumption is questionable, at least in the law school setting: "Many law schools have strong preferences for the children of faculty members, so teachers are . . . unlikely to think of their own children as the potential victims of preferential policies."<sup>76</sup> In short, Professor Ely's proposal relies too heavily on

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73. Greenawalt, *supra* note 29, at 573-74.

74. *Id.* Greenawalt also adds: "Without doubt, some university programs for blacks, though I think few admissions preferences, have been adopted after considerable pressure that threatened or actually resulted in disruption." *Id.*

75. Ely, *supra* note 71, at 735.

76. Greenawalt, *supra* note 29, at 573.

unwarranted assumptions to establish the proposition that political powerlessness ought to be a prerequisite to the invocation of the strict scrutiny standard of review.

Another major objection to the indicia of suspectness test is that it makes a constitutional right depend upon membership in a particular group,<sup>77</sup> shifting the focus of constitutional adjudication from individual rights to statistical categories.<sup>78</sup> The Court has traditionally maintained that equal protection is an individual right. "It is the individual . . . who is entitled to the equal protection of the laws—not merely a group of individuals, or a body of persons according to their numbers."<sup>79</sup> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual."<sup>80</sup> "The rights established are personal rights."<sup>81</sup> "[T]he guarantees of the Fourteenth Amendment extend to *persons*."<sup>82</sup>

On the other hand, the "group rights" theory has paved the way for arguments such as Professor Robert O'Neil's:

Unlike employment quotas and school desegregation orders, preferential policies in higher education do not include or exclude anyone solely on the basis of race. Members of the ethnic majority will continue to fill most of the seats in college and graduate school classrooms. The effect of increasing the number of minority participants is not to bar any white applicant on the basis of race, but only to reduce slightly the chances of whites whose prospects would be marginal even without a minority preference.<sup>83</sup>

It is impossible to see how the observation that "members of the ethnic majority will continue to fill most of the seats" in the Davis Medical School, for example, could lead to the conclusion that Allan Bakke was not excluded "solely on the basis of race." If Bakke was refused admission because of his race, it is unclear what relevance the treatment of other whites might have on his constitutional challenge. It might be argued that Bakke was not excluded on account of his race, since he was free to compete for the eighty-four seats available to whites. But this line of reason-

77. See Brief for Respondent at 31-36, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

78. T. SOWELL, *AFFIRMATIVE ACTION RECONSIDERED* 43 (1975).

79. *Mitchell v. United States*, 313 U.S. 80, 97 (1941).

80. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

81. *Id.*

82. 438 U.S. at 289 (emphasis added).

83. O'Neil, *supra* note 14, at 940.

ing misses the crucial point that the constitutionally significant question is not *which* seat he was denied, but *why* he was denied it. It would be preposterous but equally logical to conclude that if one black out of every thousand were forced to the back of the bus, the nondiscriminatory treatment received by the other 999 would somehow neutralize this one instance of racial discrimination. As Justice Powell pointed out in *Bakke*, "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."<sup>84</sup>

Justice Powell noted a further difficulty with the concept of group rights: determining which minority groups to recognize as deserving preferential protection. He insisted that "[t]here is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not."<sup>85</sup> In trying to make such a decision, the Court would face a number of thorny sociological problems. What degree of discrimination must a minority group suffer before a racial classification that disadvantages it can be characterized as "invidious"? How are prejudice and discrimination measured? May a group lose its preferred status as the impact of preferential programs begins to be felt? May a group regain that status once it is lost? The analysis necessary to deal adequately with such questions does not, Justice Powell concluded, "lie within the judicial competence."<sup>86</sup>

## 2. *The legislative history*

A second theory supporting the preferential view argues that the legislative history of the fourteenth amendment justifies preferring blacks over whites in state university admissions.<sup>87</sup> In 1868, the argument goes, whites had no need of special amendments to secure their rights to equal protection of the laws. But blacks, because of their previous condition of servitude, were in special need of the amendment to secure their civil rights. Therefore, although the equal protection clause does not actually mention blacks, they are the special interest of that clause. As Justice

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84. 438 U.S. at 289-90.

85. *Id.* at 296.

86. *Id.* at 297.

87. "It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes." 438 U.S. at 396-97 (Marshall, J., separate opinion).

Miller wrote in the *Slaughter-House Cases*<sup>88</sup> in 1873:

On the most casual examination of the language of [the thirteenth, fourteenth, and fifteenth] amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.<sup>89</sup>

To argue that the fourteenth amendment today ought to protect whites even when doing so works to the disadvantage of its original beneficiaries is thus said to "stand the equal protection clause on its head."<sup>90</sup>

Alexander Bickel has demonstrated that section 1 of the fourteenth amendment "carried out the relatively narrow objectives of the Moderates, and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation."<sup>91</sup> In fact, a specific formulation of civil rights (including desegregation) would almost certainly have failed adoption.<sup>92</sup> The purpose of the fourteenth amendment was, in Sandalow's words, "[f]reedom, not equality."<sup>93</sup> Raoul Berger adds that racism and fierce opposition to social and political equality were widespread in the North as well as the South, infecting the amendment's supporters as well as its opponents.<sup>94</sup> Furthermore, there is evidence to suggest that the framers intended the fourteenth amendment to protect, in addition to newly freed slaves, southern whites who, because of their sympathy with the Union, were in danger of discriminatory treatment at the hands of the southern state legislatures.<sup>95</sup> In short, the idea that blacks should be given preferential treatment in state uni-

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88. 83 U.S. (16 Wall.) 36 (1873).

89. *Id.* at 71.

90. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 U.C.L.A. L. REV. 343, 357 (1974).

91. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955).

92. *Id.* at 61-62.

93. Sandalow, *supra* note 17, at 665. The amendment was designed merely to incorporate into the Constitution the terms of the Civil Rights Act of 1866. R. BERGER, *GOVERNMENT BY JUDICIARY* 166-92 (1977).

94. R. BERGER, *supra* note 93, at 12-16, 27-36.

95. See Comment, *The Constitutionality of Preferential Minority Admissions Programs in State Professional Schools*, 45 U.M.K.C. L. REV. 343, 353 & nn. 47-51 (1977).

versities would have struck the amendment's framers as "bizarre"<sup>96</sup> if not inconceivable.<sup>97</sup>

On the other hand, Justice Marshall argued in *Bakke* that the Congress of 1868 was indeed willing to see the interests and rights of whites subordinated to those of the newly freed slaves. He observed that the same Congress that passed the fourteenth amendment also passed the 1866 Freedmen's Bureau Act,

an act that provided many of its benefits only to Negroes. . . . Although the Freedmen's Bureau legislation provided aid for refugees, thereby including white persons within some of the relief measures, . . . the bill was regarded, to the dismay of many Congressmen, as "solely and entirely for the freedmen, and to the exclusion of all other persons."<sup>98</sup>

And even though the bill was attacked on the ground that it gave blacks special treatment unavailable to many whites, Congress overrode President Johnson's veto to make it law. However, the Freedman's Bureau Act was not designed to benefit succeeding generations of blacks or, as Justice Marshall seems to imply in some passages, blacks generally;<sup>99</sup> its primary purpose was to aid newly freed slaves in their extraordinarily difficult transition from slavery to freedom.

Justice Marshall concluded that the "intent of the Framers" was to achieve "genuine equality" rather than merely "abstract equality."<sup>100</sup> He apparently used the term "abstract equality" to refer to legal equality, and the term "genuine equality" to refer to social, financial, educational, and occupational equality. In view of the formidable evidence to the contrary, which Justice Marshall does not acknowledge,<sup>101</sup> the legislative history of a single limited legislative enactment cannot justify the conclusion that the 1868 Congress intended the fourteenth amendment to achieve such extra-legal equality. The most that can consistently be said of those who enacted the fourteenth amendment was that they intended it to *allow*, rather than *achieve*, such equality.

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96. Posner, *supra* note 23, at 21.

97. Bickel theorized that the wording of the equal protection clause was intended by the Radicals to be sufficiently ambiguous to allow for future manipulation of the clause. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 63 (1962). For an analysis of that hypothesis, see R. BERGER, *supra* note 93, at 99-116.

98. 438 U.S. at 397 (Marshall, J., separate opinion) (citations omitted).

99. See *id.* at 398.

100. *Id.*

101. Indeed, the portion of the Marshall opinion which claims to look at the history of the fourteenth amendment does not even refer to that history; it is devoted exclusively to the history of the Freedmen's Bureau Act. *Id.* at 397-98.

There is also a loosely constructed argument that looks not at the framers' intent, but only at its *direction*. Since the framers moved toward extending greater legal benefits to blacks,<sup>102</sup> the argument runs, all further extensions of benefits are historically justifiable. This position is problematical for two reasons. First, it requires a court to claim historical sanction for an opinion that would never have been approved by those historical figures to whom the court looks for support. The difficulty is not dispelled by the insistence that the Court would only be harvesting the fruit of the seed first planted by the framers. On what ground can the framers' desire to move in a particular direction be consistently taken more seriously than their desire not to move any further in that direction? One ground might be that society has moved farther in that direction than the framers were willing to move. That explanation may be justifiable, but it is not historical, and should not be accorded the weight that an appeal to legislative history provides.

A second basic problem with this contention is that it provides no fixed limits on the exercise of judicial discretion. Thus, such a rule of interpretation suggests no logical stopping point beyond which the Court must not push the "intent" of the framers. The Court is no longer required to ask what the legislative history *dictates*, but only what it *allows*. And by taking the quasi-historical view that it allows any state action that benefits blacks, the Court can insulate itself from genuinely historical objections. The effect is to shroud an utterly unhistorical view with apparent historical legitimacy while dismissing the truly historical view as unhistorical.

### C. *The Symmetrical View: Equal Protection for All Races*

A third view of the equal protection clause, which might be referred to as the "symmetrical view," dictates that all governmental practices that discriminate on the basis of race be subject to "the most rigid scrutiny."<sup>103</sup> Such practices can be permitted only if they can be shown to further a "compelling state interest" and then only if no less restrictive alternative is available.<sup>104</sup> The essential difference between this view of equal protection and the preferential view is that the symmetrical view insists that all

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102. See, e.g., Greenawalt, *supra* note 29, at 570-71.

103. *Korematsu v. United States*, 323 U.S. 214 (1944).

104. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

types of racial discrimination are equally repugnant to the Constitution, and hence that all racial classifications are equally suspect.

For nearly a century, landmark opinions have maintained that the equal protection clause prohibits all discriminatory treatment on account of race.<sup>105</sup> It does not, according to those decisions, favor particular racial or ethnic groups and give only limited protection to all others. In fact, not until the last decade has anyone suggested that equal protection might have one-way application in the sense that only classifications affecting certain racial groups are subject to strict judicial scrutiny. The one-way application attracted support only after it became apparent that the clause might operate to the detriment of minorities by curtailing affirmative action programs. This hasty reinterpretation of the clause has left minority rights advocates vulnerable to the criticism described by John Rawls:

It is not, however, an unnatural extension of the duty of fair play to have it include the obligation which participants who have knowingly accepted the benefits of their common practice owe to each other to act in accordance with it when their performance falls due; for it is usually considered unfair if someone accepts the benefits of a practice but refuses to do his part in maintaining it.<sup>106</sup>

The principle at stake was succinctly stated by Chaim Perelman: "If the judge violates the rules of concrete justice he has himself accepted, then he is unjust."<sup>107</sup> Rawls makes a similar point: "[H]aving a morality is analogous to having made a firm commitment in advance; for one must acknowledge the principles of morality even when to one's disadvantage. A man whose moral judgments always coincided with his interests could be suspected of having no morality at all."<sup>108</sup> This definition of morality seems to require that minorities acknowledge the principle of law on which they have based previous claims, even when doing so is to their disadvantage.

Consequently, the suggestion that the Court should approve benign racial discrimination has aroused moral indignation from many diverse camps,<sup>109</sup> including minorities.<sup>110</sup> Even advocates of

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105. See notes 62-68 and accompanying text *supra*.

106. Rawls, *supra* note 20, at 180, reprinted in H. BEDAU, *supra* note 20, at 90.

107. C. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 20 (1963).

108. Rawls, *supra* note 20, at 173, reprinted in H. BEDAU, *supra* note 20, at 84.

109. See, e.g., Cohen, *The DeFunis Case: Race and the Constitution*, *THE NATION*, Feb. 1975, at 135; Graglia, *Special Admission of the "Culturally Deprived" to Law School*,

such discrimination are not oblivious to its potential for causing discomfort.<sup>111</sup> There is good reason for such discomfort. Advocates of preferential programs are demanding that Americans unlearn in the 1970's the moral lesson that was thrust upon them in the 1960's. An arduous struggle, reflected in marches, songs, rallies, stickers, movies, and freedom rides, brought legislation and culminated finally in the concession of the American nation that race should be a legally neutral fact. The moral force of this proposition was irresistible. The watchcry of "equal opportunity" in great measure mobilized the hearts and minds of Americans, and rightly so. The principle of racial neutrality is one that comports with a priori notions of equal justice. As Professor Carl Cohen has written: "Whenever individuals are penalized solely because they manifest some adventitious characteristic wholly out of their control—their skin color, their national origin, or the like—the unfairness arouses strong indignation. Our viscera do not mislead us in this; any reasonable standard would certainly exclude such uses of racial classification."<sup>112</sup> H.L.A. Hart comes to a similar conclusion in *The Concept of Law*:

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119 PA. L. REV. 351, 353, 356 (1970); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 380 (1966); Lavinsky, *A Moment of Truth on Racially Based Admissions*, 3 HASTINGS CONST. L.Q. 879, 881 (1976); Perhacs, *But Some Animals Are More Equal Than Others: A Look at the Equal Protection Argument Against Minority Preferences*, 12 DUQ. L. REV. 580, 600 (1974); Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern*, 34 U. CHI. L. REV. 817, 854 (1967).

110. See, e.g., McPherson, *The Black Law Student: A Problem of Fidelities*, THE ATLANTIC, Apr. 1975, at 93, 100; Sowell, *Are Quotas Good for Blacks?*, COMMENTARY, June 1978, at 39.

Public-opinion polls have repeatedly shown most blacks opposed to preferential treatment either in jobs or college admissions. A Gallup Poll in March 1977, for example, found only 27 percent of non-whites favoring "preferential treatment" over "ability as determined by test scores," while 64 percent preferred the latter and 9 percent were undecided. (The Gallup breakdown of the U.S. population by race, sex, income, education, etc. found that "not a single population group supports affirmative action.")

*Id.*

111. For example, Professor Sandalow has commented:

[R]acial and ethnic preferences do involve serious dangers. In the end, however, a decision concerning their validity cannot avoid a judgment about whether they are likely to contribute to or retard development of the kind of society we want. In my own judgment, for reasons already explained, the former is more likely. It would be foolish to assert that judgment confidently, however. If the potential benefits are great, so too are the potential losses. But in the light of the seriousness of America's racial problem, the risk seems worth taking, however uncomfortable we may be with it.

Sandalow, *supra* note 17, at 703.

112. Cohen, *supra* note 109, at 141.

Indeed so deeply embedded in modern man is the principle that *prima facie* human beings are entitled to be treated alike that almost universally where the laws do discriminate by deference to such matters as colour and race, lip service at least is still widely paid to this principle. If such discriminations are attacked they are often defended by the assertion that the class discriminated against lack, or have not yet developed, certain essential human attributes; or it may be said that, regrettable though it is, the demands of justice requiring their equal treatment must be overridden in order to preserve something held to be of greater value, which would be jeopardized if such discriminations were not made.<sup>113</sup>

Alexander Bickel has observed:

The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.<sup>114</sup>

In accordance with this fundamental principle minorities have rightfully demanded protection from governmental discrimination, citing the equal protection clause for the proposition that no one should be denied a governmental benefit or suffer a governmentally imposed penalty because of his race. No special prophetic powers are needed to predict that when it is argued that whites suffering similar governmental discrimination cannot avail themselves of similar protection, the demand for an explanation will be vigorous if not indignant.<sup>115</sup> As stated by the Califor-

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113. H.L.A. HART, *THE CONCEPT OF LAW* 158 (1961).

114. A. BICKEL, *THE MORALITY OF CONSENT* 133 (1975).

115. Such reaction has not been limited to academic circles:

The *New York Times* recently published an editorial endorsement of the reverse discrimination that caused the rejection of Allan Bakke by the medical school of the University of California at Davis. Two weeks later, the *New York Times* turned over the whole of its editorial page to spirited discussions of that stand, introduced by an editorial statement that, by a ratio of 15 to 1, the *Times'* readers rejected the *Times'* logic.

Buckley, *Are We All Conservatives Now?*, *NATIONAL REVIEW*, Aug. 5, 1977, at 904.

Most Americans oppose granting preferential treatment to minorities and women in getting jobs or entering college, according to a recent Gallup Poll.

The survey found that, despite claims of past and present discrimination, 81 percent of those questioned felt that ability as measured by test scores should be the main consideration in hiring and admitting people to schools. Only 11

nia Supreme Court, preferential admissions "represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality."<sup>116</sup> Americans remember their earlier lesson well enough to sense "a certain irony in climaxing a long struggle in the name of equality by demanding inequality."<sup>117</sup>

Of the three views of the equal protection clause—the utilitarian, the preferential, and the symmetrical—the one best supported by fundamental principles of fairness as well as the legacy of the Court's pronouncements is the third. But merely adopting the symmetrical view does not automatically dispose of the preferential admissions question. This view does not forbid all racial discrimination. It simply requires that the Court apply its strictest standard of review. The strict scrutiny standard requires that the state's racial classification, to survive judicial review, be necessary to serve a compelling state interest.<sup>118</sup> Further inquiry must therefore focus on whether or not the interests served by preferential admissions programs are sufficiently compelling to justify an exception to the general rule forbidding classifications based on race.

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percent favored preferential treatment, and 8 percent had no opinion.

U.S. NEWS & WORLD REPORT, Dec. 5, 1977, at 24.

116. *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 62-63, 553 P.2d 1152, 1171, 132 Cal. Rptr. 680, 699 (1976), *aff'd in part, rev'd in part*, 438 U.S. 265 (1978).

117. Kaplan, *supra* note 109, at 364. On the other hand, there is an argument that any action taken to eradicate the effects of historical discrimination is moral. Nathan Glazer, for example, contends that "any claim for blacks (and in lesser degree for other minorities) has an immediate moral force and justification." N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 207 (1978). While recognizing that hard affirmative action measures "could not get the support of Congress today on a straight vote, and would certainly not get the support of the majority of the American people if asked," Glazer insists that "[t]hey are seen as moral." *Id.* at 210. He further suggests that much of the moral weight of affirmative action programs is accorded them by those who "do not want to find themselves in the posture of the South." *Id.* at 209. If he is right, what he calls moral support would be more accurately described as a fear of being unfairly accused of racism, a risk all nonracists run when they support, for moral or legal reasons, positions that are supported by racists for racist reasons. The risk is real. See, e.g., Broderick, *supra* note 31, at 175. See also Seeburger, *A Heuristic Argument Against Preferential Admissions*, 39 U. PITT. L. REV. 285 (1977).

118. "It should be noted that 'compelling state interest' in this instance is not synonymous with the general recognition of an important social goal, but rather, with that degree of importance which would justify overcoming our traditional abhorrence of racial discrimination." Brief for Respondent at 55, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

### III. STATE INTERESTS IN PREFERENTIAL ADMISSIONS

From the time the Court first applied a heightened scrutiny to racial classifications, national survival is the only example of an interest so vital that the Court has labeled it "compelling."<sup>119</sup> In *Korematsu v. United States*<sup>120</sup> the Court stated:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.<sup>121</sup>

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119. As noted in the brief for Allan Bakke:

This Court has found a basis for sanctioning racial discrimination in only two cases. In *Korematsu v. United States*, and in *Hirabayashi v. United States*, . . . the Court upheld military exclusion and curfew orders directed against American citizens of Japanese origin. In view of the widespread criticism of these cases, it is not clear that even the threat of invasion, espionage, and sabotage would justify these racially discriminatory orders were they to be reviewed by a present-day court.

Brief for Respondent at 55 & n.52. See also Greenawalt, *supra* note 29, at 567; Renfrew, *supra* note 12, at 605.

In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court upheld the practice of the Bureau of Indian Affairs of hiring Indians whenever possible. In doing so, however, the Court made clear that the case was *sui generis* because of the "unique legal status of Indians" as well as the "plenary power of Congress to deal with the special problems of Indians . . . drawn both explicitly and implicitly from the Constitution itself." *Id.* at 551-52. The Court emphasized that the BIA's practice was not in fact racial discrimination at all and that the case was not to be considered a precedent to justify future exceptions to the constitutional ban on racial discrimination:

Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the Constitutional requirement that a United States Senator, when elected, be "an inhabitant of that State for which he shall be chosen," Art. I, § 3, cl. 3, or that a member of a city council reside within the city governed by the council. Congress has sought only to enable the BIA to draw more heavily from among the constituent groups in staffing its projects, all of which, either directly or indirectly, affect the lives of tribal Indians. The preference, as applied, is granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion . . . . In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.

*Id.* at 553-54. *Morton v. Mancari* is therefore not a suitable guide to the meaning of the term "compelling state interest."

120. 323 U.S. 214 (1944).

121. *Id.* at 216.

The Court continued:

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.<sup>122</sup>

Justice Douglas, in his concurring opinion in *Hirabayashi v. United States*,<sup>123</sup> made it clear that as far as the Court was concerned, "[t]he threat of Japanese invasion of the west coast was not fanciful but real"<sup>124</sup> and that "national survival [was] at stake."<sup>125</sup> These cases established a very rigid standard which was not met by any racial classification from World War II until *Bakke*.

Advocates of preferential admissions have advanced four major interests that such programs are designed to serve: (1) the need to compensate for historical mistreatment of minorities, (2) the need for professional services among minorities, (3) the need for racial proportionality, and (4) the need for student body diversity. None of these objectives is without some justification; certainly none is advanced frivolously. Most commentators who advance them do so out of concern for members of minority races and for the nation as a whole. The objectives cannot, therefore, be frivolously dismissed, but neither ought they be allowed to neutralize a recognized constitutional right without being subjected to the closest examination. The right to equal protection of the laws may not be lightly overridden. The right to be treated without regard to one's race is precious and should only be denied in deference to a countervailing interest that is truly compelling.<sup>126</sup>

#### A. *Compensating for Historical Mistreatment of Minorities*

Perhaps the argument that has most captivated scholars, practitioners, and laymen alike is that preferential admission programs are needed to compensate minorities for mistreatment

122. *Id.* at 219-20.

123. 320 U.S. 81 (1943).

124. *Id.* at 105 (Douglas, J., concurring).

125. *Id.* at 106.

126. It has been argued that the compelling state interest test represents a standard too high for benign discrimination cases, and that some intermediate standard ought therefore to be applied. See note 29 and accompanying text *supra*. The discussion in the text is relevant both to strict scrutiny and to any intermediate standard.

they have received at the hands of whites throughout the nation's history. The general idea is that "preferential programs are a form of compensation, or reparations, to repay these minority groups for the harm inflicted upon them in the past by society and to compensate them for the benefits which nonminorities have reaped as a result of the deprivations suffered by minorities."<sup>127</sup> This statement emphasizes one strand of the compensation argument, namely, that whites owe a debt to minorities because whites have unjustly benefited by mistreating minorities. The other strand of the argument is typified by the allegation that as a result of discrimination minorities are poorly equipped to compete on an equal basis, and therefore "evenhanded treatment cannot yield equal results."<sup>128</sup> Professor John Kaplan has graphically depicted the argument:

The treatment-according-to-need argument often uses the analogy of a foot-race in which one of the runners has been shackled for the entire time. We could not simply remove his chains and let the race continue. Not only would he then be far behind in the race, but also, from want of exercise and various other disabilities, he would be much less able to continue.<sup>129</sup>

In another statement, Professor Kaplan aptly expresses both strands of the argument:

[S]ince our white society has enslaved and exploited the Negro, leaving him in far worse condition to compete in and enjoy the benefits of our society, it is only fair that each victim of this wrong be compensated for his injuries—whether or not he is presently in need. This is especially so, the argument goes, since the white society which damaged the Negro has been unjustly enriched by benefiting from slavery and cheap Negro labor. In addition, over and above the measurable financial loss inflicted, compensation may be claimed for pain, suffering and humiliation. There has, indeed, been some precedent for the recognition of this type of obligation. We have sought to compensate American Indians for lands taken away from their ancestors and, though to some the comparison may be odious, the West German government has paid millions of dollars to Israel in reparation for Nazi crimes against Jews. This repayment of a debt theory avoids the thorny issue of the correspondence between color and need. Under this view, "the professional

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127. Redish, *supra* note 90, at 379.

128. Cohen, *supra* note 109, at 135.

129. Kaplan, *supra* note 109, at 365.

Negro, the Negro businessman, and those able to climb the ladder despite their handicaps would each be much further along than they are if it were not for the immoral practices of the white society," and hence are legitimate objects of compensation.<sup>130</sup>

While the redressing of past injustices has an emotional appeal, the position is not without its difficulties. For example, Karst and Horowitz have pointed out a major problem with the compensation theory as it is applied in employment cases. Their observation is appropriate to the educational context as well:

Not only are the beneficiaries of today's preferential quota normally not the actual victims of yesterday's discrimination by employer or union; it is also difficult to determine whether they have been affected even indirectly by the past practices of the employer or union in question. On the other side, those who are disadvantaged by today's preferential quota normally have not been responsible for the past discrimination, and have not profited from it. Affirmative action cannot be "compensatory" or "remedial" except in the most diffuse sense.<sup>131</sup>

Karst and Horowitz focus on two different concerns. First, do preferential programs benefit the right people? Second, do preferential programs disadvantage the right people?

Justice Marshall, in *Bakke*, addressed the first concern by insisting that "[i]t is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."<sup>132</sup> His comment is an answer to the objection that the class benefited by today's preferential programs is too broad. Since no black has escaped the effects of discrimination, no black can be said to be unjustly benefited by compensatory programs.

There is, of course, another objection: the class benefited by today's preferential programs is too narrow. Nonblack Americans have also suffered discrimination. And, as Posner has observed, "when race is used as a proxy for characteristics thought to be

130. *Id.* at 365-67 (footnotes omitted) (quoting Morcuse, in *EQUALITY* 149 (1965)).

131. Karst and Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 964-65 (1974). See also Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534, 538-39 (1975); Posner, *supra* note 23, at 16.

132. 438 U.S. at 400 (Marshall, J., separate opinion).

relevant to the educational experience, discrimination against people who have the characteristics (of poverty, cultural handicaps, etc.) but not the racial identity, results."<sup>133</sup> His point is this: the intention never was to prefer minorities merely because they were minorities, but to prefer those who have suffered the effects of discrimination. Minority status per se is used as a basis for preference only because there is thought to be a high correlation between the class of all minorities and the class of all discrimination victims.<sup>134</sup> However, this approach to identifying discrimination victims necessarily denies many actual victims the benefit of preferential treatment merely because their racial, ethnic, or religious status does not entitle them to official compensation. Furthermore, there are many other persons who, although not the victims of racial or ethnic prejudices, are similarly disadvantaged by circumstances largely beyond their control.

A just solution might therefore be to prefer applicants of any race who can demonstrate that they have suffered the effects of discrimination or who are otherwise disadvantaged.<sup>135</sup> A typical response to this suggestion is that if preferences are accorded on the basis of disadvantage rather than race, too few minorities will be admitted to professional schools.<sup>136</sup>

This objection is valid only if some compelling interest in preferring minorities for a reason other than historical disadvantage, such as promoting student body diversity, exists. If such an independent compelling interest were recognized, and if the number of minorities admitted under a program based on disadvantage were significantly lower than under the present system of

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133. Posner, *supra* note 23, at 14.

134. Nickel, *supra* note 131, at 550-51. Professor Nickel suggests a framework for analyzing preferential policies by building flexibility into the correlative scheme. *Id.* at 555-58.

135. It appears that no schools to date have experimented with preferential programs based on disadvantage. Lavinsky, *supra* note 109, at 880. However, "[o]fficials of the NAACP Legal Defense and Education Fund and the Mexican-American Legal Defense Fund have acknowledged that they 'could live with' a program based on disadvantage." *Id.* at 889 (footnote omitted).

136. Justice Tobriner, dissenting from the California Supreme Court's decision in *Bakke*, noted:

Because all disadvantaged students need financial aid, the total number of such students a medical school can afford to admit is limited. As a consequence, inclusion of all disadvantaged students in the special admission program would inevitably decrease the number of minority students admitted under the program and thus curtail the achievement of all integration-related objectives.

*Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 90, 553 P.2d 1152, 1190, 132 Cal. Rptr. 680, 718 (1976) (Tobriner, J., dissenting).

racial preferences, the program would be vulnerable to the criticism that it was ineffective in serving the recognized state interest.<sup>137</sup> If, on the other hand, it is the disadvantaged status of minorities that is being advanced as the compelling state interest, preferential programs based on disadvantage would not be vulnerable to the criticism that they benefited nonminorities as much or more than minorities.

In *Bakke*, Justice Powell dealt with the issue of whether beneficiaries of preferential treatment must demonstrate previous disadvantage by pointing out that the Court has always required at least a showing of illegal discrimination on the part of the employer or school before it would sanction preferential programs. He wrote: "After such findings have been made, . . . the legal rights of the victims must be vindicated."<sup>138</sup> To allow remedial programs to compensate for "societal discrimination" would unduly jeopardize the rights of those who are disadvantaged by such programs. For, as Justice Powell also observed, "there is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."<sup>139</sup>

Greenawalt has proposed a plausible answer to this challenge. It is reasonable to assume, he suggests, that if no discrimination had ever occurred, many more blacks would qualify for admission without the benefit of special preference. Borderline whites who are accepted to schools without preferential admissions policies are therefore the unwitting beneficiaries of others' discriminations, even if they are innocent of discrimination themselves. To adopt a preferential policy that excludes them is merely to place them "in the position they would have been in if the discrimination had never occurred."<sup>140</sup> Strictly speaking, however, this argument does not answer Justice Powell's objection. What Greenawalt proposes is an allocation of the burdens of compensation upon the beneficiaries of the wrongdoing rather than upon the perpetrators of the wrongs; he does not demonstrate that that alternative is fairer than the traditional method of allocation. There are also additional difficulties with the "unwitting beneficiary" theory which become evident when it is applied hypothetically in other contexts. Should white students' grades be

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137. O'Neil, *After DeFunis: Filling the Constitutional Vacuum*, 27 U. FLA. L. REV. 315, 341; Sandalow, *supra* note 17, at 690.

138. 438 U.S. at 307.

139. *Id.* at 298.

140. Greenawalt, *supra* note 29, at 585.

discounted on the assumption that the discounted grades are the ones they would have received absent discrimination? Ought law school class standings be rearranged to reflect what they presumably would have been absent discrimination? Should white attorneys, when opposing black attorneys, be held to a higher standard of proof than their opponents on the assumption that, absent discrimination, black attorneys would be better qualified and hence more likely to persuade the court? These examples are more extreme than the preferential admissions situation, but they are equally well supported by the "unwitting beneficiary" theory.

There is a further theoretical pitfall in forcing today's nonminority students to bear the burden of compensating for historical discrimination. In his *Bakke* opinion, Justice Marshall observed cryptically that until 1954, "ours was a Nation where, by law, an individual could be given 'special' treatment based on the color of his skin."<sup>141</sup> The observation is crucial: acts of discrimination committed before 1954 were legal.<sup>142</sup> Those who committed discriminatory acts behaved well within their constitutional rights as set forth by the Supreme Court. For today's Court to sanction a governmental agency's attempts to redress "several hundred years of class-based discrimination against Negroes"<sup>143</sup> would thus require it to permit penalization of nonminorities for actions which, at the time they were committed, were admittedly legal.

The court has scrupulously observed this distinction between legal and illegal discrimination in applying the Civil Rights Act of 1964. In *Albemarle Paper Co. v. Moody*<sup>144</sup> the Court observed: "[U]nder Title VII backpay liability exists only for practices occurring after the effective date of the Act . . . . Thus no award was possible with regard to the plant's pre-1964 policy of 'strict segregation.'"<sup>145</sup> The limitation that pertains to backpay awards pertains also to awards of retroactive seniority. Although Justice Marshall strenuously objected, the Court ruled in *International Brotherhood of Teamsters v. United States* that "employees who suffered only pre-Act discrimination are not entitled to relief, and

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141. 438 U.S. at 401 (Marshall, J., separate opinion).

142. Segregation was legal in public schools, of course, until *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Most discrimination by private institutions is now prohibited by the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 247 (codified in scattered sections of 42 U.S.C.).

143. 438 U.S. at 400 (Marshall, J., separate opinion).

144. 422 U.S. 405 (1975).

145. *Id.* at 410 n.3.

no person may be given retroactive seniority to a date earlier than the effective date of the Act."<sup>146</sup>

Ironically, there is also reason to believe that racially preferential programs in fact stigmatize the very minority applicants they are designed to benefit, including those who would have been admitted to the school without preferential consideration.<sup>147</sup> Justice Douglas recognized this problem in his *DeFunis* dissent:

A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved: that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.<sup>148</sup>

One black law student has written: "[M]aking the student feel special, placing him in a category which takes intellectual limitations for granted at the start of the ordeal, only makes his struggle that much harder, that much more painful."<sup>149</sup> Dr. Thomas Sowell, himself a black, has pronounced this indictment of the preferential admissions system:

Bending a few rules here and there to get the right body count of minority students seems a small price to pay for maintaining an image that will keep money coming in from the government and the foundations. When a few thousand dollars in financial aid to students can keep millions of tax dollars rolling in, it is clearly a profitable investment for the institution. For the young people brought in under false pretense, it can turn out to be a disastrous and permanently scarring experience.<sup>150</sup>

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146. 431 U.S. 324, 356-57 (1977).

147. See Project, *Preferential Admissions to Professional Schools: The Equal Protection Challenge*, 22 VILL. L. REV. 983, 1009 (1977).

In an article in the opinion-editorial section of the *New York Times*, David L. Evans, Senior Admissions Officer of Harvard, complained: "So much has been written about the illegitimacy of special recruiting efforts for minority students, black students' disillusionment and 'reverse discrimination' that the mere presence of blacks at selective institutions has more and more begun to imply substandard credentials." He added: "Black students who come to Harvard far too often receive the coolest, most ambivalent reception given to any upwardly-mobile ethnic group that has ever entered these ivied walls." N.Y. TIMES, Nov. 24, 1976, at 33, col. 1.

Lavinsky, *supra* note 109, at 889 n.57.

148. 416 U.S. at 343 (Douglas, J., dissenting).

149. McPherson, *supra* note 110, at 100.

150. Sowell, *supra* note 110, at 41.

Professor Lino Graglia has indicated that the problem has been compounded:

Some schools have in fact abandoned the factual premise on which the programs were originally based and no longer insist on undiluted performance standards—lower standards are now justifiable. At New York University Law School, for example, a special admission program was first adopted in 1966 when the school employed an anonymous grading procedure under which the identity of the student was not known to the professor until after the grade was assigned. After two years, twelve of fifteen specially admitted students were not maintaining a passing average. A faculty committee reporting on the problem found that the special admission program was being “crippled by the rigidity of the anonymous grading system” and that “(t)he preservation inviolate of traditionally narrow canons of academic excellence recedes into insignificance when confronted with the dimensions of the American crisis of social injustice.” It successfully recommended that the grading system be changed to permit a professor to take into account special admission when a student would otherwise receive a failing grade.<sup>151</sup>

Again, it is not only preferred applicants who suffer the stigma, but all minority professionals. For example, both the minority applicant who would have been admitted to medical school without preferential treatment and the minority student at a medical school which has no preferential admission program may, despite excellent qualifications as practicing physicians, be suspected of being less qualified than their white counterparts.<sup>152</sup> In short, “one of the most serious disservices done by lowered academic standards for Negroes in institutions of higher learning is to call into question the legitimacy of every Negro graduate.”<sup>153</sup> As Justice Powell noted in *Bakke*, “preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”<sup>154</sup>

Another reason why preferential programs are likely to frustrate the interests of minorities is that “by making different rules for the white and the Negro [the government] can only increase the importance of race in our already race-ridden society.”<sup>155</sup> Pro-

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151. Graglia, *supra* note 109, at 359-60 (footnotes omitted).

152. See Greenawalt, *supra* note 29, at 571-72.

153. Graglia, *supra* note 109, at 356.

154. 438 U.S. at 298.

155. Kaplan, *supra* note 109, at 380.

fessor Ralph Winter has observed:

In any event, preferential programs are fundamentally countereducative on the basic issue of racial discrimination itself. Instead of helping to eliminate race from politics, they inject it. Instead of teaching tolerance and helping those forces seeking accommodation, they divide on a racial basis. Such programs tend to legitimate the back-lash by providing it with much of the philosophical and moral base from which the civil rights movement itself began. And, indeed, there is no reason to believe that if racial issues become more, rather than less, of a political issue, Neroes will be the winners.<sup>156</sup>

Professor Graglia has pointed out yet another disservice a university may do to minorities by holding out the promise of a quality product at a discounted price: "Inadequate grade school, high school, and college educational opportunities cannot be redressed by offering quality law school education. In quality education it is not possible to begin at the top."<sup>157</sup> The flaw in the program that Graglia focuses on is merely one manifestation of something far more pervasive and more counterproductive: the insistence that problems be solved on the level of the symptoms rather than at the roots. Rather than preparing minority students to really compete in the admissions program, admission standards are changed; rather than helping minority students to learn the law more thoroughly, the grading system is changed. It has even been suggested that rather than helping minorities pass the bar exam, the test should be changed.<sup>158</sup> In short, concentration is placed not on making minority students professionals in the fullest sense of that word, but on making them professionals, if only in name.

### B. *Professional Services Among Minority Groups*

One of the more serious medical problems facing the country is the inadequacy of medical services in poor minority neighborhoods. Data indicating a high incidence of many serious diseases among blacks<sup>159</sup> may reflect a significant lack of available medical care. This scarcity of medical care is arguably caused by the shortage of practicing minority doctors. For example, the physi-

156. Winter, *supra* note 109, at 854. See also Greenawalt, *supra* note 29, at 571.

157. Graglia, *supra* note 109, at 353.

158. See, e.g., Antonides, *Minorities and the Bar Exam: Color Them Angry*, JURIS DOCTOR, Aug./Sept. 1978, at 56.

159. Brief for Petitioner at 23-24, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

cian/nonphysician ratio in the population generally is about seven times greater than the same ratio among blacks. The situation for Chicanos and American Indians—for whom similar data are unavailable—is thought to be even worse.<sup>160</sup>

In *Bakke* the University of California did not argue that *only* blacks can treat blacks, but simply that they are more likely to do so:

To suggest that the paucity of minority physicians is reflected in poor medical care for minorities is not to suggest that only blacks can treat blacks or that only Asians should treat Asians . . . . It is simply to recognize the reality that many forces, including economics, idealism, and continuing patterns of discrimination, commonly bring minority physicians back into minority communities, where the shortage of health services is most severe, and that as a society we have refrained from compelling other physicians to locate their practices in those areas.

“If you could insist, for instance, that the people who come into the professional school make a contract for 10 to 20 year terms to serve low-income people, then you would have no need to be racially selective. But the fact of the matter is you could neither make nor enforce such a contract.”<sup>161</sup>

Although the University asserted that “many forces . . . commonly bring minority physicians back into minority communities,”<sup>162</sup> the only evidence cited in its brief in support of that contention is the following statement: “There are data showing that doctors of non-racial ethnic groups (Anglo-Saxon, Irish, Italian, Jewish, and Polish) tend to ‘specialize in serving their fellow-ethnics.’”<sup>163</sup> And although all the minority students participating in a preferential program may express an interest in practicing in disadvantaged ethnic communities, there are no guarantees that the students will ultimately practice in such communities.<sup>164</sup> If the concern is truly with the medical services available to those who need it most—there seems to be no necessity for defining need in terms of race—those services can be virtually assured without reference to race, without constitutional infringement,

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160. *Id.* at 23.

161. *Id.* at 24-25 (quoting Jenkins, *The Howard Professional School in a New Social Perspective*, 62 J. NAT'L MED. A. 167 (1970)).

162. *Id.* at 25.

163. *Id.* at 25 & n.24.

164. See *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 56, 553 P.2d 1152, 1167, 132 Cal. Rptr. 680, 695. (1976).

and without compelling anyone to do anything. The state could specify certain schools, or certain seats at certain schools, as available only to students who agree to "be bound—even as students at West Point are bound to spend time in the army—to spend time in the ghettos."<sup>165</sup>

Likewise, rather than merely hoping that minority doctors will answer the needs of underserved communities—and this at the price of curtailing a recognized constitutional right—increased medical services in such communities could be ensured by having the states contract with medical students to practice in underserved communities in exchange for free medical education. The University of California insisted that "you could neither make nor enforce such contracts."<sup>166</sup> While it might be impossible to compel the graduate's performance, the state could at least make breach sufficiently unattractive by demanding damages and preventing the breaching graduate from practicing elsewhere.<sup>167</sup>

Delivery of legal services presents a similar problem: "All should recognize that the current shortage of Negro attorneys has reached crisis proportions. Whatever one's view of ultimate objectives, it is clear that for the present more Negro attorneys must be trained as quickly as quality preparation permits."<sup>168</sup> In addition, there has been a heavier emphasis in the area of the law to insist on the need for lawyers from ethnic minorities to serve members of their respective ethnic groups. Sandalow states:

Although it would be absurd to suppose that only a Jewish lawyer can adequately represent a Jew or that only a black lawyer can adequately represent a black, it is true nonetheless that many Jews and many blacks (like many persons of other

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165. Buckley, *supra* note 115, at 905.

166. *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 56, 553 P.2d 1152, 1167, 132 Cal. Rptr. 680, 695 (1976).

167. Regarding such personal services contracts,

[i]t has been held that where an executory contract contains both positive and negative promises, and the Court is unable to enforce the former, it may nevertheless enforce the latter by injunction. Thus, where a professional singer was sued by the proprietor of a theater for specific performance of a contract to sing at his theater upon certain terms, and during a certain period to sing nowhere else, the court refused to enforce so much of the contract as related to the promise to sing, but enforced the promise not to sing elsewhere by granting an injunction.

SIMPSON, *HANDBOOK OF THE LAW OF CONTRACTS* 406 (2d ed. 1965).

168. Gelhorn, *The Law Schools and the Negro*, 1974 DUKE L.J. 1069, 1075. See also O'Neil, *supra* note 137, at 329; Willey, *supra* note 28, at 222-23.

ethnic and racial backgrounds) would prefer to be represented by lawyers with an ethnic and racial identity similar to their own. The satisfaction of these wants, absent strong countervailing reasons, ought to be a permissible goal of public policy.<sup>169</sup>

Every individual should of course have the right, in selecting an attorney or a physician, to favor those who are members of his racial or ethnic group. But that fact does not imply that the state has a compelling interest in ensuring that lawyers and doctors of all racial and ethnic backgrounds are available. While the state has an obligation to protect the health and welfare of its residents, it has no obligation to select a particular means to that end when other comparable means exist. This is especially true if selecting that particular means would require the suspension of a right vouchsafed by the Constitution.

### C. *Racial Proportionality*

Integration is, of course, a valid social goal. But some would go even further, arguing that the state has a compelling interest in achieving racial proportionality. Such arguments are usually advanced with broad statements. "The integration of blacks and other disadvantaged minorities into the larger economic, political and social framework of the society continues to be an essential social goal."<sup>170</sup> "Minorities [have been] grossly underrepresented in the medical profession."<sup>171</sup> "The importance of a fundamental reordering of race relations in our society can scarcely be debated."<sup>172</sup> "The time for racial balance is now."<sup>173</sup> "The hope . . . is to set in motion a chain reaction leading to the break-down of a complex of conditions which today condemn large numbers of people to lives of poverty and desperation."<sup>174</sup> "[T]he mere elimination of formal barriers"<sup>175</sup> is not enough; nothing short of "an integrated society in which persons of all races are represented in all walks of life and at all income levels"<sup>176</sup> is enough.

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169. Sandalow, *supra* note 17, at 687 (footnote omitted).

170. *Id.* at 688.

171. *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 85, 553 P.2d 1152, 1187, 132 Cal. Rptr. 680, 715 (1976) (Tobriner, J., dissenting).

172. Karst and Horowitz, *supra* note 131, at 965.

173. Cohen, *supra* note 109, at 138.

174. Sandalow, *supra* note 17, at 689.

175. Brief for Petitioner at 35, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

176. *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 87, 553 P.2d 1152, 1188, 132 Cal. Rptr. 680, 716 (1976) (Tobriner, J., dissenting).

Naturally, the assimilation of minorities into "all walks of life" must include their entrance into the legal and medical professions. As demonstrated by the very existence of preferential admissions programs, however, the use of traditional "objective" admissions criteria "has disproportionately excluded minority groups from higher education,"<sup>177</sup> and would likely continue to do so.<sup>178</sup> In addition, "many who have been thus denied access were in fact qualified and would have done satisfactory academic work."<sup>179</sup> The demand, therefore, is not to admit unqualified minorities, but to admit qualified minorities, who by traditional standards are less qualified than their white competitors<sup>180</sup> and consequently cannot become the doctors and lawyers needed to accomplish the goal of eradicating racial imbalance.<sup>181</sup> Not to do so would "mark a return to virtually all-white professional schools," allowing the professions to remain "white enclaves."<sup>182</sup>

The Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>183</sup> conceded that school authorities might "as an educational policy" conclude that "in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students."<sup>184</sup> But the Court also noted that the district court could not "require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing."<sup>185</sup> The Court has there and elsewhere<sup>186</sup> been unwilling to require strict proportionality of state schools. Furthermore, the school desegregation cases can be distinguished on the ground that they "deprive no one of a legally cognizable right or benefit."<sup>187</sup> Congress has shown a similar reluctance. Title VII of the Civil Rights Act of 1964 reads, in part:

Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion,

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177. O'Neil, *supra* note 14, at 945.

178. Margolis, *supra* note 10, at 420 & nn. 11 & 12. See Brief for Petitioner at 28-30; Broderick, *supra* note 31, at 170-71, 180-87.

179. O'Neil, *supra* note 14, at 945.

180. See Brief for Petitioner at 6.

181. 438 U.S. at 407 (Blackmun, J., separate opinion).

182. Brief for Petitioner at 13.

183. 402 U.S. 1 (1971).

184. *Id.* at 16.

185. *Id.* at 24.

186. In *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court noted that "desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade, or classroom.'" *Id.* at 740-41.

187. Lavinsky, *supra* note 109, at 884 (footnote omitted).

sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, state, section, or other area, or in the available work force in any community, state, section, or other area.<sup>188</sup>

Although in *Bakke* the University of California asserted in defense of their preferential admissions program that "[t]he ends of the program are universally recognized as compelling,"<sup>189</sup> it adduced no evidence to that effect. What evidence there is indicates, at best, widespread disagreement over the means chosen by the University to advance its ends, and, at worst, fundamental disagreement as to the ends themselves.<sup>190</sup> Certainly one would expect a greater consensus if an interest was truly compelling.

Professor Cohen opines that "the call for proportionality is inspired by a strange vision of an ideal society—one that is pervaded by ethnic identification. According to that ideal the numerical proportionality of races is a principal measure of distributive justice in virtually every sphere of social life."<sup>191</sup> His is no idle observation; the call may be heard even in *Bakke*. The following passage from Brennan's *Bakke* opinion is freighted with meaning: "States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination."<sup>192</sup> In other words, discriminatory (race-conscious) programs are valid so long as "the evil addressed" is the result of racial discrimination; but the important point is that the term "the evil" is used not to describe racial discrimination, but "minority underrepresentation." According to this reasoning, minority underrepresentation is considered evil per se (although not always redressable by the government) *whether or not it is caused by racial discrimination*. Implicit in Brennan's statement is the premise that it is not racial discrimination per se that is objectionable, but the fact that the nation's

188. Title VII of the Civil Rights Act of 1964 § 703 (j), 42 U.S.C. § 2000e-2 (j) (1976).

189. Brief for Petitioner at 32.

190. See notes 109-11, 115 and accompanying text *supra*.

191. Cohen, *supra* note 109, at 142.

192. 438 U.S. at 366 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

social structure fails to conform to a particular idea of the model state.

Here again, the question of a national consensus is relevant. Why should a state be allowed to marshall its educational resources for the purpose of imposing this vision of a racial utopia on its constituents, many of whom do not share in it? Indeed, as Justice Douglas insisted in his *DeFunis* dissent, this concept runs counter to the very concept of equal protection:

The State, however, may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized.<sup>193</sup>

It is now clear that undergirding much of the rhetoric supporting preferential admissions—and affirmative action programs in general—is a view of justice that demands not that the state treat its citizens without reference to their race, but that it rearrange them precisely on the basis of their race. The objective is not equal treatment but equal representation. Consequently, the goal is not really equal opportunity; unless, of course, merely giving people equal opportunities will cause them to voluntarily line up in some predetermined order, which is possible but not likely. If by chance, given equal opportunity, Americans were to rearrange themselves along neatly racial lines, would preferential programs no longer be needed? Or would they still be necessary to maintain that delicate equilibrium?

Some would counter that but for pervasive discrimination in the past American society would in fact be racially proportionate, or close to it. Brennan's *Bakke* opinion does not go that far; it merely contends that those who do go that far have good reason to believe what they believe. For example, it states that "Davis had a sound basis for believing" that underrepresentation was the result of racial discrimination, that "Davis had very good reason to believe" that a color-blind admission policy would not correct the pattern of minority underrepresentation, and that "Davis clearly could conclude" that minority underrepresentation is the result of historical discrimination.<sup>194</sup>

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193. *DeFunis v. Odegaard*, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting).

194. 438 U.S. at 369-71 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

There are at least two reasons for being skeptical of the proposition that previous discrimination is the sole cause of minority underrepresentation. The first is that the proposition cannot be, or at least has not been, proven.<sup>195</sup> Brennan implicitly acknowledged this fact (although he relied on the proposition anyway), as demonstrated by the language quoted above. No one can doubt that pervasive discrimination has contributed to the gross underrepresentation of minorities in, for example, the medical profession. On the other hand, the question of chronic minority underrepresentation is so fraught with variables that to conclude blindly that the underrepresentation is "the result"<sup>196</sup> of purposeful discrimination indicates an insensitivity to the complexities of a difficult problem. To do so is to *presuppose* that in a multi-racial society devoid of discrimination all races would be proportionately represented on all levels of society. A sweeping constitutional interpretation should not rest upon such an unsure foundation. An individual whose constitutional right is being suspended deserves at least to be presented with evidence of the allegedly compelling interest; the Court should not *presume* it.

The second reason for caution in this area is that even if one were to attempt to prove the proposition that minority underrepresentation is caused by past discrimination, he could not base his argument on the premise that discrimination always causes underachievement. Indeed, it is plausible that discrimination may in fact boost achievement. It would not be illogical to argue, for example, that the spectacular intellectual record of the Jewish people has been enhanced rather than impaired by what is certainly the longest if not the most brutal history of discrimination in the world. On the other hand, if one insisted that the effects of discrimination are always deleterious, he would be forced to

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195. Glazer noted:

Absent discrimination, of course, one would expect nothing [like random distribution of women and minorities in all jobs]. Economists, labor market analysts, and sociologists have devoted endless energy to trying to determine the various elements that contribute to the distribution of jobs of minority groups. Some of the relevant factors are: level of education, quality of education, type of education, location by region, by city, by part of the metropolitan area, character of labor market at time of entry into the region or city, and many others. These are factors one can in part quantify. Others—such as taste or, if you will, culture—are much more difficult to quantify. Discrimination is equally difficult to quantify. To reduce all differences in labor force distribution (even for entry-level jobs) to *discrimination* is an incredible simplification.

N. GLAZER, *supra* note 117, at 63.

196. 438 U.S. at 370 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

conclude that but for past discrimination the overrepresentation of Jewish people in academia would be even more pronounced than it is today. Consider the further anomaly of the rather suspicious underrepresentation of Jewish people among the ranks of professional baseball players.<sup>197</sup> Is this "evil" the result of too much discrimination or not enough?

Clearly, the attempt to characterize minority underrepresentation as the result of a single cause—discrimination—is overly simplistic. Courts that adjudicate on the basis of that characterization, especially when constitutional rights hang in the balance, are on perilous ground. The Constitution does not require our courts to manipulate the law in order to ensure proportionate representation of certain racial groups in all segments of American society.

#### *D. Student Body Diversity*

From the grand vision of society arranged along racially proportionate lines springs a smaller vision, a vision of the student bodies in state-supported professional schools arranged to reflect the racial makeup of society at large. According to this view, there is intrinsic value in a diverse student body. Medical schools, for example, exist primarily for the purpose of training physicians to serve the medical needs of a heterogeneous society. Justice Powell observed in *Bakke* that the presence of minority students may bring to a medical school "experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."<sup>198</sup>

Promoting a higher quality of education is certainly a legitimate state interest. The state has a responsibility to train competent doctors for all segments of society, especially those segments that are presently medically underserved. To ensure that every medical school student has classmates who represent minority racial groups seems a logical way to increase nonminority stu-

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197. Consider the following statement:

Recently a spokesman for the Jewish Defense League commented with tongue in cheek:

"Jews come from athletically deprived backgrounds. Irving is kept off the sandlot by too much homework and too many music lessons. He is now 25 and still can't play ball, but 'he has the desire to learn.' Therefore, the Jewish Defense League is demanding that New York City which has a 24 percent Jewish population, fill the city's ball teams with 24 percent Jews."

G. ROCHE, *THE BALANCING ACT: QUOTA HIRING IN HIGHER EDUCATION* 27-28 (1974).

198. 438 U.S. at 314 (footnote omitted).

dents' rapport with minorities and to sensitize them to minority health problems. There are, however, more direct and less constitutionally burdensome methods for accomplishing these ends, such as courses geared to minority medical problems<sup>199</sup> and special internship programs. The existence of less burdensome alternatives creates doubt as to the acceptability of quota admissions programs.<sup>200</sup>

In *Bakke*, however, Justice Powell took the student body diversity argument one step further. He argued that academic freedom is a "special concern of the First Amendment," and that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."<sup>201</sup> Thus, he concluded, although a university does not have a first amendment right to establish rigid racial quotas, it may constitutionally consider the race of its applicants if it does so in order to enhance the educational atmosphere of its campus.<sup>202</sup> By implication, the protection of this first amendment right is a compelling reason to override the applicant's fourteenth amendment right not to be discriminated against on account of race. State schools are allowed to prefer some applicants (and thereby penalize others) on the ground that their race is, of itself, a "plus." The following statement by Justice Powell is reminiscent of those of Terrance Sandalow quoted earlier:

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an

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199. Such courses are apparently already offered at Davis. *Preferential Racial Admissions*, *supra* note 30, at 751.

200. The Court has held:

Statutes affecting constitutional rights must be drawn with "precision," and must be "tailored" to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."

*Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (citations omitted).

201. 438 U.S. at 312.

202. *Id.* at 314.

admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant . . . .<sup>203</sup>

Justice Powell also stated:

The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant.<sup>204</sup>

The implication here is very strong that race holds no special constitutional place, but rather that it may be considered as one of many nonobjective admissions criteria. This conclusion appears to repudiate the bulk of the opinion, which seems to be squarely based on the view that race holds a special place in constitutional jurisprudence. Furthermore, Justice Powell took great pains to avoid saying that the excluded applicant was not excluded because of his race. What he did say is that the applicant was not "foreclosed from all consideration" because of his race. The difference, however, does not seem to go to the constitutional point. It is clear that giving a "plus" to a minority student is quite meaningless unless the plus will give that minority student some concrete benefit he would not have had without it. In competition for admissions, there is only one concrete benefit: admission. And it is logically impossible to deny the other side of the coin: for every minority student whose plus made the difference for him between admission and rejection there will perforce be a nonminority student who was excluded because he lacked the plus; excluded, in other words, because of his race. In the face of that inescapable fact, the excluded applicant cannot rightly be expected to take consolation that, although his race prevented his admission, it did not prevent his consideration. The purpose of applying, after all, is not to be considered, but to be admitted.

Justice Powell's defense of this racially discriminatory practice is grounded on the first amendment: state universities have a constitutional right to decide, on academic grounds, whom they will admit. That assertion raises at least two separate questions.

First of all, if such a right exists in favor of a state institution,

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203. *Id.* at 317.

204. *Id.* at 318.

it has never before been recognized. The only opinion quoted in support of this right<sup>205</sup> is a concurring opinion by Justice Frankfurter in *Sweezy v. New Hampshire*.<sup>206</sup> The dispute in that case centered around whether an employee of a state university could be penalized for refusing to answer the state attorney general's questions pertaining to the employee's connection with an allegedly subversive organization. The subject of admissions was never broached. Furthermore, the rationale and holding of the case are based on the constitutional rights of individuals, not institutions.<sup>207</sup>

Secondly, Justice Powell seems to be suggesting that a governmental body may be possessed of a constitutional right. Consider the following passage from *Bakke*: "Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment."<sup>208</sup> There is enough vagueness in the language to leave room for doubt, but it appears that Justice Powell is recognizing in a state university the capacity to invoke the first amendment in its own behalf. The suggestion is unprecedented. It is unnecessary here to review the theory of constitutional rights any more than to observe that their function has always been to protect the individual against the power of the government, rather than, as Justice Powell seems to suggest, protecting the government against the power of the individual.

It has long been recognized that individuals employed by governmental agencies, such as state universities, are possessed of constitutional rights. In fact, the two cases Justice Powell cited on this subject held precisely that. In *Sweezy*, for example, the Court wrote: "Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association."<sup>209</sup> Likewise, *Keyishian v. Board of Regents*<sup>210</sup> dealt with the first amendment rights of individual teachers. The Court stated that "[o]ur nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not

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205. *Id.* at 312.

206. 354 U.S. 234 (1957).

207. *See id.*

208. 438 U.S. at 313.

209. 354 U.S. at 250 (emphasis added).

210. 385 U.S. 589 (1967).

merely to the teachers concerned.'"<sup>211</sup> The academic freedom referred to was not the right of the state university as an institution, or the faculty as a body, but the climate of freedom which follows inexorably from allowing each individual teacher his or her full scope of expression; it is the sum total of many individuals exercising their individual freedom. The "robust exchange of ideas" commended by Justice Powell<sup>212</sup> results naturally in an environment free from governmentally imposed restraints on basic freedoms. Once the government assumes the responsibility of ensuring that the exchange of ideas is sufficiently robust, it is in danger of stifling the very exchange it seeks to promote. Nothing is as certain to destroy the free marketplace of ideas as governmental interference.

#### IV. DIAGNOSING *Bakke*

##### A. *Equal Protection Derailed*

It is not surprising that the result reached by Justice Powell in *Bakke* was very different from that reached by Justices Brennan, White, Marshall, and Blackmun; he applied a different view of equal protection. In the main, Justice Powell adopted the symmetrical view of equal protection. "The guarantee of equal protection," he wrote, "cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."<sup>213</sup> Justices Brennan, White, Marshall, and Blackmun, on the other hand, adopted the preferential view. "[A] state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination."<sup>214</sup> The two opinions thus proceeded independently of each other; they moved in the same direction, but on parallel courses as it were, sharing little or no common ground. That their destinations overlapped is curious. They did so primarily because Justice Powell surprisingly found a compelling state interest where neither party had—in the first amendment right of a governmental institution. This derailment of Powell's analysis

211. 438 U.S. at 312 (quoting *Keyishian v. Board of Regents*, 385 U.S. at 603).

212. *Id.* at 313.

213. *Id.* at 289-90.

214. *Id.* at 369 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

kept his opinion from reaching its otherwise obvious conclusion—a result that would have enhanced the stability and persuasiveness of *Bakke* and better protected the integrity of the equal protection clause itself. The ultimate derailment of the Powell opinion, and consequently of the equal protection clause, fundamentally undermines *Bakke*.

### B. *The Larger Question*

It is fitting that the requirements of the “compelling state interest” test are stringent; the lifeblood of a constitutional safeguard is its inviolability. Carl Cohen has observed:

A constitution, ideally, is not an expression of particular social needs; rather, it identifies very general common purposes and lays down principles according to which the many specific ends of the body politic may be decided upon and pursued. Its most critical provisions will be those which absolutely preclude certain means. Thus to say that a protection afforded citizens is “constitutional” is at least to affirm that it will be respected, come what may. The specific constitutional provision that each citizen is entitled to equal protection of the laws is assurance that, no matter how vital the government alleges its interest to be, or how laudable the objective of those who would temporarily suspend that principle, it will stand.<sup>215</sup>

A constitutional right that is honored only when there is no pressing reason to dishonor it is of minimal value, for in those cases there is very little to protect against. It is when public sentiment, the wisdom of the experts, social statistics, humanitarian impulses, and national goals all seem to militate against respecting a particular safeguard that the safeguard is to be most respected; unless it is respected then, it is no safeguard. A right existing only at the pleasure of some judicial tribunal, even the Supreme Court of the United States, and which may be revoked by that tribunal at will, is constitutional in name only. When the Court undertakes to remake constitutional rules to accommodate specific social goals, or when it stops looking at what a provision means, and begins to speculate on how it can be used, the integrity of the document has been compromised.

Justice Douglas sensed this principle in his now famous *DeFunis* dissent: “If discrimination based on race is constitutionally permissible when those who hold the reins can come up with

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215. Cohen, *supra* note 109, at 139-40.

"compelling" reasons to justify it, then constitutional guarantees acquire an accoridianlike quality."<sup>216</sup> Justice Jackson recognized it when he penned the following passage in *West Virginia Board of Education v. Barnette*:<sup>217</sup>

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>218</sup>

Justice Jackson went further in his *Korematsu* dissent to warn that once the practice of making exceptions is begun, "[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>219</sup>

*Bakke* is, however, more complex than *Korematsu*. In *Korematsu*, the Court was called upon to draw a line: How important must a governmental interest be before it can be classed as "compelling"? On the other hand, the central question of *Bakke* was whether to sanction two separate lines, one for minority Americans and the other for nonminorities. The decision of where each line should be drawn is subordinate to the decision of whether or not to draw two lines.<sup>220</sup> By insisting that the compelling interest be defined in racial terms, proponents of preferential admissions demand that a recognized constitutional right be suspended because it is exercised by the wrong person. The *Bakke* Court's answer to the central question was uncertain, but the question will not go away.<sup>221</sup> It is too persistent, too terrible, to be dismissed with an ambiguous gesture.

At any rate, the Court has now struck to the heart of the matter. Anglo-American jurisprudence has been, over the decades, over the centuries, agonizingly winding its way to the reali-

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216. *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

217. 319 U.S. 624 (1943).

218. *Id.* at 638.

219. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

220. An analogous case in the free speech area would only incidentally involve deciding how inflammatory a political statement has to be before it is no longer protected by the first amendment; it would primarily involve deciding whether certain political groups have the right to make remarks that are more inflammatory than those other political groups may make.

221. Greenawalt, *supra* note 29, at 559.

zation of the ideal that Bracton, four hundred years ago, memorialized with the words, "The King is subject not to men, but to God and the law."<sup>222</sup> Now it seems that, in one area of national life at least, rule by law has nearly become a reality. *Bakke* now forces the question: Is rule by law what the nation really wants? Regardless of the outcome of the ongoing debate over the wisdom, urgency, or legality of preferential admissions, the real question will remain whether this nation is truly dedicated to a government of law and not of men. Because this is the question, it is relatively insignificant that the class to be singled out for special treatment is underprivileged rather than privileged; in either case, the impartiality of law is violated.<sup>223</sup> And the violation of the rule-of-law principle is not without its risks, as Friedrich A. Hayek has warned: "It is the Rule of Law, in the sense of the rule of formal law, the absence of legal privileges of particular people designated by authority, which safeguards that equality before the law which is the opposite of arbitrary government."<sup>224</sup> To the extent that the courts are willing to enforce laws selectively in order to achieve effects on particular people, they must forfeit their claim to impartiality.<sup>225</sup> Furthermore, once the government has taken upon itself the duty of altering rules for this or that person, party, or group, it must decide *which* person, party, or group requires assistance. Such a course inevitably results in official capriciousness.<sup>226</sup> The dilemma was aptly articulated by John Stuart Mill: "We should be glad to see just conduct enforced and injustices repressed, even in the minutest details, if we were not, with reason, afraid of trusting the magistrate with so unlimited an amount of power over individuals."<sup>227</sup>

It may be that preferential admissions programs stem "from a desire to 'do something,' even though all that is within our power to do . . . is unsuitable or even counterproductive as a means of meeting the problem. . . . What we can do is . . . admit the deprived to our . . . schools. It at least shows where our hearts are."<sup>228</sup> It may be that those who defend programs such

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222. Quoted in T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 49 (5th ed. 1956).

223. "You shall not pervert justice, either by favouring the poor or by subservience to the great." *Leviticus* 19:15 (New English version).

224. F. HAYEK, *THE ROAD TO SERFDOM* 79 (1944).

225. *Id.* at 76.

226. *Id.* at 73-74.

227. Mill, *Utilitarianism*, in H. BEDAU, *JUSTICE AND EQUALITY* 53 (1971).

228. Graglia, *supra* note 109, at 353.

as the one under fire in *Bakke* are pained by the plight of members of society who seem to have little or no access to advantages that other members take for granted. It may be that they are moved when they look upon their fellows struggling, but unable, to find their way into the mainstream of American life. It may well be that they tremble with impatience at the uncharitable posture that many voices demand the state universities take. Nevertheless, it is finally justice, not charity, that must be demanded from the government. It is only to justice, not to charity, that favoritism is forbidden;<sup>229</sup> it is only in justice that the unlovable or unpopular can find refuge when public sentiment is against them; and it is only justice—formal justice—that keeps government from being entirely arbitrary.

The establishment of universal happiness cannot be relegated to those who have ultimate power over life and property. Indeed, even the definition of happiness cannot be relegated to them. The state can be trusted to establish fair, formal rules within which each citizen can define and pursue his own happiness. But when the state unconstitutionally refuses to stay its hand, even in the pursuit of some laudable objective; when it insists on overstepping the bounds of justice in the name of justice; when it substitutes, for a system of impartial, generalized rules, a headlong rush towards some utopian vision, however glorious; then to that extent, individual life, liberty, and happiness must ultimately be abandoned.

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229. See C. PERELMAN, *supra* note 107, at 41.