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# Bakke Below: A Constitutional Fallacy

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# BAKKE BELOW: A CONSTITUTIONAL FALLACY

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## INTRODUCTION

At the heart of the California Supreme Court's reasoning in *Bakke v. Regents of the University of California*[1] is a fundamental misapplication of constitutional law. The court's use of the strict scrutiny equal protection test in evaluating the university's special admissions program for minority medical students was an erroneous application of that test as it has been historically developed by the United States Supreme Court. When the *Bakke* court's misuse of strict scrutiny is corrected, the special minority admissions program of the medical school is in accord with the United States Supreme Court's interpretation of the equal protection clause of the fourteenth amendment.[2]

This article examines the *Bakke* decision by comparing the historical and present use of the strict scrutiny test by the United States Supreme Court with the California Supreme Court's use of the same test. Before examining the origin of strict scrutiny, it is important to note the reasoning used by the California court in deciding to apply the wrong constitutional test.

The California Supreme Court saw in the *Bakke* facts the narrow issue whether racial classification of medical school applicants intended to assist minorities, but having the effect of denying some members of the white majority admission to medical school, violates the constitutional rights of white applicants.[3] In deciding the issue, the court posed two subsidiary

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1. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 45 U.S.L.W. 3555 (U.S. Feb. 22, 1977) (No. 76-811).

2. No claim is made that this contention is novel or original. The same point has been explicitly formulated by the United States Supreme Court on numerous occasions (*see* text accompanying notes 31-41, *infra*) and is set forth cogently by Justice Tobriner in his dissent in *Bakke* (3 Cal. 3d at 79-80, 553 P.2d at 1183, 132 Cal. Rptr. at 711).

For a general discussion of so called reverse discrimination against whites, see Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

3. The court stated, "The issue to be determined thus narrows to whether a racial classification which is intended to assist minorities, but which also has the effect of

questions: (1) what equal protection test should be applied and (2) did the medical school minority admissions program meet the applicable test?[4]

In most cases of government classification, the *Bakke* court acknowledged, the proper equal protection test is the rational basis test: governmental classifications are "valid 'if any state of facts reasonably may be conceived' in their justification."[5] The court then noted however, that a second test, which requires that courts exercise strict scrutiny, applies in some circumstances.[6] After asserting that the strict scrutiny test must be applied in cases involving classifications which impose a detriment on the basis of race, the court stated that the strict scrutiny test can be met only if the classification meets a compelling state interest and if no less onerous alternatives exist.[7]

The court considered and rejected the university's argument that the rational basis test should apply in *Bakke* since the racial classification did not discriminate against minorities. The court explicitly repudiated the contention that different equal protection tests apply depending upon whether the classification burdens the white majority or a minority group.[8]

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depriving those who are not so classified of benefits they would enjoy but for their race, violates the constitutional rights of the majority." 18 Cal. 3d at 48, 553 P.2d at 1162, 132 Cal. Rptr. at 690.

4. Specifically, the court noted that "[t]wo distinct inquiries emerge at this point; first, what test is to be used in determining whether the program violates the equal protection clause; and second, does the program meet the requirements of the applicable test." *Id.* at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690.

5. *Id.*

6. Craig v. Boren, 97 S. Ct. 451 (1976), decided after *Bakke* was announced, indicates that an intermediate "important interest/substantial relation" test has now emerged. For the implications of this development *see* text accompanying notes 54-56 *infra*. Although Justice Tobriner, in dissent, discussed the possibility of using an intermediate test, the majority applied the traditional "two-tier" equal protection analysis.

7. The court stated:

> Classification by race is subject to strict scrutiny, at least where the classification results in detriment to a person because of his race. In the case of such a racial classification, not only must the purpose of the classification serve a "compelling state interest," but it must be demonstrated by rigid scrutiny that there are no reasonable ways to achieve the state's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification. The burden in both respects is upon the government.

18 Cal. 3d at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690.

8. The court stated: "We cannot agree with the proposition that deprivation based upon race is subject to a less demanding standard of review under the Fourteenth Amendment if the race discriminated against is the majority rather than a minority." *Id.* at 50, 553 P.2d at 1163, 132 Cal. Rptr. at 691.

After giving several reasons for its conclusion,[9] the court ended its discussion of what test should be applied by briefly noting that there had been cases not directly on point which indicated judicial reluctance to apply different standards to rights of ethnic minorities and the white majority.[10]

The remaining sections of the California Supreme Court's *Bakke* opinion contained no further analysis of the critical decision to apply the strict scrutiny test. Rather, the Court went on to discuss whether the strict scrutiny test had been met by the university and other subordinate questions, such as procedures to be used on remand. Ultimately, the court concluded that the university did not satisfy the strict scrutiny test and that the special admissions program was therefore unconstitutional.

## BACKGROUND AND DEVELOPMENT OF THE STRICT SCRUTINY TEST

The strict scrutiny test, as conceived and developed by the United States Supreme Court, is not applicable in *Bakke*, since the racial classification used by the University of California in its special minority admissions program is not the kind of "suspect classification" which is subject to heightened judicial scrutiny. Examination of the history of the strict scrutiny test provides a basis for understanding the misapplication of the test in *Bakke*.

### *Carolene Products: The Locus Classicus of the Strict Scrutiny Test*

The first explicit formulation of the strict scrutiny test by the United States Supreme Court occurred in the celebrated footnote four in *United States v. Carolene Products Co.*[11] Authored by Justice Harlan F. Stone, footnote four introduced the concept that there are three specific situations when the judicial branch should give more exacting review to legisla-

9. The following reasons are mentioned. First, there are no cases so holding. Second, racial discrimination is equally unjustified regardless of the race against which it is directed. Third, since the racial classification imposes a disadvantage upon whites, it should be considered suspect even though it does not impose an invidious stigma. Fourth, since the equal protection clause by its terms applies neutrally to any "person," it must be applied uniformly to all racial and ethnic groups. In a footnote, the court proposed a fifth reason: the white majority itself is a pluralistic group of minorities. *Id.* at 50-51 n.16, 553 P.2d at 1163-64 n.16, 132 Cal. Rptr. at 691-92 n.16.

10. *Id.* at 51, 553 P.2d at 1164, 132 Cal. Rptr. at 692.

11. 304 U.S. 144, 152 n.4 (1938).

tion: first, when the legislation contravenes specific prohibitions set forth in the United States Constitution; second, when it tends to undermine the open functioning of the democratic process; third, when it imposes burdens upon discrete and insular religious, national or racial minorities.[12]

The general topic of footnote four is the so called "presumption of constitutionality." This presumption, which applies in most cases where legislation is challenged, requires the courts to uphold the legislation in question unless it is clearly unconstitutional. In terms of the equal protection clause, this translates roughly into the familiar "rational basis"

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12. Footnote four reads:

> There may be *narrower scope for operation of the presumption of constitutionality* when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg v. California*, 283 U.S. 359, 369-370; *Lovell v. Griffin*, 303 U.S. 444, 452.
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> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to *more exacting judicial scrutiny* under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin, supra;* on interferences with political organizations, see *Stromberg v. California, supra*, 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-378; *Herndon v. Lowry*, 301 U.S. 242; and see Holmes, J., in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365.
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> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. 484, or racial minorities, *Nixon v. Herndon, supra; Nixon v. Condon, supra:* 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.* Compare *McCulloch v. Maryland*, 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 184, n.2, and cases cited.

*Id.* (emphasis added).

Since the special admissions program involved in the *Bakke* case does not contravene any specific constitutional prohibition but instead is challenged only under the "general prohibitions of the fourteenth amendment," the first component of the strict scrutiny test is not discussed in detail in this article. The focus is on the political rationale underlying the second and third components. Primary emphasis will be on the third ("suspect classification") component, which was relied upon by the court in *Bakke.*

test—courts must uphold the use of legislative classifications if the legislature could rationally conclude that the classification serves a valid governmental interest.[13]

The seminal idea expressed by the Supreme Court in footnote four is that there may be a narrow class of cases in which legislative judgments will be subject to more exacting or more searching judicial scrutiny. Since the formulation in *Carolene Products* has been widely recognized as the *locus classicus* of the strict scrutiny test,[14] it merits careful study in order to determine the precise purpose and scope of the exceptions to the general presumption of constitutionality.

A fundamental premise of the footnote is that the normal method of altering unsound governmental conduct is the legislative process. In a democratic society, if the majority of the people are opposed to governmental conduct, they can normally alter that conduct by enacting statutes which embody their wishes. What the Court recognized in *Carolene Products* was that, in a narrowly limited number of situations, this logic does not apply. There are a few situations in which the majoritarian political process cannot be relied upon to correct legislative abuses.[15] The Court referred to two such situations. If the legislation itself undercuts the very political process which would normally be used to repeal undesirable legislation, then it is obviously unwise to presume that it can be corrected through further legislation.[16] Similarly, if the legislation imposes burdens on discrete, insular minority groups, it cannot safely be presumed that the political process can be trusted to correct any injustices involved, since—in contrast to the politi-

13. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Williamson v. Lee Optical Co., 348 U.S. 483, 488-89 (1955); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

14. *See, e.g., In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

15. Although the footnote speaks only of legislation, its rationale is equally applicable to conduct by the executive branches of federal and state governments.

16. An example would be a statute which prohibits free speech. Since such a statute would close down the open marketplace of political ideas which is the foundation of the democratic process, it would be unwise for courts to assume that the self-corrective mechanisms of the democratic process could be relied upon to repeal the legislation. The same would be true for legislation prohibiting free press, public assemblies or the right to vote. *Cf.* Baker v. Carr, 369 U.S. 186 (1962) *and* Reynolds v. Sims, 377 U.S. 533 (1964), where the Court entered the previously forbidden thicket of electoral districting because the legislative process could no longer be relied upon to correct the serious problem of unequal voter representation.

cal majority—such minorities do not have the votes and political power needed to obtain passage of remedial legislation.

In short, the fundamental concept underlying the second and third prongs of the strict scrutiny test—as formulated in the *Carolene Products* case—is a political one. In those narrow cases where the majoritarian political process cannot be relied upon to correct the evils of governmental conduct, the courts should insist on a clear and convincing showing of justification for the governmental action. In other cases, however, where there is no attack either upon the fundamental constitutional underpinnings of the democratic process itself or upon politically powerless minorities, the court should exercise restraint and uphold the governmental conduct as long as it has some arguably rational basis.

For purposes of the *Bakke* case, only the third ("suspect classification") component of the *Carolene Products* analysis is directly relevant.[17] It should be noted that, in discussing the third component, the Court explicitly limited the requirement of "more exacting scrutiny" to governmental conduct imposing a detriment or burden on *minority groups.* In fact, the reference to minorities was made twice.[18] Moreover, the Court indicated that the *reason* for using strict scrutiny where legislation burdens minority groups is that the majoritarian political process cannot be relied upon to protect the interests of those groups.[19]

Thus, with regard to racial classifications, the *Carolene Products* opinion, by its own terms, limited the application of the strict scrutiny test to situations in which the racial classification places a burden on racial minorities. In other words, the strict scrutiny test, in its inception, did not apply to racial classifications which impose burdens upon the racial majority, since the majority controls the political process and can thus

17. The first and second components are not on point since the Supreme Court has explicitly held that the right to education is not a fundamental constitutional right which triggers the strict scrutiny test. San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973).

18. Footnote four states in relevant part: "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial *minorities*, . . . whether prejudice against *discrete and insular minorities* may be a special condition, . . . which may call for a correspondingly more searching judicial inquiry." 304 U.S. at 153 n.4 (emphasis added).

19. The Court stated: "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* . . . ." *Id.* (emphasis added).

rely upon normal political procedures for relief from any unjust burdens.[20]

*Background of Carolene Products.* The original rationale for the strict scrutiny test, as delineated in the language of footnote four in *Carolene Products,* was essentially political. Except in cases involving specific constitutional prohibitions, courts should apply strict scrutiny in evaluating the constitutionality of governmental conduct only in those cases where the normal political process cannot be relied upon to provide needed corrective action. The fact that political theory lay at the core of the Court's thinking in *Carolene Products* may be further demonstrated through analysis of the historical background of the case.

From the appointment of Roger B. Taney in 1837 to roughly 1895, the normal practice of the United States Supreme Court was to defer to the judgment of the other branches of government on legislative and executive matters. Only rarely did the Court of the mid-1800's declare governmental conduct to be unconstitutional. Perhaps the classic case illustrating this practice was *Munn v. Illinois,*[21] the leading post-Civil War case acknowledging the authority of state legislatures to regulate

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20. Although it is generally agreed that footnote four of *Carolene Products* is the "classic" formulation of the notion that racial classifications are subject to strict scrutiny, a critical reader might raise an objection to the contention that footnote four is the *origin* of that test. It is true that, during the period from the passage of the fourteenth amendment to the issuance of the *Carolene Products* opinion, a number of cases came before the Supreme Court which involved fourteenth amendment challenges to the use of racial classifications. It is also true that the Supreme Court, as a general rule, struck down such classifications. From this perspective, it can be said that the Supreme Court was applying strict scrutiny to racial classifications before *Carolene Products.*

The pre-*Carolene* cases, however, do not provide guidelines for considering the constitutionality of racial classifications imposing burdens on the white majority, since all of those cases involved the imposition of burdens on minority groups. Moreover, the judicial activism of the pre-*Carolene* Court was based on principles concerning the general role of the judiciary which have subsequently been rejected and which no longer provide accurate guidance as to situations in which strict scrutiny is appropriate. To put the point another way, the undisciplined use of strict, if not hostile scrutiny of governmental conduct by the pre-*Carolene* Supreme Court does not provide rational guidelines for the exercise of strict scrutiny in the post-Roosevelt era of judicial restraint.

There appears to be little doubt that *Carolene Products* is the birthplace of the concept of strict scrutiny in its modern, principled sense. The term "strict scrutiny" is a direct paraphrase of the terms "more exacting judicial scrutiny" and "more searching judicial scrutiny" used in footnote four. More importantly, however, *Carolene Products* marks the first attempt by the Supreme Court to formulate a principled basis for the application of strict scrutiny against the background of the philosophy of judicial restraint which emerged in the late 1930's.

21. 94 U.S. 113 (1876).

the business practices of corporations. The prevailing doctrine during this period was that legislatures have general authority to enact statutes protecting the health, safety and welfare of the people and that the judicial branch should defer to the judgment of the legislature in such matters.

The year 1895 marked the beginning of an era in which the Supreme Court, with increasing frequency, overthrew the decisions of the legislative and executive branches and substituted its own judgment as to what constituted proper governmental conduct.[22] During this period, the presumption of constitutionality was anemic, if not nonexistent. The pattern of judicial supremacy, which began with the overthrow of the federal income tax in *Pollock v. Farmers' Loan & Trust Co.*,[23] and the nullification of the Sherman Act in *United States v. E. C. Knight Co.*,[24] continued until the late 1930's. Moreover, with minor exceptions, the Court's willingness to substitute its own judgment for that of the legislature increased in intensity throughout this period until it reached the status of a governmental crisis in the 1930's. From 1895 through 1936, numerous congressional programs were declared unconstitutional.[25] By the mid-1930's, the conflict between the judicial and legislative branches had resulted in a full-scale attempt by the federal courts to declare the New Deal unconstitutional.[26]

During the late 1930's, a constitutional revolution occurred. The Court, with new personnel appointed by President Roosevelt, rejected the notion that it should sit as the ultimate censor of legislation. The presumption of constitutionality was reinstated in the strongest terms, and a philosophy of judicial restraint was adopted. The doctrine enunciated by the Roosevelt Court and subsequently restated in numerous cases is that legislation should be upheld, as a general rule, as long as the Court can conceive of any rational basis to support it.[27]

An important question that gradually emerged in the

22. E. CORWIN, COURT OVER CONSTITUTION (1928); R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

23. 157 U.S. 429 (1895).

24. 156 U.S. 1 (1895).

25. The most frequent basis for overturning legislation was the concept of substantive due process. Other grounds included the commerce clause, unlawful delegation of executive power, and unlawful encroachment on states' rights.

26. During the 1935-36 period, "Sixteen hundred injunctions restraining officers of the Federal Government from carrying out acts of Congress were granted by federal judges." R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 115 (1941).

27. *See* cases cited note 13 *supra*.

aftermath of the constitutional revolution of the 1930's was whether the presumption of constitutionality and its corollary, the doctrine of judicial restraint, should apply in all cases or whether there should be areas in which governmental conduct should be subject to closer judicial scrutiny. Justice Frankfurter was the leader of a group of justices who felt that the doctrine of judicial restraint should apply in all cases.[28] Other justices, including Justices Black and Douglas, asserted that exceptional circumstances did exist in which the presumption of constitutionality should be set aside.[29] The clash between those two viewpoints developed into a major constitutional debate focusing explicitly on the degree of control that the Court should exercise over the legislative and executive branches.

*Carolene Products* was the first attempt by the Roosevelt Court to formulate a principled exception to the emerging doctrine of judicial restraint. The case itself involved an application of the new general rule requiring the Court to uphold the constitutionality of legislation "unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[30] Thus, the revitalized concept of judicial deference to the majoritarian political process provided both the general and the immediate framework in which the Court speculated, by way of footnote four, regarding possible situations in which "more exacting scrutiny" or "more searching judicial scrutiny" may be appropriate.

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28. "Primary responsibility for adjusting the interests which compete in the situation before us [freedom of speech and national security] of necessity belongs to the Congress. . . . We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it." Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). *See* Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. PA. L. REV. 295, 300-03 (1954).

29. "So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain a law suppressing freedom of speech and press on the basis of Congress' or our own notions of 'reasonableness.'" Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting). *See* Decker, *Justice Hugo L. Black: The Balancer of Absolutes*, 59 CALIF. L. REV. 1335, 1348-53 (1971).

Justice Douglas felt that the legislative judgment on economic and business matters was "well-nigh conclusive," (Berman v. Parker, 348 U.S. 26, 32 (1954)), but that when legislation invaded freedoms guaranteed by the Bill of Rights the Court must take an active reviewing role. Poe v. Ullman, 367 U.S. 497, 509-22 (1961) (Douglas, J., dissenting). *See* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716, 717-18 (1969).

30. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

In summary, an examination of the historical context in which *Carolene Products* arose confirms the fact that political theory concerning the workings of majoritarian democracy lay at the very heart of the Court's thinking in formulating footnote four. The background of *Carolene* was a major constitutional revolution based upon the central concept that, in a democracy, the Court should not exercise veto power over the majoritarian legislative process. The *Carolene* Court suggested that there might be exceptions in which the doctrine of judicial restraint should not apply, namely, situations where a specific constitutional prohibition is involved or where the majoritarian political process cannot be relied upon to correct governmental abuse.

The critical point for the *Bakke* decision is that, from the *Carolene* perspective, racial classifications which burden the majority are not subject to "more exacting scrutiny," since the political process can be used by the majority to change the governmental program using the racial classification.

*Progeny of Carolene Products.* The *Carolene Products* notion[31] that the strict scrutiny test applies when governmental classifications impose a burden on *minority* groups has been reaffirmed in a number of subsequent United States Supreme Court cases, including at least five cases decided since 1970.

In *Graham v. Richardson,* which held that alienage is a suspect classification, the Court stated:

> Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. . . . But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. *Aliens as a class are a prime example of a "discrete and insular" minority* (see *United States v. Carolene Products Co.) for whom such heightened judicial solicitude is appropriate.*[32]

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31. By this and subsequent references to the "*Carolene Products* notion" or the "*Carolene Products* principle," we do not mean to suggest that footnote four is binding authority. *Cf.* Kovacs v. Cooper, 336 U.S. 77, 90-91 (1941) (Frankfurter, J., concurring) (Justice Frankfurter's comments concerning the inappropriateness of announcing new constitutional doctrine by way of dicta in a footnote). The point remains, however, that *Carolene Products* is acknowledged as the source of the concepts in question.

32. 403 U.S. 365, 371-72 (1971) (emphasis added). The quoted language mentions the concept that strict scrutiny is to be given to suspect classifications. The term "suspect classification" is nothing more than a shorthand term developed by the Court to refer to the kinds of classification specified in the third component of the *Carolene*

Although the *Graham* opinion contains a general statement that racial classifications are subject to strict scrutiny, the statement is qualified by the immediately ensuing sentence which reiterates the *Carolene Products* suggestion that heightened judicial solicitude is appropriate *because* the classification burdens a discrete and insular minority.[33]

One of the most explicit statements demonstrating that the strict scrutiny test, as developed by the United States Supreme Court, applies to racial classifications only when they burden minority groups is the following statement in Justice Powell's majority opinion in *San Antonio Independent School District v. Rodriquez:*

> The system of alleged discrimination and the class it defines have none of *the traditional indices of suspectness: the class is 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.*[34]

This language contains a very specific restatement of the fundamental notion that the strict scrutiny test is concerned with situations where the classification burdens a politically power-

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*Products* footnote as deserving strict scrutiny.

33. *Cf.* Hunter v. Erickson, 393 U.S. 385 (1969) (overturning a city charter provision requiring a referendum on all ordinances designed to prevent racial discrimination). In its opinion (per Justice White), the Court stated,

> Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. *The majority needs no protection against discrimination and if it did, a referendum might be bothersome, but no more than that.*

*Id.* at 391 (emphasis added).

In Oregon v. Mitchell, 400 U.S. 112 (1970), Justices Stewart, Burger and Blackmun, dissenting in part from a decision overturning a voting age statute, twice asserted that the challenged state action was not subject to strict scrutiny because it did not burden a political minority: "The establishment of an age qualification is not state action aimed at any discrete and insular minority." *Id.* at 295 n.14 (Stewart, J., dissenting, in part). "The state laws that it [§§ 302 of the 1970 Amendments to the Voting Rights Act] invalidates do not invidiously discriminate against any discrete and insular minority." *Id.* at 296.

34. 411 U.S. 1, 28 (1973) (emphasis added). The *Rodriquez* case involved a challenge to Texas' method of financing public schools through local property taxes. The system was attacked under the fourteenth amendment on the ground that it arbitrarily discriminated against students in school districts having low tax bases. The Court held that the right to education is not a fundamental constitutional right for purposes of triggering the strict scrutiny test and that an economic classification such as that involved in the Texas school finance system is not the type of suspect classification which requires strict scrutiny.

less minority group which cannot obtain redress through the majoritarian political process. Obviously, the reasoning does not apply to the white majority, which is not politically powerless and therefore can be expected to protect itself through the normal political process.[35]

Two 1973 cases involving the issue of discrimination against resident aliens used language clearly implying that legislative classifications are suspect and thus subject to strict scrutiny only if they burden minority groups. *In re Griffiths,*[36] which involved the exclusion of aliens from the Connecticut bar, repeated in full the statement in *Graham v. Richardson* concerning discrete and insular minorities. In *Sugarman v. Dougall,* the following paraphrase was used:

> In *Graham v. Richardson,* . . . we observed that aliens as a class "*are a prime example of a 'discrete and insular' minority* (see *United States v. Carolene Products Co.*)," and that classifications based on alienage are "subject to close judicial scrutiny."[37]

Even Justice Rehnquist, arguing in his *Sugarman* dissent that the only suspect classifications under the fourteenth amendment are racial classifications, seems to acknowledge that racial classifications are only suspect when they burden racial minorities. "But there is no language used in the Amendment, or any historical evidence as to the intent of the framers, which would suggest to the slightest degree that it was . . . designed in any way to protect 'discrete and insular minorities' other than racial minorities."[38]

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35. The first two "indices of suspectness" set forth in the *Rodriquez* case also recognized the difference between classifications which burden discrete minority groups which have been victimized by discrimination and those which burden the favored white majority. Thus, use of the strict scrutiny test is not indicated unless the class burdened by the classification is saddled with disabilities which "command extraordinary protection from the majoritarian political process" or has been subjected to a history of purposeful unequal treatment. Clearly the white majority meets neither of these conditions.

36. 413 U.S. 717, 721 (1973).

37. 413 U.S. 634, 642 (1973) (emphasis added).

38. *Id.* at 649-50. A similar point of view has been expressed by Justice Rehnquist in his dissent in *Craig v. Boren:*

> Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past discrimination, such as was relied on by the plurality in *Frontiero* to support its invocation of strict scrutiny. *There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts.*

Finally, in *Johnson v. Robison,* which rejected the contention that legislation denying veterans benefits to conscientious objectors should be subject to strict scrutiny, the Court quoted with approval the following district court statement to the effect that the underlying rationale of the strict scrutiny test applies only to minority groups:

> [I]t would seem presumptuous of a court to subject the educational benefits legislation to strict scrutiny on the basis of the *'suspect classification' theory, whose underlying rationale is that, where legislation affects discrete and insular minorities, the presumption of constitutionality fades because traditional political processes may have broken down.*[39]

Moreover, the *Johnson* Court again recited the language of the *Rodriquez* opinion which indicates that the strict scrutiny test applies only to minority groups characterized by "such a position of political powerlessness as to demand extraordinary protection from the majoritarian political process."[40]

The underlying political rationale of the strict scrutiny test as first enunciated in *Carolene Products* is alive and well in the United States Supreme Court. The fundamental concept is that classifications are suspect, and thus subject to strict scrutiny, when they impose burdens on classes which demand extraordinary protection from the majoritarian political process. Classifications burdening racial minorities fit this description since such minorities are "politically powerless" and thus cannot protect themselves through the normal political process. Moreover, such minorities have been saddled with disabilities and subjected to a history of deliberately unequal treatment. These indices are not present, however, in situations where the racial classification burdens the white majority. In such situations, the strict scrutiny test does not apply since the majority group is presumed to have the capacity to protect itself through the normal political process and thus does not require "extraordinary protection" from the judiciary.[41]

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> . . . There is, in sum, nothing about the statutory classification involved here to suggest that it . . . works against a group, which can claim under the Equal Protection Clause that it is entitled to special judicial protection.

97 S. Ct. at 468 (1976) (emphasis added).

39. 415 U.S. 361, 375 n.14 (1974) (emphasis added).

40. *Id.* The Court also stated that the use of an "immutable characteristic" is one of the traditional indices of suspect classifications.

41. There have been several post-*Carolene* cases which recite and apply an ap-

## THE FALLACY: MISAPPLICATION OF THE STRICT SCRUTINY TEST BY THE BAKKE COURT

The California Supreme Court's holding in *Bakke* that the strict scrutiny test applies to the special admissions program at the University of California at Davis Medical School, reads as follows:

> Classification by race is subject to strict scrutiny, at least where the classification results in detriment to a person because of his race. . . .
>
> The university asserts that the appropriate standard to be applied in determining the validity of the special admission program is the more lenient "rational basis" test. . . .
>
> We cannot agree with the proposition that deprivation based upon race is subject to a less demanding standard of review under the Fourteenth Amendment if the race discriminated against is the majority rather than a minority.[42]

This holding is incorrect. The strict scrutiny test, as developed by the United States Supreme Court, is not applicable in the context of the *Bakke* case.

The central material fact concerning the special admissions program at the medical school is that it favors minority applicants and, according to the California Supreme Court, discriminates against white applicants.[43] The strict scrutiny test, as developed in the United States Supreme Court, was clearly not designed to apply to legislation that imposes a burden on members of a racial majority.

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parent "general principle" that race is a suspect classification. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); *cf.* Korematsu v. United States, 323 U.S. 214 (1944) (where the Court equated a classification based on ancestry with a classification based on race). None of these cases, however, involved discrimination against the white majority. Although *Loving* and *McLaughlin* involved racially neutral schemes which appeared to affect whites and nonwhites alike, it is apparent that the government, in each case, was attempting to segregate the races and thus drive the minorities into further isolation. The detriment involved in such isolation lies, of course, much more heavily on the minority races than on the white majority.

The fact that the use of racial classifications is *not* always suspect has been established in a number of post-*Carolene* cases. *See, e.g.*, Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1972); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); Louisiana v. United States, 380 U.S. 145 (1965); Tancil v. Woolls, 379 U.S. 19 (1964) (summary affirmance).

42. 18 Cal. 3d at 49-50, 553 P.2d at 1162-63, 132 Cal. Rptr. at 690-91.

43. *Id.* at 47-48, 553 P.2d at 1161-62, 132 Cal. Rptr. at 689-90. The authors believe that the program was merely an effort to *neutralize* the normal preference for whites.

The California court makes much of the fact that the equal protection clause, by its terms, applies to all persons equally.[44] Although this observation is true, the implication drawn from it is not. Admittedly, the equal protection clause does protect all persons against irrational governmental classifications, *i.e.*, it requires a valid governmental objective and a reasonable fit between the ends and the means to support the challenged classification. It is inappropriate, however, to use the language of the equal protection clause to determine the applicability of the suspect classification component of the strict scrutiny test. The suspect classification concept was not derived from the language of the equal protection clause, but rather from the fundamental political perception that insular minority groups need special judicial protection because of their political powerlessness. In fact, at the very foundation of the suspect classification doctrine is the concept that minority groups *are* to be treated differently from the political majority. Only Justice Tobriner, in dissent, recognized this crucial concept.[45]

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44. *Id.* at 51, 553 P.2d at 1163, 132 Cal. Rptr. at 691.

45. The dissent stated:

> [I]n addition to the history and purpose of the Fourteenth Amendment, constitutional decisions explicating the appropriate scope of judicial review provide a sound basis for the differential judicial treatment of invidious and benign racial classifications. Beginning with Justice Stone's celebrated "footnote 4" in *U.S. v. Carolene Products Co.* (1938) 304 U.S. 144, [82 L.Ed. 1234, 58 S. Ct. 778], the Supreme Court has recognized that whereas in most areas courts properly entertain a presumption that governmental action is constitutional, "prejudice *against* discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of the political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (Italics added.) (304 U.S. at pp. 152-153, fn.4 [82 L.Ed. at p. 1242].)
>
> Heightened judicial scrutiny is accordingly appropriate when reviewing laws embodying invidious racial classifications, because the political process affords an inadequate check on discrimination *against* discrete and insular minorities." (See, e.g., *Graham v. Richardson, supra*, 403 U.S. 365, 372 [29 L.Ed.2d 534, 541-542]; *Frontiero v. Richardson* (1973) 411 U.S. 677, 685-686 [366 L.Ed.2d 583, 590-591, 93 S.Ct. 1764]; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal. 3d 1, 18-20, [95 Cal. Rptr. 329, 485 P.2d 529, 46 A.L.R. 3d 351]; *cf. Massachusetts Board of Retirement v. Murgia* (1976) ___ U.S. ___ [49 L.Ed.2d 520, 96 S. Ct. ___]; *San Antonio School District v. Rodriquez* (1973) 411 U.S. 1, 28 [36 L.Ed.2d 16, 39-40, 93 S. Ct. 1278].) By the same token, however, such *stringent judicial review is not appropriate when, as here, racial classifications are utilized remedially to benefit such minorities, for under such circumstances the*

The California Supreme Court's erroneous application of the strict scrutiny test dictated the conclusion that the university's special admissions program is unconstitutional. After initially determining that the strict scrutiny test should be applied, the court followed precedents which indicated that the test could be met only if the university showed both that a compelling interest is served by the racial classification and that no less onerous alternative is available to protect that interest.[46]

Appropriately, the court did assume, at least for purposes of argument, that the special admissions program is supported by a compelling governmental interest, namely the social interest in integrating the medical profession and thus terminating at least one chapter in this nation's history of racial discrimination.[47] The court found, however, that the special admissions program could not pass constitutional muster because the university failed to demonstrate the nonexistence of less onerous alternatives for accomplishing this compelling purpose: "[W]e are not convinced that the University has met its burden of demonstrating that the basic goals of the program cannot be substantially achieved by means less detrimental to the rights of the majority."[48] This standard imposes an extremely strict, if not impossible burden on the university. The imposition of this burden flows directly from the application of the strict scrutiny test.

Under traditional equal protection analysis, if the strict scrutiny test is not applicable, the case must be decided under the rational basis test.[49] When the rational basis test is applied, it is evident that the special admissions program is constitutional. There is no serious dispute that the government has a

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*normal political process can be relied on to protect the majority who may be incidentally injured by the classification scheme.*

18 Cal. 3d at 79-80, 553 P.2d at 1183, 132 Cal. Rptr. at 711 (emphasis added).

46. In the case of such a racial classification, not only must the purpose of the classification serve a "compelling state interest," but it must be demonstrated by rigid scrutiny that there are no reasonable ways to achieve the state's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification. The burden in both respects is upon the government.

*Id.* at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690.

47. *Id.* at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693.

48. *Id.*

49. A third intermediate standard has now emerged and must also be considered. *See* note 6 *supra* and text accompanying notes 54-56 *infra.*

valid interest in integrating the medical profession. Similarly, it is certainly conceivable that direct recruitment and admission of minorities is rationally related to achieving this end. In fact, it is difficult to imagine a more direct method. Thus, application of the traditional rational basis test requires the reversal of the decision in *Bakke*.

## RECENT DEVELOPMENTS CONCERNING SEX AS A SUSPECT CLASSIFICATION

During the early 1970's certain Supreme Court justices who believed that sex should be treated as a suspect classification began to articulate new criteria for the application of the strict scrutiny test, going beyond the majority/minority political rationale of *Carolene* and its progeny. This development was at least partly caused by the fact that the electorate is roughly equally divided between men and women, and neither sex appears to be the kind of politically powerless minority group which needs extraordinary judicial protection. In this situation, some of the justices appeared to be searching for new theories which would allow the court to scrutinize sex classifications more closely than would be appropriate under the rational basis test. A discussion of *Bakke* in terms of fourteenth amendment equal protection would not be complete without reference to the emerging concepts.

One theory propounded by the justices who felt that sex classifications were suspect was that women, like racial minorities, have historically been politically powerless. This position was articulated by Justice Brennan in *Frontiero v. Richardson*[50] and *Kahn v. Shevin*.[51] Justice Brennan's opinions emphasized that women have been subjected to a history of discrimination including denial of the right to vote and that, although women now have political equality in terms of abstract voting power, strict scrutiny of sex classifications burdening women is justified because, as a result of past discrimination, women continue to be "vastly underrepresented in this nation's decision-making councils."[52] In other words, women should be treated as a de facto political minority. This theory is entirely consistent with the argument that racial classifications favoring the white majority are not subject to strict scrutiny. However,

50. 411 U.S. 677 (1973) (plurality opinion).
51. 416 U.S. 351 (1974) (dissenting opinion).
52. Frontiero v. Richardson, 411 U.S. at 685 n.17 (1973).

other theories tentatively suggested to justify the strict scrutiny of sex classifications, if they had been adopted as controlling, might have caused more difficulty in the *Bakke* context.[53]

Recently the Supreme Court has resolved this potential problem by definitively holding that sex classifications are not subject to strict scrutiny. In *Craig v. Boren,* all nine justices agreed that the strict scrutiny test should not be applied to legislation distinguishing between eighteen year old men and women in the right to purchase 3.2% beer.[54] Three justices (Stewart, Burger and Rehnquist) applied the rational basis test. The remaining six justices also concluded that strict scrutiny was not required. Justices Brennan, Marshall, White, Blackmun and Powell held that the sex classification could be sustained if it served "important governmental objectives" and was "substantially related to achievement of those objectives."[55] Justice Stevens arrived at a similar result by using still different reasoning.[56]

The outcome of *Craig v. Boren* clears an easy path for the Supreme Court to return to the original *Carolene Products* rationale for the strict scrutiny test and to hold that racial classifications burdening the white majority are not suspect. There is no longer any need for the Court to stretch the strict scrutiny test to cover groups which do not have the classic characteristics of insular political minorities.

In the aftermath of *Craig v. Boren,* the closer question may be whether racial classifications burdening the majority should be evaluated under the traditional rational basis test or under an intermediate test similar to that used in evaluating the Oklahoma statute concerning the sale of 3.2% beer. It seems quite likely that, when *Bakke* or some comparable case reaches the Court, the new "important interest/substantial relation" test will be applied. If so, there is no reason why special minority admissions programs should not be held constitutional. There is an important governmental interest in combatting the continuing effects of the racial discrimination which has plagued this nation's history. Moreover, special programs ex-

53. The most noteworthy example is the notion that classifications based upon "immutable characteristics" are suspect and therefore subject to strict scrutiny. The theory that immutability alone justifies strict scrutiny, however, has been rejected by the Supreme Court. *See, e.g.,* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

54. 97 S. Ct. 451 (1976). *See also* Reed v. Reed, 404 U.S. 71 (1971).

55. 97 S. Ct. at 457.

56. *Id.* at 464.

plicitly designed for minorities are substantially related to the achievement of this interest. In fact, there is an almost perfect fit between the problem and the solution, since racial prejudice and discrimination operate to the detriment of *all* members of the affected minority groups, and can best be remedied by programs designed specifically for the members of the racial groups adversely affected.

## CONCLUSION

There are a number of persuasive policy considerations which support the existence of special admissions programs for racial minorities. There can be no doubt that white persons in this society are granted a pervasive de facto preference and that minority persons, regardless of individual merit, are victimized both by explicit racial hostility and by unconscious racial stereotypes on the part of the white majority. A basic sense of justice demands that this unfair treatment of minorities be rectified.

Prejudice, both conscious and unconscious, is racially specific. It cannot be effectively combatted unless the remedies are also racially specific and sufficiently potent to offset the very real preference which white persons unjustifiably enjoy. If the equal protection clause is construed in a manner which makes effective programs for remedying discrimination against racial minorities illegal, then what was originally designed as a charter of equality for black persons will be transformed into a barrier against equality.[57]

These and other compelling policy considerations have been spelled out by many authorities, including Justice Tobriner in his *Bakke* dissent, and are beyond the scope of this discussion. Suffice it to say that the authors of this article share the perception that special programs for racial minorities are wholly justified and indeed urgently needed if this nation is ever to put an end to its tragic history of denying equality to racial minorities.

The purpose of this article is to show one clear path out of the trap that the California Supreme Court set for legitimate civil rights efforts. Stated simply, correct application of equal

57. The original purpose of the equal protection clause was to protect the black persons who had been victimized by the institution of slavery. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60 (1955).

protection analysis leads to the conclusion that the special admissions program at issue in *Bakke v. Regents of the University of California* is constitutionally permissible. The contrary decision of the California Supreme Court was based on a misapplication of the strict scrutiny test for evaluating governmental classifications under the equal protection clause. This test, in its origin, its rationale, and its subsequent applications, has been confined to the review of racial classifications directed against minority groups. It has no application in cases involving classifications which impose burdens on majority groups which have no need for extraordinary judicial protection. When the correct test—*i.e.*, the rational basis test or the new "intermediate" test—is applied, there can be no doubt that the special admissions program at issue in *Bakke* is constitutional.