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Fourteenth Amendment - Equal Protection: Preferential Admissions - Race as an Admissions Criterion

Dorothy W. Schoch

Case Note

FOURTEENTH AMENDMENT—EQUAL PROTECTION: PREFERENTIAL ADMISSIONS—RACE AS AN ADMISSIONS CRITERION

Bakke v. Regents of University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977).

I. INTRODUCTION

The variety and intensity of the social, political, and emotional arguments involved in the discussion of preferential admissions programs in general, and *Bakke v. Regents of University of California*[1] in particular, tend to obfuscate the true nature of the legal issues facing the Supreme Court this term. From a social perspective, the Court faces a very real dilemma. To declare the preferential admissions programs of public professional schools unconstitutional may mean that any substantial integration of the medical and legal professions will be delayed for an indeterminate length of time; to uphold the use of such programs may mean that the state can deny a graduate education to an individual because of the color of his or her skin. Either of these results will be disturbing to a large segment of the public.

Nevertheless, the Court has an opportunity to elucidate what is presently a very confused area of the law by making plain its method of equal protection analysis. A decision in the *Bakke* case can, and should, explain what kind of racial preference, if any, is permissible and when it can be utilized. The Court will also have to enunciate the applicable standard of equal protection review to be used in cases of racial preference. Although the Court has not been inclined to articulate precisely which standard it is using, there is evidence that new standards besides the traditional tests of "rational basis" and "compelling interest" are evolving.[2] The purpose of this Note is to state the legal issues the Court faces in the impending *Bakke* decision, to

1. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977).

2. *See* Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); *but see* Craig v. Boren, 429 U.S. 190, 210 & n.* (1976) (Powell, J., concurring).

analyze the few lower court decisions which have dealt expressly with preferential admissions programs, and to suggest an appropriate standard of review to determine the validity of racial preference admission programs challenged under the equal protection clause of the fourteenth amendment.[3]

II. BAKKE V. REGENTS OF UNIVERSITY OF CALIFORNIA

Allan Bakke applied for admission to the University of California's medical school at Davis in both 1973 and 1974. In each of those years there were 100 places available: 16 were reserved for minority candidates selected by a special admissions program, while the other 84 places were filled through the normal admissions process.[4] Bakke alleged that the candidates selected under the preference plan were less qualified than himself since the normal admissions process would have excluded some of them automatically on the basis of grades and test scores. Therefore, he sought mandatory, injunctive, and declaratory relief.

The trial court agreed that the special program was unconstitutional, but refused to order the university to admit Bakke. The court reasoned that Bakke had not proved he would have been admitted but for the program. The Supreme Court of California affirmed the trial court as to the unconstitutionality of the program, and remanded the case for a determination of whether Bakke would have been admitted.[5] The court held it was error for the trial court to place the burden of proof on Bakke. Since Bakke had established racial discrimination by the university, the burden regarding nonadmission had shifted to the university.

The issue addressed by the majority was "whether a racial classification which is intended to assist minorities, but which also has the effect of depriving those who are not so classified of benefits they would enjoy but for their race, violate[d] the constitutional rights of the majority."[6] The court dismissed any presumption of a per se violation based on the use of a racial classification, recognizing that racial classifications have been upheld in numerous contexts.[7] Howev-

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

4. Justice Mosk provided a detailed explanation of each program. *See* 18 Cal. 3d at 39–44, 553 P.2d at 1156–59, 132 Cal. Rptr. at 684–87.

5. *Id.* at 63–64, 553 P.2d at 1172, 132 Cal. Rptr. at 700. The Supreme Court, pending its disposition of the case, stayed the execution of the California Supreme Court's mandate. Regents of Univ. of Cal. v. Bakke, 429 U.S. 953 (1976).

6. 18 Cal. 3d at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690.

7. *Id.* at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 688.

er, unlike remedial plans in school desegregation cases where racial classifications are judicially mandated, in *Bakke* there was no prior intentional discrimination by the university.[8] Another distinguishing factor the court noted was that no complete deprivation of educational benefits occurs when children are bussed, whereas a person such as Bakke suffers an absolute deprivation of a benefit when he is denied a place in a professional school.[9]

The California Supreme Court found that the program violated the equal protection clause unless the university could show a "compelling interest,"[10] rejecting the university's arguments that a less stringent standard should apply. The court chose the strict standard of review because it felt that no adequate justification had been or could be made to demonstrate that discrimination by the majority against itself was not as invidious as discrimination by the majority against a minority group.[11] Moreover, the opinion cited *McDonald v. Santa Fe Trail Transportation Co.*[12] for the proposition that the United States Supreme Court is presently reluctant to apply different standards when determining the rights of minority and majority group members.[13] The majority recognized that the *McDonald* Court held that the standards of both Title VII[14] and section 1981[15] of the Civil Rights Act prohibit discrimination against whites as well as non-whites.[16] Although the majority assumed *arguendo* the compelling nature of the university's aims—to integrate the student body and to improve medical care for minorities[17]—it remained unconvinced that preferential admission

8. *Id.* at 59, 553 P.2d at 1169, 132 Cal. Rptr. at 697.

9. *Id.* at 46–47, 553 P.2d at 1160–61, 132 Cal. Rptr. at 688–89. The same argument was propounded by Justice Douglas dissenting in DeFunis v. Odegaard, 416 U.S. 312, 366 n.18 (1974).

10. 18 Cal. 3d at 49–50, 553 P.2d at 1162–63, 132 Cal. Rptr. at 690–91. Noteworthy, is dicta to the contrary in Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976): "[P]etitioner urges us to apply the strict scrutiny test in reverse discrimination cases. This we may not do." *Id.* at 332, 348 N.E.2d at 542, 384 N.Y.S.2d at 87.

11. 18 Cal. 3d at 51, 553 P.2d at 1163–64, 132 Cal. Rptr. at 691–92.

12. 427 U.S. 273 (1976).

13. 18 Cal. 3d at 48, 553 P.2d at 1161–62, 132 Cal. Rptr. at 689–90.

14. 42 U.S.C. §§ 2000e–2000e–17 (1970).

15. 42 U.S.C. § 1981 (1970).

16. 18 Cal. 3d at 51, 553 P.2d at 1164, 132 Cal. Rptr. at 692. The majority questioned the court's ability to reach this result in spite of language in the statute that minorities should enjoy the same rights as "*white* citizens." *Id.* (emphasis in original).

17. The university argued that enrollment of a substantial number of minority students would further the university's goals because these students would provide diversity in the class and influence students and members of the profession to become

policies based on race were necessary to achieve such goals.[18]

The university analogized its preferential program to those found in the employment area, but the majority of the court distinguished employment cases as it had the school cases, because minority preference in employment was a remedial measure in light of past discrimination.[19] Although the proposition was offered by amici curiae that the use of standardized tests by the university was a discriminatory act, the record revealed no past discrimination on the part of the university, and the university did not assert that its plan was remedial. The court also cited *Washington v. Davis*[20] to further support the argument that the use of standardized tests having a disproportionate racial impact does not, by itself, comprise a constitutional violation.[21] The Supreme Court in *Davis* held that proof of discriminatory purpose is necessary when a denial of equal protection is alleged.[22] Standing alone, underrepresentation of minorities in the medical school, which may be partially caused by low test scores, would not be sufficient to prove past discrimination; without proof of discriminatory intent—creating a situation requiring remedial racial preferences—the court found the analogy to Title VII equal employment cases incomplete.

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more aware of minority needs in the community. Moreover, they would provide role models for other minorities. Because of greater rapport with minority community members, minority doctors would have greater interest in serving the special needs of the minority community. 18 Cal. 3d at 52–53, 553 P.2d at 1164–65, 132 Cal. Rptr. at 692–93.

18. *Id.* at 53–54, 553 P.2d at 1165–66, 132 Cal. Rptr. at 693–94. The university failed to prove that less onerous alternatives did not exist. The majority also distinguished other preferential programs because there was no past discrimination warranting a remedy, no prior judicial authority for a voluntary program, and no assurance that the divisive effects of such programs on society would be outweighed by the compensatory relief the programs offered to minorities. *Id.* at 57–62, 553 P.2d at 1168–71, 132 Cal. Rptr. at 695–99.

19. *Id.* at 57–59, 553 P.2d at 1168–69, 132 Cal. Rptr. at 696–97.

20. 426 U.S. 229 (1976).

21. 18 Cal. 3d at 60, 553 P.2d at 1169–70, 132 Cal. Rptr. at 697–98.

22. The Court did not limit discriminatory purpose to explicit expression of such a purpose on the face of the statute; nor did it discount the relevance of discriminatory impact in determining discriminatory purpose. An invidious purpose could be shown if a statute was given discriminatory application, or if intent could be shown from the totality of relevant facts. 426 U.S. at 239–45. The requirement of discriminatory purpose was clarified in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). Addressing the interrelationship between purpose and impact, the Court in *Arlington Heights* suggested six evidentiary sources for measuring the discriminatory intent behind official action: (1) the impact of official action, (2) the historical background of a decision (a series of official actions), (3) the specific sequence of events leading up to the challenged decision, (4) departures from the normal procedural sequence, (5) substantive departures (factors usually considered important strongly favor a decision contrary to the one reached), and (6) legislative or administrative history. 429 U.S. at 266–68.

The court offered three racially neutral means by which the university could increase its minority enrollment which demonstrated that the university had not used "the least intrusive or even the most effective means to achieve [its] goal."[23] It suggested that the university could be assured of more qualified minority applicants through a combination of flexible admission standards based on nonquantitative criteria, aggressive recruitment, and an increased number of places.[24] Even though the motives behind the university's policy might be socially worthy, the balance could not be struck in favor of the racial criteria. The court feared that an admissions program using racial criteria would be socially counterproductive, as well as a dangerous precedent.[25] Another defect in the special program was its similarity to historically suspect quota systems.[26] The majority of the Supreme Court of California therefore concluded that:

> To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would 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.[27]

Thus, in the majority's estimation, the safest and most constitutionally sound course of action was to deny judicial sanction to the special admissions program.[28]

Justice Tobriner was the lone dissenter. He felt that the university's special admissions program furthered the legitimate constitutional purpose of promoting integration. He found it ironic that the first admissions program "aimed at promoting diversity ever to be struck down under the Fourteenth Amendment [was] the program most consonant with the underlying purposes of the Fourteenth Amendment."[29]

Justice Tobriner refuted the majority's position on two levels. First, he asserted that the majority used the wrong standard of review by erroneously equating the university's classifications with traditional racial classifications. In doing so, the majority failed "to distinguish

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23. 18 Cal. 3d at 57, 553 P.2d at 1167, 132 Cal. Rptr. at 695.

24. *Id.* at 55–56, 553 P.2d at 1166–67, 132 Cal. Rptr. at 694–95. The California Supreme Court left open the possibility that special consideration could still be given to the "disadvantaged" in a racially neutral way. The court, however, did not define disadvantaged. 18 Cal. 3d at 54–55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

25. *Id.* at 61, 553 P.2d at 1171, 132 Cal. Rptr. at 699.

26. *Id.* at 62–63, 553 P.2d at 1171–72, 132 Cal. Rptr. at 699–700.

27. *Id.* at 62–63, 553 P.2d at 1171, 132 Cal. Rptr. at 699.

28. *Id.* at 63, 553 P.2d at 1171–72, 132 Cal. Rptr. at 699–700.

29. *Id.* at 66, 553 P.2d at 1174, 132 Cal. Rptr. at 702.

between *invidious racial classifications* and remedial or '*benign' racial classifications*.''[30] Secondly, he faulted the majority for its determination that the minority students were less qualified than the rejected nonminority students; he felt that the majority had overemphasized the importance of the standardized criteria. Because school officials have discretion to determine admission criteria, Justice Tobriner reasoned that the departure from strictly objective criteria was a permissible policy choice.[31]

Elaborating on his first criticism, Justice Tobriner initially found that the majority had not cited any authority that required the same standard of review for both benign and invidious racial classifications. He distinguished *McDonald v. Santa Fe Trail Transportation Co.*,[32] which the majority had used[33] to demonstrate the Supreme Court's present tendency to evaluate discrimination in the same manner for both blacks and whites.[34] Justice Tobriner pointed out that in *McDonald*, Justice Marshall pointedly refrained from ruling on the permissibility of affirmative action programs, ''whether judicially required *or otherwise prompted*.''[35] He also distinguished the majority's use of *Swann v. Charlotte-Mecklenburg Board of Education*,[36] reading *Swann* not as requiring a ''constitutional obligation to desegregate'' before racial classifications could be instituted, but rather as allowing the voluntary use of racial classifications to promote integration. The use of such classifications would be totally consistent with the broad discretionary powers that school authorities possess ''to prepare students to live in a pluralistic society.''[37]

The majority insisted that all prior benign classifications could be distinguished because no absolute deprivation was imposed upon the majority class, or because racial classifications were used remedially,

30. *Id.* at 65, 553 P.2d at 1173, 132 Cal. Rptr. at 701 (emphasis in original).

31. Justice Tobriner compared the Davis program with the preference granted by many universities to athletes and relatives of alumni. *Id.* at 66, 553 P.2d at 1174, 132 Cal. Rptr. at 702. It must be kept in mind that the admission program in question allowed all who considered themselves economically or educationally disadvantaged to be reviewed under the special program. However, no nonminority had been accepted under the program during the five years since its inception in 1969. *Id.* at 40–41, 553 P.2d at 1156–57, 132 Cal. Rptr. at 684–85.

32. 427 U.S. 273 (1976).

33. 18 Cal. 3d at 51, 553 P.2d at 1164, 132 Cal. Rptr. at 692.

34. *Id.* at 69 n.3, 553 P.2d at 1176 n.3, 132 Cal. Rptr. at 704 n.3.

35. 427 U.S. at 281 n.8 (emphasis added).

36. 402 U.S. 1 (1971).

37. 18 Cal. 3d at 70, 55 P.2d at 1177, 132 Cal. Rptr. at 705 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

in response to instances of past discrimination. Justice Tobriner answered the deprivation argument with an analogy to the employment area. If nonminorities are not hired, and minorities are hired in their place, one could say that "but for their race" one or more of the nonminorities would have been hired. Yet the federal courts have consistently upheld such programs to the "detriment" of the majority.[38] In a society of limited resources, rectifying past inequities to minorities will of necessity result in some deprivation to nonminorities.[39]

Justice Tobriner also considered erroneous the assertion that past discrimination is a requisite element of a valid racial preference scheme.[40] The special program was voluntarily designed to overcome the effects of past discrimination in this country. Moreover, remedial court orders had been issued in Title VII cases to rectify "an objective condition of minority underrepresentation that is not satisfactorily justified by an employer."[41] Justice Tobriner reasoned that if Congress could statutorily mandate remedial action for such discrimination, the medical school should be able to overcome its substantial minority underrepresentation as well.[42] He therefore concluded that to insist on strict scrutiny for benign racial classifications was not supported by logic or by case law, and was contrary to the history and purpose of the fourteenth amendment.[43] He would replace the strict scrutiny test with a less rigid test, yet one more stringent than the rational basis test. Under this alternative test, a benign classification could be upheld if it were "directly and reasonably related to the attainment of integration."[44] Justice Tobriner found that this intermediate constitutional test, if applied, would be satisfied in *Bakke*. First, objective academic criteria did not provide an equitable basis for comparing minority and

38. *Id.* at 73, 553 P.2d at 1179, 132 Cal. Rptr. at 707. *See, e.g.*, Associated Gen. Contractors, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1974); United States v. Wood, Wire and Metal Lath. Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

39. 18 Cal. 3d at 75, 553 P.2d at 1180, 132 Cal. Rptr. at 708.

40. *Id.*

41. *Id.* at 76, 553 P.2d at 1181, 132 Cal. Rptr. at 709.

42. *Id.* at 76–77, 553 P.2d at 1181, 132 Cal. Rptr. at 709.

43. *Id.* at 78–80, 553 P.2d at 1182–83, 132 Cal. Rptr. at 710–11. A second level of argument was based on refuting the majority's assumption that the minority candidates accepted were less than fully qualified. By showing that the minority students were in fact qualified, Justice Tobriner argued that the use of racial classifications was a reasonable attempt to promote integration. *Id.* at 82, 553 P.2d at 1184–85, 132 Cal. Rptr. at 712–13.

44. *Id.* at 81, 553 P.2d at 1184, 132 Cal. Rptr. at 712.

nonminority students.[45] Thus, to overcome the cultural biases built into traditional academic admission criteria, the university extended deferential treatment to minorities.[46] Second, minority background was determined to be a relevant admission criterion because it helped to promote a diverse student body. Admissions on this basis would serve the medical profession and ultimately benefit society as a whole.

Since the medical school's objectives could be met "reasonably and directly" by using race as a criterion, a presumption of unconstitutionality was erroneous. Consequently, the burden placed upon the school officials to prove that alternatives were nonexistent was also erroneous. Justice Tobriner felt that the majority of the court should have accepted the statement of the faculty that the "*special admissions program [was] the only method* whereby the school [could] produce a diverse student body which [would] include qualified students from disadvantaged backgrounds."[47] Finally, Justice Tobriner dismissed as disingenuous and impractical the alternatives the majority had set forth; to think that any one of them was feasible, or capable of achieving the goals of the admissions program was unrealistic.[48] He found it anomolous that the fourteenth amendment could be used to compel integration of primary and secondary schools, yet, could be used to bar graduate schools from achieving the same objective.[49]

III. TRADITIONAL STANDARDS OF REVIEW UNDER EQUAL PROTECTION

Minimum and strict scrutiny[50] are the two traditional methods of reviewing equal protection challenges to government classifications, such as the California admissions program. Originally, minimum

45. Justice Tobriner noted the results of empirical studies suggesting little correlation between academic credentials and excellence in the medical profession. He cited several characteristics of the "successful" doctor, such as "energy, compassion, empathy, dedication, [and] dexterity"—which are all incapable of quantification. *Id.* at 84, 553 P.2d at 1186, 132 Cal. Rptr. at 714.

46. This point in the dissent was unfortunate, as it clearly, if not intentionally, misconceived the majority position. The majority emphasized that the university could make use of any subjective criteria which were not racial. *Id.* at 54–55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

47. *Id.* at 89, 553 P.2d at 1190, 132 Cal. Rptr. at 718 (emphasis in original).

48. The majority suggested that nonracial means be used to achieve the same goals, such as a program for the "disadvantaged." However, Justice Tobriner argued the goal was an ethnically and racially integrated student body, not simply an economically diverse one. *Id.* at 89–90, 553 P.2d at 1190, 132 Cal. Rptr. at 718.

49. *Id.* at 92, 553 P.2d at 1191, 132 Cal. Rptr. at 719.

50. Professor Gunther refers to these as the "old" and the "new" equal protection. Gunther, *supra* note 2, at 8.

scrutiny alone was used in judicial review, requiring only a "rational relationship" between the challenged classification and a permissible governmental purpose.[51] The judiciary deferred almost completely to the legislature.[52] However, it was soon recognized that certain "suspect" classifications affecting "fundamental interests" required much more exacting justification. The resulting strict scrutiny of those classifications led to considerable judicial intervention.[53] This two-tiered system became increasingly inflexible, leading commentators to remark upon "the marked contrast between aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact [and] the deferential 'old' equal protection . . . with minimal scrutiny in theory and virtually none in fact."[54]

Briefly, to pass the minimum scrutiny test a classification must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[55] However, this formulation proved so permissive that the equal protection clause was largely powerless to constrain legislative classifications; to withstand scrutiny, the challenged statute had to be shown to have merely a rational relationship to its stated objectives.[56] In fact, some legislation survived even though the statutory purpose was unclear.[57] In such cases, the state statute would be sustained so long as the Court could conceive of some justification for the classification made.[58]

More rigorous or "strict" scrutiny is appropriate when the classification in question is racial, or is related to a fundamental personal

51. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077–78 (1969) [hereinafter cited as *Developments*].

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

53. *Id.*

54. Gunther, *supra* note 2, at 8 (footnote omitted).

55. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

56. *See* McDonald v. Board of Elections Comm'rs, 394 U.S. 802 (1969).

57. *Developments*, *supra* note 51, at 1078–81.

58. The extent of judicial deference under minimum scrutiny is evidenced by an early statement of Chief Justice Warren:

> [T]he States [are permitted] a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

interest.[59] In reviewing legislation or other means of state action, when either a suspect class or a fundamental interest is involved, strict scrutiny requires the state to show that the classification serves a compelling interest, and that no alternative methods are available to achieve the same ends.[60] These requirements have severely limited legislative racial classifications. When applying strict scrutiny, courts refuse to speculate in order to discover a rationale for the classification;[61] furthermore, a statute will not be upheld unless it provides the necessary means for implementing and achieving its purpose.[62]

Professor Gunther has suggested that, despite the continued articulation of a rigid two-tiered analysis, a "newer" equal protection is evolving.[63] Gunther described this "newer" method of analysis as "equal protection bite without 'strict scrutiny.' "[64] The predominant characteristic of this middle-level standard is that it is a "means-focused, relatively narrow . . . ground of decision" within which the Court must consider seriously whether the "legislative means . . . substantially further legislative ends."[65] The Justices would no longer resort "to rationalizations created by perfunctory judicial hypothesizing"[66] but would assess only the reasonableness of the means in question.[67] In short, this new standard would "close the wide gap between the strict scrutiny of the new equal protection and the minimal

59. The fundamental interests recognized by the Supreme Court have not been limited to those expressly guaranteed by the Constitution. Others that have been included are the right to interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969), the right to vote, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), and the right to criminal appeals, Griffin v. Illinois, 351 U.S. 12 (1956). The Burger Court has generally refused to continue expanding the list. Where welfare benefits, Dandridge v. Williams, 397 U.S. 471 (1970), housing, Lindsey v. Normet, 405 U.S. 56 (1972), and education, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), were asserted to be fundamental rights, the Court has not required strict scrutiny. An attempt to include wealth as a suspect classification has also failed, James v. Valtierra, 402 U.S. 137 (1971).

60. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

61. *See, e.g.*, Lewis v. Cohen, 417 F. Supp. 1047, 1052 (E.D. Pa. 1976).

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

63. *See* Gunther, *supra* note 2, at 17–24.

64. *Id.* at 12.

65. *Id.* at 20.

66. *Id.* at 21.

67. The impact of this model on future judicial scrutiny would be significant. First, it would be solely a "means" analysis. The "ends" analysis of strict scrutiny requiring a compelling state interest would be eliminated. Second, it would not require that state purposes be subject to a critical examination of their relative merits, thereby permitting a broad range of state objectives which would not be subject to the personal value judgments of individual members of the Court. Finally, the states' ability to choose appropriate means would be far less limited than under the strict equal protection standard. The means chosen would not have to be the only alternative available. As long as the proposed means furthered substantially the legislative purpose, the statute would be constitutional. *Id.*

scrutiny of the old, not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry."[68] However, Professor Gunther noted that this newer equal protection analysis would not preempt the strict scrutiny standard when the inquiry concerned either suspect classifications or fundamental interests. For example, where a racial classification was at issue, the state would still be required to show that that classification was the least onerous means necessary to achieve a compelling end.[69]

It should be noted that Professor Gunther is not alone in advocating the recognition of more flexible standards of review in equal protection cases. Justice Marshall has called for the implementation of a sliding-scale balancing test which would accommodate competing governmental and individual interests.[70] In addition, dissenting in *San Antonio Independent School District v. Rodriquez*,[71] he suggested that the Court had already applied a spectrum of standards in equal protection cases. "This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized *invidiousness* of the basis upon which the particular classification is drawn."[72] The majority of the Court, however, has remained steadfast in its refusal to adopt expressly a middle-level equal protection analysis.[73] The method of analysis articulated by the Court remains two-tiered.

IV. THE PREFERENTIAL ADMISSIONS CASES

In addition to the famous case of *DeFunis v. Odegaard*,[74] at least two other cases[75] have dealt with the issue now faced by the Supreme

68. *Id.* at 24.

69. *Id.*

70. Dandridge v. Williams, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting).

71. 411 U.S. 1, 70 (1972) (Marshall, J., dissenting).

72. *Id.* at 99 (emphasis added). This is also the tenor of Justice Powell's remarks in his concurring opinion in Craig v. Boren, 429 U.S. 190, 210 (1976). He not only recognized that a newer standard is being invoked by the Court, but also identified the situations where it is applied.

> [O]ur decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characteristic and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases.

Id. at 211 n.*.

73. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

74. 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974).

75. Hupart v. Board of Higher Educ., 420 F. Supp. 1087 (S.D.N.Y. 1976); Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

Court in *Bakke*. The opinions in these cases, and that of the Supreme Court of California in *Bakke,* do not reach a consensus, however, on which equal protection standard is appropriate in reviewing constitutional challenges to preferential admissions programs.

In *Hupart v. Board of Higher Education*,[76] a plaintiff class of male Caucasians alleged that they were improperly denied admission to the Biomedical Program of the Center for Biomedical Education of the City College of New York for the academic year 1974. They accused the defendants of discriminating against both Caucasians and Asians through the use of a predetermined quota system for Blacks and Hispanics.[77]

The district court determined that of the 260 applicants the admission committee was considering, 94 had been given tentative acceptances (had been put in the "Yes" category), and another 84 to 100 had been tentatively put in one of two "Hold" categories.[78] A subcommittee decided to offer admission to only 79 of the "Yes" candidates. Of the 15 "Yes" candidates excluded by the subcommittee, none were Black or Hispanic. When not all 79 offerees accepted, candidates were chosen from a list of alternates solely on the basis of race, in proportion to the number of refusals within each of four racial categories.[79]

The court found these practices to be overt, invidious racial discrimination. At first it was thought that, like the University of California, the New York Board had deliberately adopted a policy of minority preference to fulfill the goals of integration and improved medical service in urban areas.[80] But, as the case developed, it became clear that the committee's use of race as the sole basis for making many of the selections was guided by an unwritten and unapproved 50 percent quota for Blacks and Hispanics, leaving Caucasians, Asians, and others in the remaining 50 percent. The College, the State of New York, and the Board's own policy all forbade the use of race as an admissions standard under any circumstances, even in a program which sought to encourage young people to pursue a career in urban medicine.

The facts of *Hupart*, then, only demonstrated unauthorized racial

76. 420 F. Supp. 1087 (S.D.N.Y. 1976).

77. *Id.* at 1103.

78. *Id.* at 1095.

79. *Id.* at 1096–98.

80. *Id.* at 1105.

discrimination by an agent of the state.[81] The need for the court to be specific about its equal protection standard was therefore eliminated:

> Whatever standard of scrutiny is ultimately fashioned in "reverse discrimination" cases, it is clear that the State cannot justify making distinctions on the basis of race without having first made a deliberate choice to do so. . . . [The court then left open the question of whether discrimination by the State based on race could ever be justified.]
>
> While perhaps not every classification by race is "odious," every distinction made on a racial basis is at least suspect and must be justified. . . . It is not for the court to supply a rational or compelling basis (or something in between) to sustain the questioned state action.[82]

The clear message of the district court opinion in *Hupart* is that racial classifications must always be justified, and the state must provide that justification. The state must have arrived at its racial preference through a process of deliberate and conscious choice, or it will fail to meet even a rational basis test. It is also noteworthy that the court refused to speculate as to the possible justifications for the classification. Such an attitude is close to Professor Gunther's "newer" equal protection—rational basis "with bite."[83]

The second recent case from the state of New York is *Alevy v. Downstate Medical Center*.[84] The plaintiff, a white male who applied for admission to the medical center, was placed on the waiting list, but was eventually denied admission. He alleged that the defendant had "arbitrarily granted preferential treatment" to minority applicants.[85] The medical center responded by admitting that its admission program was designed to be "responsive to the medical needs of the community's large black and Puerto Rican population."[86] The center sought to achieve this goal by considering all relevant factors, including race, and financial and educational disadvantages. The center maintained that due to the large number of applicants, factors readily discerned through the interviewing process were given more weight than actual quantitative factors.[87]

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81. The court noted that the NAACP Legal Defense and Educational Fund had obtained leave to participate as amicus in the case, but withdrew when these facts became apparent. *Id.* at 1105 n.40.

82. *Id.* at 1106.

83. *See* notes 64–67 *supra* and accompanying text.

84. 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

85. *Id.* at 328, 348 N.E.2d at 540, 384 N.Y.S.2d at 85.

86. *Id.*

87. *Id.* at 330, 348 N.E.2d at 540, 384 N.Y.S.2d at 86. The court noted:

> Dr. Parnell conceded that petitioner's screening code was above the average score of the accepted minority applicants, and that had petitioner been a

The court applied the test of racial neutrality espoused by Justice Douglas in his dissent in *DeFunis v. Odegaard*.[88] The court then concluded that the program *was* neutral, since the admissions decisions were based not on race, but on factors of financial and educational disadvantage. In the alternative, the court found that even if the minority students had not been admitted, the plaintiff was number 154 in priority for admission, and thus would not have been admitted in any event. The appellate division affirmed the trial court decision without opinion.[89] The court of appeals also affirmed the decision on the basis that Alevy had "failed to demonstrate that he, personally, suffered any legal harm as a result of respondent's student selection process."[90]

In dicta, the court indicated how it would have decided had it been necessary to apply the equal protection clause to instances of "reverse discrimination." Judge Gabrielli reviewed the rigidity of the two-tiered equal protection approach, and noted that the more recent Supreme Court cases seem to strike a middle ground, at least in terms of result.[91] He then discussed the appropriate standard to apply when faced with "benign" discrimination:

> The Fourteenth Amendment was adopted to guarantee equality for Blacks, and by logical extension has come to include all minority groups . . . . It would indeed be ironic and, of course, would cut against the very grain of the amendment, were the equal protection clause used to strike down measures designed to achieve real equality for persons whom it was intended to aid. We reject, therefore, the strict scrutiny test for benign discriminations as, in our view, such an application would be contrary to the salutary purposes for which the Fourteenth Amendment was intended.[92]

> minority group member he probably would have been accepted. He explained, however, that due to the large number of applicants, qualitative [*sic*] achievement formed but a part of the committee's consideration and that factors concerning the individual, as revealed in his interview, were far more important in the selection process.

Id. at 330, 348 N.E.2d at 541, 384 N.Y.S.2d at 86. The court probably intended to use the word "quantitative" not "qualitative" to describe the type of achievement measured by the screening code since the code score is the aggregate of an applicant's undergraduate grade point average multiplied by 20, and his average MCAT score multiplied by .05, adding one point if the applicant is a resident of New York. *Id.* at 329 n.3, 348 N.E.2d at 540 n.3, 384 N.Y.S.2d at 84 n.3.

88. 416 U.S. 312, 320 (1974).

89. 39 N.Y.2d at 331, 348 N.E.2d at 542, 384 N.Y.S.2d at 87.

90. *Id.* at 338, 348 N.E.2d at 547, 384 N.Y.S.2d at 92.

91. The judge cited cases such as Reed v. Reed, 404 U.S. 71 (1971), and James v. Strange, 407 U.S. 128 (1972), in support of this proposition. 39 N.Y.2d at 334, 348 N.E.2d at 544, 384 N.Y.S.2d at 89.

92. 39 N.Y.2d at 334–35, 348 N.E.2d at 544–45, 384 N.Y.S.2d at 89.

The rational basis test was rejected by the New York court as well because "[g]ranting preferential treatment to some racial groups encourages polarization of the races," and perpetuates "undesirable perceptions of race as criteria."[93]

The court decided upon a middle-level analysis, requiring a "substantial state interest" to justify preferential treatment. At minimum the interest must be articulated and legitimate, but it need not be "urgent, paramount or compelling."[94] Rather, courts should uphold a preferential policy which, on balance, is more beneficial than detrimental. A further inquiry should then be made, according to the *Alevy* court, to determine if the state's policy could be accomplished by a "less objectionable" alternative: "In sum, in proper circumstances, reverse discrimination is constitutional. However, to be so, it must be shown that a substantial interest underlies the policy and practice and, further, that no nonracial, or less objectionable racial, classifications will serve the same purpose."[95]

Perhaps the most well-known preferential admission case is *DeFunis v. Odegaard*.[96] The Supreme Court of Washington found the preferential admissions program used by the University of Washington Law School to be constitutionally valid. The court found that for nonminority students the predicted first year average computation (PFYA) was heavily weighed in the admissions process, but it was not a major consideration for the minority students. The school had no fixed quota system; instead it sought a "reasonable" representation of minority groups in the school. It was clear, however, that the PFYA's of some minority students would have caused their summary rejection had they been white.[97] From the facts, three issues arose: (1) Whether race can ever be considered as a factor in admissions; (2) if the use of race can be sanctioned, what is the correct standard of review; and (3) when the standard is applied, does the admissions program pass constitutional muster?[98]

The court found that the use of race is not a per se violation of the fourteenth amendment.[99] The court relied heavily on the school desegregation cases which not only proscribed segregated school sys-

93. *Id.* at 335, 348 N.E.2d at 545, 384 N.Y.S.2d at 90.

94. *Id.* at 336, 348 N.E.2d at 546, 384 N.Y.S.2d at 90.

95. *Id.* at 336–37, 348 N.E.2d at 546, 384 N.Y.S.2d at 90.

96. 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974).

97. *Id.* at 22–23, 507 P.2d at 1174.

98. *Id.* at 25, 507 P.2d at 1178.

99. *Id.* at 31, 507 P.2d at 1181.

tems, but placed affirmative duties on school officials to use race when necessary to achieve the goal of a unitary, racially integrated system.[100] Since the goal of Washington's program was to bring the races together, not to separate or stigmatize them, the Supreme Court of Washington found that the use of race in the law school admissions program was not an invidious classification, and therefore not unconstitutional per se.[101] It concluded that "the Constitution is color conscious in order to prevent the perpetuation of discrimination and to undo the effects of past segregation."[102] The plaintiff argued that the use of the school desegregation cases was inapposite in this context because no benefit was denied in those situations. The court dismissed his argument, stating that the denial of a benefit is not a per se violation when the racial classification is compensatory and used to promote integration.[103]

As to the appropriate equal protection standard, the court decided that because racial classifications have traditionally been upheld only after strict scrutiny, and because a "benign" classification is not benign with respect to the nonminorities who are adversely affected, anything less than a compelling interest test would be inappropriate.[104] Although the compelling interest test usually leads to an automatic conclusion that the classification is unconstitutional, the court in *DeFunis* found that the university had demonstrated a compelling state interest in promoting integration, especially in light of the gross underrepresentation of minorities in the legal profession.[105]

The underrepresentation of minorities in the university had three significant effects. First, law students were not adequately prepared to deal with societal problems resulting from continued isolation of the races. Second, because of the crucial role the legal profession plays in the decisionmaking sectors of society, minority concerns go unrepresented (or, at the very least, underrepresented). Third, the shortage of minority law students not only leads to a shortage of minority attorneys engaged in private practice—but also leads to fewer black defenders, prosecutors, judges, and other public officials.[106] "If minorities are to live within the rule of law, they must enjoy equal representation within our legal system."[107] Thus, to provide minority representation in

100. *Id.* at 25–30, 507 P.2d at 1178–80.
101. *Id.* at 27, 507 P.2d at 1179.
102. *Id.* at 29, 507 P.2d at 1180.
103. *Id.* at 30, 507 P.2d at 1181.
104. *Id.* at 32, 507 P.2d at 1182.
105. *Id.* at 33, 35, 507 P.2d at 1182, 1184.
106. *Id.* at 35, 507 P.2d at 1183–84.
107. *Id.*

professional schools was determined to be a compelling interest which withstood strict scrutiny. The only viable means available to reach that end was found to be a program of racial preference. The court also found that the admissions plan was "the only feasible 'plan that promises realistically to work, and promises realistically to work *now*.' "[108]

The *DeFunis* case squarely presented the issue of the propriety of racial distinctions in situations where there had been no deliberate past discrimination. In other words, the court was asked whether it is a violation of the fourteenth amendment to remedy de facto segregation by means of racial preferences. The court found that the de jure/de facto distinction was not controlling. The state interest in integrating the legal profession did not become less compelling because the admission procedures were not implemented to remedy a prior constitutional violation.[109]

The Supreme Court of the United States vacated the decision of the Washington court on the grounds that DeFunis' impending graduation from law school rendered the controversy moot.[110] Justice Douglas, in his dissent, was the only member of the Court who discussed the merits of the case. Although seriously questioning the propriety of reliance upon supposedly objective criteria such as test scores and grade point averages in determining the qualifications of an applicant, Justice Douglas reaffirmed the principle that each citizen must be treated by the government on the basis of his or her individual merit, and not on the basis of race.[111] This principle also requires strict equal protection scrutiny of racial classifications, but unlike the Washington court, Justice Douglas found that "any state-sponsored preference to [*sic*] one race over another . . . is in my view 'invidious' and violative of the Equal Protection Clause."[112]

V. STANDARDS USED IN SEX-BASED DISCRIMINATION CASES

Of the few state and federal cases dealing with preferential admissions programs, *Bakke* offers the most complete treatment of the various issues involved. Still, one line of cases largely overlooked in *Bakke* may prove helpful in determining the appropriate standard of review under the fourteenth amendment. In cases involving governmental classification based on gender, the Supreme Court has arrived

108. *Id.* at 36, 507 P.2d at 1184 (quoting Green v. County School Bd., 391 U.S. 430, 439 (1968)) (emphasis in original).

109. 82 Wash. 2d at 34, 507 P.2d at 1183.

110. 416 U.S. at 319–20.

111. *Id.* at 337.

112. *Id.* at 344.

at a method of equal protection analysis which is articulated as a two-tiered approach, but clearly employs a middle-level scrutiny.[113] Moreover, a reading of some of the principal sex discrimination cases suggests that the Court has varied its equal protection standard depending upon the purpose of the sex-based classification. When the classifications have been struck down, the courts have used an ill-defined intermediate standard.[114] When faced with state or federal legislation that attempts to compensate for past inequities to females, courts have applied a less strict rational basis test, and have generally upheld the gender-based classification.[115] These cases may help the Court apply a more principled equal protection anaylsis in the *Bakke* case.

A. *Unsuccessful Attempts to Employ Sex-Based Classifications*

When the United States Supreme Court has struck down gender-based classifications, the rights of the female are usually found to be inadequately protected. In *Reed v. Reed*,[116] *Frontiero v. Richardson*,[117] and *Stanton v. Stanton*,[118] when the competing interests of the state and the plaintiffs were evaluated, female interests were found to be impermissibly burdened. In *Craig v. Boren*,[119] it was determined that the state denied equal protection to males. The Supreme Court, nevertheless, employed the same equal protection analysis[120] in all four cases. The Court purported to use the traditional rational basis standard for non-suspect classifications, but invalidated the government classification even though there was some rational justification in each case. These holdings, therefore, lend credence to the theory that there is another standard at work; on the face of the cases the test is rational basis, but the result is that of strict scrutiny.[121]

In *Reed*,[122] a woman challenged her husband's appointment as the administrator of their son's estate. Although they were equally entitled

113. *See* text accompanying notes 116–51 *infra*.
114. *See* text accompanying notes 116–37 *infra*.
115. *See* text accompanying notes 142–51 *infra*.
116. 404 U.S. 71 (1971).
117. 411 U.S. 677 (1973).
118. 421 U.S. 7 (1975).
119. 429 U.S. 190 (1976).
120. The analysis of federal discriminatory action under the due process clause of the fifth amendment is equivalent to assessing state action under the fourteenth amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). Thus, the treatment of the federal case, *Frontiero*, was the same as that of the state cases.
121. *See generally* Comment, *The Supreme Court 1974 Term and Sex-Based Classifications: Avoiding a Standard of Review*, 19 ST. LOUIS L.J. 375 (1975); Comment, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L.J. 163.
122. 404 U.S. 71.

to appointment, the husband was appointed due to a statutory preference for males. The purpose of the legislation was to avoid "one area of controversy when two or more persons [are] equally entitled [to be appointed]."[123] The Court ostensibly employed the rational basis standard,[124] yet it found that the legislation did not further the state's objective in a "manner consistent with the command of the Equal Protection Clause."[125] Although the Court recognized the legitimacy of seeking to reduce the workload of the probate courts,[126] it nonetheless found the classification to be arbitrary and violative of the fourteenth amendment.[127]

Two years later in *Frontiero*,[128] the Court struck down a legislative scheme which allowed male Air Force officers simply to declare their spouses as dependents in order to receive increased living allowances while female officers could qualify for the same benefits only by demonstrating the actual dependency of their spouses. Justice Brennan, writing for a plurality, found sex to be a suspect classification and applied a strict scrutiny standard. He relied on *Reed* as an implicit indication of that determination. In so doing, he explicitly stated that the *Reed* decision fully justified a "departure from 'traditional' rational-basis analysis"[129] in light of the past discrimination to which women have been subjected in this country. The three Justices who concurred in the result felt that *Reed* was controlling and sought to delay because the federal government asserted that administrative convenience was the justification for the statute—the same justification as was offered by the state in *Reed*—*Frontiero* can be read as bolstering the *Reed* decision.

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123. *Id.* at 76.

124. "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Id.* (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

125. 404 U.S. at 76.

126. "Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy." *Id.*

127. *Id.*

128. 411 U.S. 677 (1973).

129. *Id.* at 684.

130. *Id.* at 688. Justice Brennan could not differentiate between the immutable quality of sex and that of race or alienage. Chief Justice Burger and Justices Powell and Blackmun concurred in the result, but thought that it was not necessary to determine the suspect nature of gender-based classifications in order to decide the case; they were compelled to wait until the fate of the Equal Rights Amendment was known before making that determination. *Id.* at 692–93.

In *Stanton*,[131] a Utah statute provided for male children to receive parental support payments until the age of twenty-one, yet payment could be discontinued for female children when they reached the age of eighteen. The Court discounted the state court's reliance on "old notions" about the financial need of male and female children,[133] and found that the state's rationale was insufficient justification for upholding the statute. Although the Court found *Reed* to be controlling,[134] it concluded that this legislative scheme would not survive *any* standard of review.[135] The Court discerned no rational basis for distinguishing between the monetary needs of males and females in light of the expanded role that women now play in American society.

Even though the lower courts in *Reed* and *Frontiero* did not speak in terms of the woman's stereotypical role in society, the Supreme Court thought that this stereotype was used by the lower courts to justify what they determined to be the rational basis of the challenged classifications. In *Reed*, men were favored over women as administrators presumably because it was assumed that men had more experience in financial matters than women. To hold hearings to permit administration by the few knowledgeable women was deemed by the state to be inefficient. It was assumed by the federal government in *Frontiero* that male officers *in fact* supported their wives. To have a procedure to ascertain the few men who did not actually provide more than one half of their wives' support was too time-consuming. The statute invalidated in *Stanton* was also based on notions of men's financial responsibility and female dependence, assumptions which the Court rejected, further reinforcing the *Reed* mode of analysis.

The Court used the same type of analysis in striking down a classification that impinged on male interests. A statute allowing females to drink beer at age eighteen, while males could not drink until age twenty-one, was set aside in *Craig v. Boren*.[136] Although the state in *Craig* presented statistics correlating a lower drinking age for males with increased automobile accidents, the Court dismissed this justification because of the "weak congruence between gender and the characteristic or trait that gender purported to represent."[137] Again, the Court

131. 421 U.S. 7 (1975).

132. *Id.* at 9–10.

133. *Id.* at 10. Those "old notions" were that men generally are responsible for providing for a home and thus need more training or education. Also, women are apt to marry earlier, and thus do not need support for as long a time.

134. *Id.* at 13.

135. *Id.* at 17.

136. 429 U.S. 190 (1976).

137. *Id.* at 199. The Court did admit, however, that the correlation asserted was not statistically insignificant. *Id.* at 201.

reaffirmed the *Reed* decision.[138] More importantly, the Court ignored the justification for the statute offered by the state, and required more than mere rationality. The standard articulated by the Court was that "classifications by gender must serve some important governmental objectives and must be substantially related to achievement of these objectives."[139]

When these four decisions are compared to earlier equal protection cases, it is not difficult to discern that the Court is doing something differently, although it is articulating its reasoning in familiar language. In *McDonald v. Board of Election Commissioners*,[140] the Court formulated the test as follows: "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if *no* grounds can be *conceived* to justify them."[141]

Under this standard courts have acted without hesitation to fill gaps left by legislation that is either inarticulate or incomplete. That clearly is not the Court's present role with regard to sex-based classifications. In all the cases above, the Court has found that, despite some rational connection, the justification was insufficient. The unavoidable explanation for the Court's lack of imagination in ascertaining a "conceivable" justification for sex-based classifications is that the Court is applying a test more stringent than the "traditional" rational basis test.

B. *Successful Attempts to Employ Gender-Based Classifications*

Not all attempts to formulate legislative schemes based on gender classifications have been invalidated. Despite the fact that the courts have ostensibly applied the *Reed* language in a consistent fashion, the results have been remarkably different. In *Kahn v. Shevin*,[142] the Florida legislature granted widows a $500 tax exemption, which was not available to widowers. In upholding the statute, the Court emphasized the state's interest in bestowing a financial benefit upon women because of their traditionally lower earning capacity and their absence from the job market.[143] The Court quoted the *Reed* test as controlling; the classifications must have some "fair and substantial relation to the object of the legislation."[144] The object of the legislation in *Kahn* was

138. *Id.* at 204.
139. *Id.* at 197.
140. 394 U.S. 802 (1969).
141. *Id.* at 809 (emphasis added).
142. 416 U.S. 351 (1974).
143. *Id.* at 354.
144. *Id.* at 355.

to reduce the economic disparity between men and women,[145] apparently a more substantial justification than the mere administrative convenience asserted in *Frontiero*.[146] Although old stereotypes partially explained the state action, the effect of the exemption was not to use those characterizations to interfere with the flow of equal benefits to females[147] but rather as a justification to compensate for the effects of the stereotypes to the extent they had deprived women of economic opportunity in the past.

A similar compensatory scheme was seen in *Schlesinger v. Ballard*.[148] A United States Navy procedure resulted in the discharge of male line officers if they had been passed over twice for promotion within nine years. The same procedure was followed for women officers, but the time period was thirteen years. Because not all Navy positions were open to women, the longer time period was a Congressional attempt to equalize treatment of the sexes.[149] The Court distinguished both *Reed* and *Frontiero* because the classifications in those cases were based on "overly broad generalizations" while in *Schlesinger* the classification was based on the "demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to professional service."[150] The classifications in *Reed* and *Frontiero* were further distinguished because they were established only to insure administrative convenience, whereas the purpose of the *Schlesinger* classification was to enable the Navy to meet its needs with highly motivated personnel.[151] Thus, as in *Kahn*, the Court allowed a gender-based classification which attempted to rectify perceived inequalities resulting from traditional, and presumably archaic, notions of male and female roles.

C. *Limitations of the Sex-Based Analogy*

The primary feature that sets *Kahn* and *Schlesinger* apart from *Reed* and its progeny is the compensatory quality of the legislation. The different result in the latter cases, where sex-based classifications were used to perpetuate traditional male-female notions, highlights the

145. *Id.* at 352.
146. *Id.* at 355.
147. This was the case in *Reed*, *Frontiero* and *Stanton*.
148. 419 U.S. 498 (1975).
149. *Id.* at 508. The Court looked to the fact that women were not assigned to duty in combat aircraft or on most vessels. *Id.* The Court further noted that when men and women are treated similarly by service regulations no gender distinctions are made in regard to tenure. *Id.* at 509.
150. *Id.* at 507–08.
151. *Id.* at 510.

Court's willingness to allow remedial measures. The cases all purport to use the same equal protection standard. Yet, one would then anticipate, especially in light of early articulations of the rational basis standard, as in *McDonald*, that the results would have been the same. All of the legislation had, at the very least, a *conceivable* justification. Yet the results were not identical. The Court is apparently willing to use a lower standard of review, perhaps the traditional rational basis standard, when the purpose of the statute is to compensate a class, such as women, who have been deprived of equal treatment because of pervasive discriminatory attitudes[152] within society.[153]

The question then becomes whether the Court would be willing to apply this framework in the racial discrimination context. Will the Court, when faced with remedial state action, use a lower standard of review? Presumably, since race is a suspect classification and racial classifications are usually subject to strict scrutiny, the Court would use some intermediate standard. Perhaps the standard proposed in *Alevy*[154]—a substantial state interest and the least onerous alternative—would be the proper standard.

In drawing an analogy based upon an analysis of *Kahn* and *Schlesinger*, it must be noted that the compensation given there has a different effect than that given in *Bakke*. Although the state in the two former cases is bestowing a benefit on one class and not on the other, it is not denying an opportunity to one class in order to grant a benefit to the other. It is the loss of opportunity which Allan Bakke is fighting—the opportunity to attend medical school. It can also be argued that *Kahn* and *Schlesinger* represent a "but for" situation: but for economic deprivations in the past, the financial position of women would probably be nearer that of men and they would not be in need of financial aid or preferential treatment. A similar argument could be applied in the *Bakke* situation: but for discrimination by whites against minorities, minorities would not be in need of any preferential treatment.[155] However, one drawback to this theory is that completely

152. In *Kahn*, the state's tax exemption was not granted to compensate for any *particular* discrimination against women, but rather to remedy general societal institutional discrimination which brought about a disparity of earning power between the sexes. 416 U.S. at 353–55. It is this institutional discrimination which the *Bakke* majority would not permit the university to remedy by means of a classification based on race.

153. Or perhaps the Court in *Kahn* and *Schlesinger* recognized that the state's compensatory purpose was more than rational—meeting some middle-level justification sufficient to sustain sex-based classifications.

154. 39 N.Y.2d at 336, 348 N.E.2d at 545, 384 N.Y.S.2d at 90.

155. This theory has been articulated as the rightful place doctrine in the Title VII context. However, in Title VII cases it is usually used to benefit individuals who suffered discrimination, and is generally applied against employers who were found to

innocent parties are affected by an institution's magnanimous offer to rectify past societal wrongs. A person like Bakke is affected even though he did not act to the detriment of any minority student.

For these reasons the Court may be reluctant to analogize from the gender classification cases and to lower the standard of review in the preferential admissions context. However, the fact that sex is at least a "quasi-suspect" class makes the analogy more legitimate.

VI. CONCLUSION: THE APPROPRIATE STANDARD

The original understanding of the fourteenth amendment as embodied in its literal terms was that the state should not confer benefits on the basis of such arbitrary criteria as race and national origin. Thus, even "benign" classifications "lie in obvious tension to the Fourteenth Amendment."[156] The decisions of the few courts which have dealt with the issue of preferential admissions reflect this attitude. Although most courts have applied the strict scrutiny test, the results have not been uniform.[157] One can only conclude that there is no consensus, and that the question before the Supreme Court in *Bakke* is still open.

Many commentators agree that the use of benign racial classifications should not be subjected to a test of per se invalidity or to the rational basis test.[158] The Supreme Court has had the opportunity to invalidate racial classifications, but has declined to do so.[159] Thus, the Court has at least provided for racial classifications to be sustained when they have either a neutral or a beneficial effect,[160] and has preserved a measure of flexibility in evaluating racial classifications. The conclusion that the equal protection clause literally requires "colorblindness" is not, therefore, mandated by the decisions of the Court to date.

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have discriminated against minorities. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Chance v. Board of Exam., 534 F.2d 993 (2d Cir. 1976); Acha v. Beame, 531 F.2d 648 (2d Cir. 1976); Watkins v. Steel Workers Local 2369, 516 F.2d 41 (5th Cir. 1975); Weber v. Kaiser Alum. & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976).

156. Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559 (1975).

157. *Compare* DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974) *with Bakke*.

158. *See, e.g.*, Greenawalt, *supra* note 156, at 560; O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925, 933–40(1974). *See generally* Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 U.C.L.A.L. REV. 343 (1974).

159. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

160. *See, e.g.*, Tancil v. Woolls, 379 U.S. 19 (1964) (racial classification upheld because it was used for purely statistical reasons).

The rational basis test is criticized as soundly as the strict scrutiny test because it provides too much flexibility. Even the dissent in *Bakke* recognized that racial classifications require more than minimum scrutiny.[161] Professor O'Neil has remarked, "[r]acial distinctions are immutable and indelible, and should therefore not be reinforced by governmental classifications to any greater degree than is absolutely necessary."[162] He is also skeptical about whether the rational basis test would provide adequate safeguards to ensure that racial classifications are limited in time and scope.[163] Moreover, when the Court applies this less strict standard, it "entertain[s] a presumption of constitutionality and place[s] the burden on the challenging party to show that the law has no reasonable basis."[164]

Strict scrutiny has been advocated as the best alternative. Otherwise, the Court must determine whether the classification is benign, which would involve the Court in the perilous search for motive. Thus, it is argued, the most constitutionally sound course is to judge both invidious and benign discrimination by the same standard.[165] Contrary to the conclusion reached in *Bakke*, however, numerous commentators and a majority of the Washington Supreme Court in *DeFunis* find that compelling state interests justify preferential admissions programs.[166]

There are several arguments against imposing a strict standard of review. The first is that the effect of strict review would be contrary to the history and purpose of the fourteenth amendment. The intent of the framers of that amendment was to forbid, in the express terms of the nation's fundamental social compact, the continuation of a segregated society. As the Court said in *McLaughlin v. Florida*, "the central purpose of the Fourteenth Amendment [is] to eliminate racial discrimination emanating from official sources in the States."[167] If benign racial classifications were subjected to strict review, however, they would often fall, either because no compelling interest was established, or because a judge will always be able to divine a less burdensome means, as the majority did in *Bakke*. Thus, a literal interpretation of the amendment invokes a standard of review which frustrates the intention of the amendment.

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161. 18 Cal. 3d at 81, 553 P.22 at 1184, 132 Cal. Rptr. at 712.

162. O'Neil, *supra* note 158, at 933.

163. *Id.* The New York court in *Alevy* also stressed the need for time limits in the application of "benign" classifications. 39 N.Y.2d at 336, 348 N.E.2d at 546, 384 N.Y.S.2d at 90.

164. *Developments*, *supra* note 51, at 1087 (footnotes omitted).

165. O'Neil, *After* DeFunis: *Filling the Constitutional Vacuum*, 27 U. FLA. L. REV. 315, 326 (1976).

166. *Id.* at 329–41.

167. 379 U.S. at 191–92.

The second objection to strict scrutiny is that a classification is not invidious unless it stigmatizes a class of persons. Since no stigma would attach to whites deprived of a place in school, the classifications cannot be considered invidious.[168] Third, because whites do not meet the traditional indicia of a suspect class,[169] strict review would be inappropriate. The characteristic of "political powerlessness" is particularly relevant here.[170] Whites are the dominant political force in this country. On the other hand, it is argued that the white majority is not a "monolith" and some whites should not be able to speak, and act, and give up rights for all whites.[171] Professor Brest responds: "Though reasonable people may differ, I doubt that 'reverse discrimination' is likely to become so pervasive at any occupational level in our white-dominated society as to cause cumulative harms or frustrations approaching the magnitude of those inflicted by . . . malign discrimination."[172] Another commentator, Professor Samford, suggests that discrimination against whites should not be considered "racial" discrimination because it does not "purposefully" disadvantage a racial minority.[173] "Purposeful" means no decision would be made "but for" its differential impact upon racial minorities. Thus, since minorities admitted under special programs are not admitted solely because of the unfavorable impact upon whites, the classifications of preferential admission programs are not suspect. Consequently, no strict scrutiny is warranted.[174]

A final reason to eschew the strict scrutiny standard is that if racial preference programs were found to meet the high standard of compelling interest, this might dilute the meaning of compelling interest, as

168. *See* Redish, *supra* note 158, at 362–63.

169. That is, white males are not "discrete and insular minorities" within the meaning of Justice Stone's famous footnote four—the source of strict scrutiny equal protection analysis. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

170. "[T]he 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." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. at 28.

171. *See, e.g.*, United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 180 (1977) (Burger, C.J., dissenting).

172. Brest, *Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 17 (1976).

173. Samford, *Toward a Constitutional Definition of Racial Discrimination*, 25 EMORY L.J. 509, 574 (1976).

174. *Id.* at 577. This "but for" definition of discrimination would also, however, preclude a finding urged by amici curiae below, that the reliance upon test scores was "institutional" discrimination, 18 Cal. 3d at 59, 553 P.2d at 1169, 132 Cal. Rptr. at 697, for the institution could not be said to rely on the test scores solely because of the disproportionate racial impact.

that term is presently understood. As a constitutional safeguard, it might be preferable to differentiate between invidious and benign classifications, and to subject invidious classifications to a strict test. Thus, invidious classifications still would be constitutionally valid only in extraordinary situations.[175]

The cases dealing with preferential admissions offer two alternative methods of analysis—either the middle-level "substantial State interest" analysis suggested by the *Alevy* court,[176] or the strict scrutiny test used by both the *Bakke*[177] and *DeFunis* courts.[178] If the Supreme Court in *Bakke* employs a middle-tier analysis, it must respond to the argument which a majority of the *Bakke* court found ultimately persuasive; that is, if the fourteenth amendment protects the right of an *individual* to equal protection, then Allan Bakke should receive the same protection from the Court as a member of any other race.[179]

Rather than responding to this argument with mere assertions of "irony" and "anomaly" as the *Bakke*[180] dissent and the *Alevy* majority,[181] the Court can make use of the analogy to sex-based discrimination cases where state classifications are permitted to remedy the effects of past societal discrimination.[182] Where the state justifies its actions in this manner in the sex discrimination cases, the Court lowers its middle-level scrutiny to a rational basis standard. Thus, in the reverse discrimination cases the Court could similarly lower its standard from strict scrutiny to a "substantial State interest" test where the state seeks to remedy de facto racial discrimination.

If the Court employs a strict scrutiny test and nonetheless *reverses* the decision below because the classification survives that scrutiny, then its chief concern must be to define adequately the increasingly obscure notion of compelling interest. Compelling interest is seldom defined in judicial opinions, with the result that courts upholding such interests tend to do so in rather summary fashion. Hopefully the Supreme Court can clarify this point in a well-reasoned and deliberate decision; more is needed than a simple statement that the

175. The Court has only upheld invidious classifications twice, both times within the context of a world war. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

176. 39 N.Y.2d at 336, 348 N.E.2d at 545, 384 N.Y.S.2d at 90.

177. 18 Cal. 3d at 50–51, 553 P.2d at 1163, 132 Cal. Rptr. at 691.

178. 82 Wash. 2d at 32, 507 P.2d at 1182.

179. 18 Cal. 3d at 51, 553 P.2d at 1163, 132 Cal. Rptr. at 691.

180. *Id.* at 66, 553 P.2d at 1174, 132 Cal. Rptr. at 702.

181. 39 N.Y.2d at 334–35, 348 N.E.2d at 544–45, 384 N.Y.S.2d at 89.

182. *See* note 152 *supra* and accompanying text.

state's goal is "undeniably" compelling.[183] If equal protection can be viewed from the perspective of a societal majority imposing its will upon a dissenting minority, a "compelling" interest should be more than an interest strongly favored by the majority—the concept first developed to describe an imperative measure necessary to national survival in time of war.[184] If that element of danger or national survival is not essential to a compelling interest, the Court should define the term so that future determinations are not based solely upon an individual judge's perception of what is socially desirable.

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183. 82 Wash. 2d at 35, 507 P.2d at 1184.

184. *See* Koremastsu v. United States, 323 U.S. 214 (1944).