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## More on the Bakke Decision

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## CONTROVERSY

### More on the Bakke Decision:

From Robert M. O'Neil, Kenneth S. Tollett, David E. Feller  
and William Van Alstyne

*Robert M. O'Neil:* In his perceptive essay, Professor Van Alstyne ("A Preliminary Report on the Bakke Case," *AAUP Bulletin*, 64 (December, 1978), pp. 286-297) has gone well beyond the initial level of analysis of the *Bakke* opinions. What he has done, in fact, is to pursue the implications for some considerable distance. That process of extrapolation is made vastly more difficult by the number and the variance of the opinions. As he observes at several points, a defection by any of the four Justices comprising either the Stevens or the Brennan block could not only alter the result, but could also divert the course of the developing law. Yet the Court deserves some sympathy for reasons that are partly obvious and partly not; despite the public excitement over the issue of preferential use of race, *Bakke* is for the Supreme Court truly a case of first impression. For this reason, as well as the intrinsic difficulty of the constitutional issues, our natural desire (and need) for clear answers should be tempered with a measure of understanding and patience. Surely the Court might have done better—and there is evidence in the opinions that a higher degree of consensus was once achieved but lost later in the spring. Yet there is also much helpful guidance in the opinions, and questions which have been so troubling since 1970 can now begin to be resolved.

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Three issues merit further comment here. First, Professor Van Alstyne seems uneasy about the deference which Justice Powell pays to the admissions process in general and more specifically to the commitment to "diversity" through that process. I must confess to some of the same uneasiness, although I may be more inclined than he to be grateful even for small favors. Given the grudging recognition by the courts of academic freedom as an element of first amendment protection, one would not have expected to find the admissions process suddenly accorded such stature. Although Justice Powell does not really tell us, presumably both the adoption and the application of admissions policies can now claim protection comparable to that afforded the statements of faculty members and the political organizations of students. The claim to be made for including admissions decisions within academic freedom is a rather subtle and intriguing one—a claim that one would have expected to be made and accepted at a later time in a case more directly presenting the issue. After the initial surprise that the argument was so readily received when it was not essential to do so—surely Justice Powell could have validated "diversity" as a university interest on other grounds—it seems to me one should express relief rather than anxiety, and get on about the business of seeking new territories to conquer. At the same time, however, the casual acceptance of the academic freedom claim in Justice Powell's opinion could raise doubts about the scope of academic freedom in other dimensions of university life to which it is more central. These issues remain for later cases, and for the moment we should take heart that so significant a feature of higher education has at least received a well-deserved measure of recognition and protection.

There is another kind of uneasiness, however. More explicit is Professor Van Alstyne's doubt whether diversity—however desirable it may be as a matter of academic policy—is truly a “compelling” interest. Justice Powell says that only such interests will suffice to sustain race-conscious programs, whether designed to help or to hurt minorities—a single standard which has much wisdom. Yet he does not offer any formula for determining when an interest is “compelling”—nor, for that matter, did the Court offer any such formula even when they were more in accord on such matters as miscegenation laws and welfare restrictions, both of which required proof of a compelling governmental interest. The failure is not simply one of definition but, as Van Alstyne suggests, goes deeper. One cannot imagine that Justice Powell would uphold a race-conscious program to *reduce* the minority enrollment—to bring in more whites from other states to replace local blacks, for example—simply because “diversity” was asserted as the rationale, and a logical connection between purpose and means could be proved. Thus, despite his rejection of the “double standard” adopted by the Brennan group, there is more than a hint that Justice Powell has in fact condoned a double standard of his own. Evidence of that lapse appears not only in the “diversity” section, but in the discussion of other possible reasons for using race—for example, the desire to meet the medical needs of “underserved areas” through special programs. (It is hard to believe that Justice Powell would uphold a program to force minority medical students or graduates to serve in rural or ghetto areas at lower incomes simply to achieve the laudable goal of improving the distribution of medical manpower. Thus the interest that may well be “compelling” when minorities are helped may be vulnerable when it underlies a classification harmful to minorities).

If Professor Van Alstyne is justifiably critical of the Powell opinion, it seems to me he may be a bit harsh on the Brennan group. While the adoption of a dual standard for racial classifications is troublesome—the more so because it makes *de jure* what remains at most *de facto* in the Powell opinion—not all the dire predictions necessarily follow. Toward the end of the essay, we are warned that four Justices have validated a “theory of racial quotas and racial double standards quite sufficient to fuel a generation or more of ethnic politics under a new order which will consciously distribute opportunity in this country by explicit racial percentages and specific ethnic classifications” (p. 297). Surely the Brennan group is not monolithic. There is, for example, Justice Blackmun's

clear plea that race-conscious remedies should be considered “transitional,” and should last only as long as the catalytic conditions persist. There is also the insistence of the Brennan group that programs for minorities must be addressed to “societal” discrimination—thus implying serious doubts about favoritism for groups (e.g., Vietnamese, Cubans) who may indeed be underrepresented but have not been victims of past racial discrimination in this country. One must also take seriously the Brennan caveat that programs must not be stigmatizing; while the Davis program may well survive this test, special remedial tracks and surely anything like differential grading policies would get few if any votes from the Brennan group. (In fact, the Brennan group seems stricter on the “stigma” issue than Justice Powell; programs designed to achieve “diversity” might well win his approval even if the beneficiaries were in some measure stigmatized.)

The point is that the Brennan opinion, despite its rather casual acceptance of a dual standard for racial classifications, is qualified in other ways. One could well infer that the Davis program represents its outer limit, and that any extension of its race-conscious elements (for example, by admitting the sixteen “Task Force” students directly rather than going back through the general admissions committee) might lose the vote of at least one Justice.

It is for this reason that I would take minor issue with one other part of Professor Van Alstyne's analysis: the suggestion that plans factually very close or even identical to the one before the Court might be sustained under slightly different circumstances. He offers as one example a program not subject to the provisions of Title VI—something of a rarity given the extent to which federal funds pervade those institutions which maintain highly desirable and therefore selective programs. (Even on the private campus, though federal funds may not be withdrawn from any but the offending unit, there is a persuasive argument that racial discrimination is forbidden in all areas of university life by the receipt of federal funding for any purpose). Moreover, this conclusion would follow only in the unlikely event that one member of the Stevens group were to reach the constitutional issue and decide it as the Brennan group did. It seems more likely that the members of the Stevens group would have some trouble even with Justice Powell's position on a factually similar case, much less with the Brennan position. The possibility of a majority of five votes to uphold anything that closely resembles the Davis program seems remote and elusive. It would be far safer if those who are

concerned with admissions policies took as their starting point the clear invalidity of the Davis program, and went on from there. Whether or not one calls this program a quota is unimportant, as Justice Powell wisely cautioned. What is important is that five Justices found the dual-track admissions system to be racially exclusionary (albeit on different grounds). The negative import of the decision is as significant as the positive implication that race may be used under different conditions. The quest for alternatives will be aided by an early and unequivocal rejection of the Davis model. Many other options, which are both fairer and more sophisticated, exist and should be tried by institutions which genuinely seek to expand educational opportunity in constitutionally valid ways.

*Kenneth S. Tollett:* Professor Van Alstyne's preliminary report on the *Bakke* case is most subtle, illuminating, and insightful. I have little quarrel with his summary of the case except for his characterization of the regular admissions program at Davis as selecting from "the best" of the applicants in contradistinction to the special admissions program, presumably not selecting from among the best. In this connection, Justice Blackmun's opinion deserved more attention from Professor Van Alstyne. Justice Blackmun recognized that "the selection process inevitably results in the denial of admission to many *qualified* persons, indeed to far more than the number of those who are granted admission." It is most important at the outset to recognize that in a decision-making arena where there are competing contestants, the values and goals of the game or the enterprise should be decisive in determining who will win or lose. Thus, to the extent that the mission of the university includes ethnic diversity and the redress of societal discrimination, "the best" necessarily embraces some of those in the special admissions program.

I have one other principal reservation or objection to Professor Van Alstyne's descriptive characterization of the case. He states that the question the Court decided "was whether racially separate and unequal admissions standards are . . . constitutionally condemned." I would prefer to restate the question: whether a racially sensitive admissions program which seeks to insure diversity and redress societal discrimination is constitutional. This difference in characterization, I believe, has considerable influence on how one will react to the decision. Thus, although

The basic message should be clear. The Supreme Court did not ban all use of race in the admissions process, though they did ban one particularly heavy-handed preferential program. The responsibility of persons who shape higher education policy—beyond as well as within colleges and universities—is to adapt as best we can to changing, though clearer, constitutional conditions. A person of good will and conscience cannot find in the *Bakke* opinions any basis for relaxation of affirmative action or equal opportunity programs. Indeed, the fact that some may now find an excuse for temporizing or even withdrawing makes a renewed commitment on the part of others even more urgent. There is much work yet to be done, and no shortage of imaginative responses.

Professor Van Alstyne accurately and fairly, indeed subtly, analyzes the case, he nevertheless tilts the reader's mind in a negative direction toward the special admissions program by stating the question so that it resonates philosophically in opposition to the Brown decision. Moreover, his characterizing the fundamental notion of Anglo-American jurisprudence of remedying wrongs as "the amortization of the national racial debt" says something about his sensitivity to the pervasive and vicious mistreatment of blacks and some other oppressed minority groups.

Major Supreme Court decisions like *Bakke* have always had different levels of meaning and implication. Lawyers and some other individuals who conscientiously want to be governed by what the Court decides will comb through such opinions with clear and different perspectives or biases and develop some plausible meaning or interpretation of the decision. If one has very high expectations regarding the reservoir of decency and rationality of the Supreme Court and this society, such an individual, notwithstanding his positive perspective toward affirmative action, may find very much that is disturbing in the opinion, particularly if he is familiar with the sorry history of the United States Supreme Court. Of course, there is another level which may be more symbolic and provocative than anything else, but probably, in political decisions like this, is the most important. One may ask simplistically who won and who lost the case? I fear that this kind of simplistic popular analysis of the *Bakke* decision may in the long run be the most decisive and disturbing aspect of the case. Certainly, to Professor Van Alstyne's

credit, he has not given a simplistic analysis of the opinion.

Whatever one may say about the special admissions program at the Davis Medical School of the University of California, it unquestionably was designed to bring more minorities into the medical profession, including blacks. An assault on the special minority admissions program at Davis was inevitably and inescapably an assault upon bringing more minority groups into medical schools and thus into higher education. Although some may have been sincerely motivated by the notion of racial neutrality in supporting Bakke in his case, an unavoidable outcome of such an assault was to undermine the legitimacy and, in some minds, the desirability of making special efforts to educate blacks and other minority groups. One cannot now fully foresee the consequences of the *Bakke* decision, although it can immediately be seen that it was partially reassuring for Justice Powell in announcing the judgment of the Court to state that race may be taken into account in the admissions process. (It is significant to note that although medical school enrollment is up, the black total is down. The Association of American Medical Colleges has recently released findings that reveal that the number of blacks in the nation's medical schools declined this year despite an increase in overall medical school enrollment, and the proportion of blacks in the first-year medical class is now the lowest it has been since 1970.)

It was disappointing for Justice Powell to write that the special minority admissions program could not be justified upon the basis of "remedying . . . the effects of 'societal discrimination,'" a concept of injury he found "amorphous" and that might be "ageless in its reach into the past."

So much has been written and said about Justice Powell's opinion—with the main substantive arguments of which no other Justice indicated agreement—that I will say little more about it. (To Professor Van Alstyne's further credit, he did give considerable attention to Justice Brennan's opinion in his postscript.) Justice Powell regarded the use of race or ethnic background in the admissions process as suspect and rejected three of the four purposes the program purported to serve. The three rejected purposes were reducing the historic underrepresentation of minorities in medical schools and the professions, remedying the effects of societal discrimination, and increasing the number of physicians who practice in underserved communities. The fourth purpose he accepted, namely, "obtaining the educational benefits that flow from an ethnically diverse student body."

However, he rejected the Davis method of considering race because although " 'the race of an applicant may tip the balance,' the factor of race in contributing to diversity may not be decisive." Back in Oklahoma we would characterize such language as "speaking with forked tongue."

Professor Van Alstyne fairly and correctly states that Justice Brennan in his concurring and dissenting opinion, in which three other Justices joined, thought government may take race into account when it does not demean or insult any race and was designed to remedy disadvantages cast on a race by past racial prejudices or discrimination. Justice Brennan thought the legacy of slavery and the turning of the Equal Protection Clause "against those whom it was intended to set free" in the separate-but-equal doctrine justified taking race into account in the admissions process.

In rejecting the argument that Title VI of the 1964 Civil Rights Act required color blindness, he wrote:

It is inconceivable that Congress intended to encourage voluntary efforts to eliminate the evil of racial discrimination while at the same time forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations.

Thus, since the racial classification in the Davis program served an important and articulated purpose, did not stigmatize or single out any group "least well represented in the political process to bear the brunt of a benign program," and sought to remedy the effects of societal discrimination which resulted in a substantial and chronic underrepresentation of minorities in medical schools, access to which was impeded by the handicaps of past discrimination, it did not violate the Constitution. After reviewing prior relevant cases of the Court, Justice Brennan concluded:

Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. There is no question that Davis' program is valid under this test.

I have quoted at length from Justice Brennan's opinion because I think undue attention has still been given to Justice Powell's opinion.

A discussion of the *Bakke* case from a perspective favorable to affirmative action and special minority admissions programs should give more attention to

Justice Blackmun's and Justice Marshall's opinions. At the very outset I alluded to Justice Blackmun's forthright recognition of how the admissions process actually operates in selective admissions programs. Two other quotations from Justice Blackmun's opinion I think are worthy of special attention in a journal directed primarily at university professors. He wrote further about the admissions process:

It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preference up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

And finally, with almost an existentialist's appreciation for the starkly subtle paradox, he concludes:

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy.

In the discussions of the *Bakke* case, very little attention has been given to Justice Marshall except that a few commentators have called his opinion emotional, although eloquent. Justice Marshall, in his opinion, catalogues in stark terms the history of unequal treatment afforded to blacks and its relationship to our present circumstances. He recites statistics that set forth the difference between blacks and whites which should shock the conscience of all decent human beings. However I am sure most readers of *Academe* know about the shorter life expectancy of blacks, the high infant mortality rate of blacks, the difference in family income and unemployment rates and the gross underrepresentation of blacks in the various high-status trades and professions. If one is familiar with those statistics, one approaches this case from a different perspective. Instead of quoting Marshall's poignant recital of those statistics, I would like to quote at length from another part of his opinion. He writes the following about the Court's judgment:

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of

class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in twentieth century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.

The *Bakke* decision was unstable and in certain respects indecisive. Surely any university sincerely committed to affirmative action and special minority admissions programs has little reason on the basis of the *Bakke* case to discontinue such programs. Yet one wonders why affirmative action and special minority admissions programs have caused so much trouble in academe; for as Paul Jablow has recently written, "If integration was to work at any place in society, it should have worked in the faculties in America's colleges and universities." One of the statistics Justice Marshall gives in his review of the status of blacks in this country is that they make up "2.6 per cent of the college and university professors."

It is a melancholy fact to reflect upon that once the principles and procedures of affirmative action explicitly were made applicable to higher education, the most sustained, insidious, and probably effective assault on affirmative action came from those closely associated with academe. I am not insensitive to the real problems and difficulties imposed upon those who, even conscientiously and sympathetically, try to abide by the procedural and substantive requirements of affirmative action. The problems and difficulties are small in comparison to the wrongs that have been committed and the social benefits to be received by those who have been excluded and denied for so long.

Although the immediate result of the *Bakke* case may be to leave things in a vague muddling state, no one can doubt the depth of the philosophical conflicts involved. It appears that the Supreme Court is reflecting the mood of the majority of white Americans that the interests of that majority are being displaced by affirmative efforts towards equality and

justice. Unable to find solutions to the short-term exaggerated problems facing the country, the negative reaction of the people seems to have spread to the learned men and women in academe whom we look to for counsel on the larger questions of justice.

I believe Professor Van Alstyne is correct when he states that Justice Powell shows considerable deference to universities in accepting as a legitimate purpose of admissions programs the attaining of racial or ethnic diversity. One can argue that this is a value peculiar to academe and deference may appropriately be given to it. Although I take a somewhat purist view regarding the missions and goals of higher educational institutions, yet believe racial diversity is a legitimate educational goal, I am more comfortable with institutions taking race into account to remedy societal discrimination. At least I think the Equal Protection Clause and the Constitution clearly permit that, in a way I am not sure they necessarily condone racial diversity as an expression of academic freedom. Moreover, I subscribe to the third purpose of higher education in the Carnegie

*David E. Feller:* Bill Van Alstyne's otherwise superb description of what the Supreme Court did in *Bakke* (as opposed to what the newspapers and magazines have reported that it did) omits a few, but important, elements.

The most important is that he fails to note, let alone emphasize, the most significant fact about the case: that there was, indeed, an opinion of "the Court," binding as precedent, as distinguished from separate opinions which agree only on the judgment and which are, in no sense, the law. That opinion consists of just two sentences, separately paragraphed for this purpose, in the Powell opinion which were explicitly concurred in by the four Justices who joined in the Brennan opinion. Those two sentences are the only authoritative statements of law in the *Bakke* case. They read as follows:

In enjoining petitioner from ever considering the race of any applicant, however, the Courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

Commission Report and Recommendations in *The Purposes and the Performances of Higher Education in the United States*: "The enlargement of educational justice for the postsecondary age group." The Commission further recommended regarding this purpose:

A determined effort to provide places in college for young persons who wish to attend from low-income and minority groups, with adequate financial assistance for their support and with respect for their cultural backgrounds.

A greater concern for the opportunities available to the total postsecondary age group, and for the total contribution of postsecondary education to the achievement of social justice. [P.4]

Finally, unlike Professor Van Alstyne, I emphatically agree with Justice Blackmun that in order to get beyond racism, we must first take account of race. It is remarkable to me that a person of Professor Van Alstyne's obvious good will, good intentions, and high intelligence, could think the contrary.

This utterance (along with the conclusion, although not in identical language, of Mr. Justice Powell and the Brennan four on the proposition that Title VI proscribes only those racial classifications that would violate the Constitution) is a decision of "the Court" and, hence, authoritative. Nothing else is. Institutionally the court is as free to decide subsequent cases as if all the other language of the opinion did not exist.

That language may, of course, be helpful in speculating as to how the individual members of the Court will vote in subsequent cases, as are comments made in oral argument or prior statements by newly appointed Justices; but it is important for others to distinguish, as the Justices themselves do, between pronouncements concurred in by a majority of the Justices and individual opinions which support the result reached but not the reasoning.

The second comment concerns not an omission but an addition. Van Alstyne says that the four Justices in the Stevens group interpreted Title VI of the Civil Rights Act "as a flat prohibition of any school which receives federal assistance from employing more rigorous admissions standards under which are excluded some students who might otherwise have

been admitted but for the reservation of places for students judged by more permissive standards solely because of their race" (p. 287). They didn't. Nor did they say that "separate and unequal admission policies . . . are . . . forbidden." They did say that Title VI of the Civil Rights Act prohibited exclusion on the basis of race. And it is undoubtedly tempting, since they also concluded that Allan Bakke had been excluded on the basis of his race, to insert into their opinion the words which Van Alstyne does as to the use of differing or separate admission standards to accomplish this exclusion. But, tempting though it be, it is improper to attempt to fill the interstices of the Stevens opinion in this way, since the opinion expressly says that it does not purport to express any opinion as to "whether race can ever be used as a factor in an admissions decision" either under the Constitution or under Title VI.

All that we know from the Stevens opinion, and clearly all that the Stevens opinion is intended to tell us, is that in the view of those four Justices Bakke was excluded from the University because of his race. They carefully, and I believe deliberately, refrained from telling us what characteristic of the Davis program it is that leads to this conclusion. We therefore do not, and cannot, know what variant on the Davis program would, in their view, pass muster under Title VI. My own guess is that this elision is the result of a disagreement among the four as to the reasoning by which the conclusion was reached that was suppressed in order to have an opinion supported by the same number of Justices as joined the Brennan opinion and thus prevent that opinion from being the "lead" opinion. The objective was achieved by omitting any reasoning and inserting the blunt statement that the opinion is not to be regarded in any way as a statement of views as to the propriety under Title VI, let alone the Constitution, of the use of race in the admissions process. The result is that we have four Justices who say that race can be used as it was at Davis, one Justice who says that race can be used, although not in the way that Davis used it, and four Justices who express no opinion on that question, either under Title VI or under the Constitution, other than the bald and unexplained statement that it was used to exclude Bakke in violation of Title VI.

Once we start to speculate, as Van Alstyne quite properly does, as to what this collection of indeterminacies means for future litigation, there is another unknown which he omitted. One of the issues argued by the parties, at the Court's request, was whether the provision of Title VI relied upon by the

four Justices who joined in the Stevens opinion would support a private right of action. The Stevens four said that it would; Powell and the Brennan four said that even if it would it would make no difference, since Title VI embodied only the constitutional restriction. Hence there was no majority for the proposition that there is a private right of action under Title VI, and Mr. Justice White—although agreeing with the substantive result of the Brennan opinion—specifically noted his view that it would not. The question is currently pending before the Court in connection with the identical provisions relating to sex discrimination in Title IX, *Cannon v. University of Chicago*, certiorari granted July 3, 1978 (five days after *Bakke*). If a majority should now hold that Title IX (and hence Title VI) provides no basis for a private action, the members of the Stevens group would then, in any *Bakke* recurrence, be obliged to reach the constitutional question and one or more of them may very well join the Brennan four, as Van Alstyne notes. The possibility that the occasion for such a decision will arise as a result of a holding that Title VI does not support a private right of action is at least as large, in my view, as the probability that this result will occur because those four will regard themselves as bound by the majority decision in *Bakke* that Title VI imposes no greater restrictions than the Constitution.

Finally, as to the descriptive portion of the article, I believe that some mention should be made of the fact that Powell appended to his opinion the Harvard College statement as to its admissions program and explicitly endorsed it as constitutionally permissible. The Harvard program, as set forth in the appendix to the opinion, says explicitly that attention is paid to numbers in awarding "plus" points based on race. Obviously, if the purpose of the "plus" is diversity there is some point at which it is achieved, i.e., a maximum. And Harvard says that, although there is no firm minimum, "it would not make sense" to admit as few as 1 per cent or 2 per cent blacks. Surely Mr. Justice Brennan is correct in saying that it can make no constitutional difference whether the number used in a special admissions program is openly stated or kept within the confines of the room in which admissions decisions are made. We are therefore entitled to conclude from Mr. Justice Powell's explicit approval of the Harvard program that an admissions program involving consideration of race and ethnic origin is not to be condemned as improperly devised, to use the Court's words, if it includes consideration of the number of persons who will be admitted on the basis of considerations of race.

Nor, analytically, would it seem to make any dif-



ference if the desired number of minority admissions is achieved by assigning a "plus" based on race to some of the competitors or by reserving a number of places for which nonminority applicants are ineligible. Powell's opinion would apparently require Davis, for example, to say to the 100 students who would have been admitted there in the absence of its special admissions programs that each is entitled to compete for all of the places, but he would permit Davis to award "plus" points to their minority competitors so designed that the result of the individual competition he requires would be some number, let us say ten, of minority admissions. The Brennan group, on the other hand, would permit the outright reservation of ten places for minority applicants. But the difference between a 90 per cent chance at 100 seats and a 100 per cent chance at 90 seats seems only to be that in the former case the imperfection in the calculation of the "plus" as applied to successive classes may lead to less precise results.

In essence, then, the difference between the Powell view and that of the Brennan four is not the difference between a one-track and a dual or triple-track system, for a one-track system with "plus" points can produce no more or less inequality than a multiple-track system without them. Or, to put the matter in Van Alstyne's words, the result in either case "is necessarily to displace certain persons from positions . . . they would otherwise have filled but for which they are now rendered ineligible . . ." (p. 295).

The differences between the Powell and the Brennan views as to the requirements of a properly devised admissions program involving consideration of race are essentially two. First, as indicated, the Powell prescription seems to require secrecy and vagueness while Brennan would permit openness and precision. As a lawyer I prefer the latter, but I am not at all sure that there are not genuine advantages to the former. Nor do I believe that Mr. Justice Powell is so obtuse as not to have understood exactly what he was doing. The Court was faced with an apparently unbridgeable gap between two positions, behind both of which large social forces had been marshalled, and the potential of a political explosion if either position were explicitly sustained. The option of simply refusing to hear the case was foreclosed because the California Court had come down firmly on one side. The mootness "out" was not available. Hence, he elected a solution which essentially said to the professional schools of America that they could continue, with one possible exception, to do pretty much what they were doing provided they disguised it a little. There are both principled and practical ob-

jections to the requirement of ambiguity which he raises to constitutional dimension. It thrusts upon educators the dubious task of engaging in double talk in order to justify consideration of race. Apparently, however, the Justice—as well as the distinguished institutions which urged this course of action<sup>1</sup>—believed that the political advantages of vagueness and imprecision were worth the cost.

There remains, of course, a second and possibly substantive reason why Powell did not regard the Davis program as "properly devised" while the Brennan group did. Powell justifies distinctions based on race only on diversity grounds and would therefore, at least implicitly, require that factors other than race be used in providing "plus" points (or their negative equivalent, handicaps). The Brennan four would not. On the other hand, the Brennan view justifies the use of differential standards as a "remedial measure" to counter the effects of past discrimination against the preferred groups, and thus limits their permissible use to those situations. Powell would impose no such limitation: any distinction in the name of diversity will apparently do. The difference may be part of the obfuscatory design of the Powell opinion: the racial line is not really so clear if you draw others, or say you are drawing others, as well. I put this aside however (and, as well, the latitude which the Powell view would at least appear to provide for distinctions based on religion, political affiliation, or other attributes that could possibly be said to contribute to diversity) in order to confront directly Van Alstyne's postscript addressed to the Brennan position.

Van Alstyne characterizes the Brennan justification (and, hence, limitation) as a system of "racial transfer payments" to amortize the racial national debt and says that those of the majority chosen to pay are the least likely to be those who benefited from the prior injustice. On this basis he concludes that if the Davis program can thus be justified it is incomplete. Why not a preference in all things: jobs, government contracts, faculty positions, even space in professional journals. Why not, I might add to this parade, lower income tax rates for blacks than for whites, thus—given a progressive rate structure—assessing most heavily those who have benefited most from the presumed past discrimination against blacks?

The answer, it seems to me, is that Van Alstyne has forgotten that the *Bakke* case involved education,

<sup>1</sup> Columbia, Harvard, Stanford, and the University of Pennsylvania.

not the awarding of prizes or money. The state's purpose in providing professional schools is not to give rewards to the most deserving, or to provide a payoff for the best, but to provide training. Concededly, those trained do receive a benefit and, given the virtual guarantee of high earnings which graduation from medical school confers, it is perhaps understandable that the system for allocating the available positions in medical schools therefore be seen as a system of allocating rewards.

Understandable, but wrong. That those admitted to school receive a benefit is an incident to a system primarily designed to select those whose education will best serve society's purposes, not to give benefits to the most "deserving." Thus, in the medical school context, preference for an applicant who comes from and who is likely to return to a rural area over an urban applicant does not signify that the city dwellers owe a debt to the farmers which is being amortized or that the rural applicant is in any sense more deserving. Equally, the suggestion made by many, and hinted at in the Powell opinion, that the purposes of special admissions programs can be served more constitutionally by providing special pre-medical-school training for minority applicants in order to better prepare them for an admissions process that is run without regard to race is nonsense: if it is unconstitutional to prefer minority applicants at the seventeenth year of the educational process, it is equally unconstitutional at the sixteenth or at the first. If a law school may not constitutionally set aside places for minority applicants, CLEO cannot constitutionally provide special prelaw training for minority would-be applicants.

For the same reasons Van Alstyne's inference from the Brennan position does not follow. He says that the not unreasonable Brennan view that the fail-

ure of minorities to present the same level of qualifications as white applicants is due to the effect of past discrimination is incomplete if it does not also permit, or indeed require, that all other public benefits be allocated on a racial basis. What was involved in *Bakke* was the allocation of educational resources to serve the objective of providing society with at least some minority doctors. Preferential treatment in the admissions process was required in order to achieve this objective because there was room for only a tiny proportion of those fully qualified for the training and past discrimination differentially affected the criteria by which those to be trained were chosen. The use of racial preference to balance the effect of past discrimination in order to achieve the desired product mix need imply nothing as to the use of race as a measure of just deserts.

I fully recognize that it is improper to draw generalizations from one or two particular cases. But since Van Alstyne has chosen to use Allan Bakke's personal background to illustrate the problem he sees in the Brennan position, it is perhaps appropriate to conclude in the same vein. Allan Bakke, he says, came from a working class family: his father was a postman. My point (and Brennan's) as to the lingering effect of past discrimination is made if we add that Bakke's home environment included a mother who had received a bachelor's degree from the University of Minnesota at a time when the number of blacks enrolled there, if any, must have been minuscule, and that he himself graduated from Coral Gables High School in Dade County, Florida, a school which no black could have attended because "complete actual segregation of the races, both as to teachers and pupils, still prevailed . . ." (*Gibson v. Board of Public Instruction of Dade County, Florida*, 272 F.2d 763, 766 CA 5 1959).

*William Van Alstyne:* Professors Tollett and Feller chide me for what seemed to them an unduly negative description of the question in the *Bakke* case. That description was, as the reader may recall: "whether racially separate and unequal admissions standards are constitutionally condemned." In contrast, Professor Tollett chose a very different formulation which, incidentally, is nearly the same as the manner the Regents also chose to describe the question in their Supreme Court Brief. "I would prefer to

restate the question" suggests Professor Tollett:

whether a racially sensitive admissions program which seeks to insure diversity and redress societal discrimination is constitutional.

In elaborating the reason why this matter of preliminary description is by no means trivial, Professor Tollett went on to observe:

This difference in characterization, I believe, has considerable influence on how one will react to the decision.

Thus, although Professor Van Alstyne accurately and fairly, indeed subtly, analyzes the case, he nevertheless tilts the reader's mind in a negative direction toward the special admissions program by stating the question so that it resonates philosophically in opposition to the Brown decision.

He is quite right. How one phrases a question, *any* question, does indeed "tilt the mind." His own preferred description most assuredly does this no less than mine. Which, then, is better? Is it true that each is no less instructive than the other, and that the true difference between them lies only in the supportive or in the hostile frame of mind of the author? I do not think that that suggestion exhausts the possibilities at all. I am very grateful for the chance to say why I found the manner in which the Regents characterized the question in *Bakke* entirely inappropriate and altogether too smug.

One may explain the Davis Medical School admissions system, or any system, in any number of ways. Before undertaking to do so, however, it may nonetheless be useful first to touch its most elementary features, to concede what they are, and thus to understand why some sort of explanation seems to be called for. The Davis admissions standards *were* racially unequal. The Davis admission processes *were* racially separate. Indeed, were it not for these features, no constitutional question would arise. Whether these circumstances are unavoidable as a means of providing diversity is important, no doubt, insofar as that may tend to provide some reason for an arrangement that must otherwise be thought highly improper. Whether these circumstances are unavoidable to redress societal discrimination is, at best, also a matter which, if true, may give appropriate pause to thoughtful persons before concluding that the arrangement should, despite its appearance of impropriety, not be constitutionally condemned. None of us, however, does any genuine professional service whatever to the difficulty of the ensuing issues by glossing over the very elements of the plan which are the essence of the controversy.

At one time, I also saw the question very much in the argumentative style in which the Regents presumed to present it, i.e., the style of maximum positive description. But I have privately tested that approach by letting it be used equivalently in other cases, discovering that it works only too well with equally devastating effect to "tilt the mind" too much. It induces a congenial acquiescence precisely when the academic mind needs encouragement to be critical instead. Indeed, my objection to its use in behalf of causes we may deem to be wholly just is no

different from my objection to its use in behalf of causes we may think to be despicable: its intellectual vice is that it literally leaves no room at all to stand against its sheer complacency.

Suppose that the case we had been considering were not *Bakke*, in 1978, but rather a close likeness of *Plessy v. Ferguson*, in 1896. Suppose, that is, it were a case just then contemporary involving the review of a state statute requiring racially separate public schools. I should have thought it reasonable to state the question in that case, equivalent to the dry and noncommittal form I used for *Bakke*, pretty much as follows:

Whether state statutes requiring racially separate public schools are constitutionally condemned.

But a reasonably parallel form of putting the question according to the rhetoric of maximum positive description (like that of the Regents in *Bakke*) would have been something more like this:

Whether a racially sensitive school assignment policy which seeks to minimize the occasions for racial friction and to assure a historically disadvantaged minority an equal opportunity to develop its own course free from domination in schools in which its culture would become submerged and its children likely to be overwhelmed by a racial majority which has for two centuries presumed to oppress it, is constitutional.

This question is self-answering: a governmental plan accomplishing so much good (and the question as formulated acknowledges no other possibility) must assuredly be constitutional. And so, indeed, might one rewrite *Plessy v. Ferguson* even now.

If it is true that my description of the basic question in *Bakke* was more jarring to the sensibilities of readers than seemed either necessary or even in good taste, it is because I have looked back at the consequences of sharing the congeniality of more "sensitive" and less adversarial descriptions of what we have done before and found within them a disastrous courtesy. The state is called upon to account for what it does. We do no cause any good to proceed differently about the matter in *Bakke* than we should have done in *Plessy* (but, in *Plessy*, as only the dissenting Justice Harlan presumed to do).

As to the other comments on my brief paper, I have too little to say that could possibly be convincing to those not already sharing my misgivings about the basic issue. That issue is the constitutional licitness in the government's use of race, now deployed to re-

quire less of some persons than of others, on the basis that this is a necessary and proper way to "help" them and yet communicate no intimation of stigma. I am admittedly doubtful that we shall "get beyond racism" by "first taking account of race" in

this or in any similar fashion, and I remain apprehensive of an accordionlike fourteenth amendment that appears to provide no repose against the perpetual temptation to submit racial classifications to the vicissitudes of politics in this country.

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