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Board of Regents v. Bakke: An American Dilemma Revisited

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BOARD OF REGENTS v. BAKKE: THE ALL-AMERICAN DILEMMA REVISITED

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INTRODUCTION

Since its adoption the Equal Protection Clause[1] has served as a catalyst for the eradication of racism in the United States.[2] Since at least 1954,[3] the United States Supreme Court has been at the forefront in equal protection implementation. Significantly, the Court has refused to fashion a *per se* rule of unconstitutionality for governmental programs which establish racial classifications. Rather, racial classification cases have been treated with great sensitivity by the Court. Chief Justice Burger reflected that sensitivity in *Swann v. Charlotte–Mecklenberg Bd. of Educ.*[4] when he stated that:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities. . . .[5]

Similarly, in *North Carolina State Bd. of Educ. v. Swann*[6] the Court observed: "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."[7]

Indeed, in cases in which the racial factors have been used in programs designed to eliminate racial isolation and create opportunities otherwise withheld from minorities, the Court, although at times unclear in its approach, has gone to great lengths to effect the ideal.[8] Thus, with some regret

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1. U.S. CONST. amend. XIV, cl. 1.

2. *Compare* Steel, *Nine Men in Black Who Think White*, N.Y. TIMES MAGAZINE, Oct. 13, 1968, at 56 *with* Daynard, *Test Case Litigation as a Source of Significant Social Change*, 18 CATH. LAW. 37 (1972).

3. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

4. 402 U.S. 1 (1971).

5. *Id.* at 16.

6. 402 U.S. 43 (1971).

7. *Id.* at 46.

8. *See* United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144 (1977). See text accompanying notes 60-62 *infra*.

we reviewed *Regents of the University of California v. Bakke*[9] and the full Court's refusal therein to treat the important question of whether public institutions may constitutionally attack the legacy of slavery through special programs that employ racial criteria for individual admission or advancement. In *Bakke* a badly splintered Court could only agree to disagree. While the nation sought guidance from the Supreme Court, the "Republican school master"[10] retreated under a blanket of technicalities; only five justices recognized the compelling need for a decision here and now.[11]

Justice Powell was among those five. Following the argument of the plaintiff-respondent, he characterized the University of California at Davis admissions program as a form of "reverse discrimination."[12] The main reason for that conclusion, he said, was that the Davis program excluded all white applicants from being considered for sixteen of the one hundred available seats in the freshman Medical College class.[13]

Powell's labeling of the Davis program as "reverse discrimination" is important. Not long ago, such programs were known primarily as "affirmative action." The change in terminology reflects an underlying reversal in the attitude taken toward those programs. Whereas "affirmative action" captured the imagination of the New Frontiersmen and the Great Society, reverse discrimination reflects the language of the Me Generation, saying in effect that enough has been done, that an equal footing has been restored. Thus, blacks are said to be free to attend any public or private school, sit where they like on public transportation, use any restaurant, sleep in any motel, use any public toilets, marry whom they ethnically please, purchase or rent any house, register to vote and vote. In short, according to this new conservatism, blatant racism is on the wane.

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9. 98 S. Ct. 2733 (1978).

10. For a view on the role of the Supreme Court, *see* Baldwin, *The United States Supreme Court: A Creative Check of Institutional Misdirection?*, 45 IND. L.J. 550 (1970).

11. Justices Powell, Brennan, Marshall, White and Blackmun recognized that need.

12. 98 S. Ct. at 2747-64. Perhaps the term "preferential minority admissions" would better suit the analysis. With the exception of congressional statutory mandates, preferential admission programs are voluntary in nature, not compelled. The programs are fashioned by whites, not by blacks; they are ameliorative in nature, seeking to accomplish what Chief Judge Coffin suggested in Essoc. Gen. Contractors v. Altschuler, 490 F.2d 9, 16 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974): "The first Justice Harlan's much quoted observation that 'the Constitution [is colorblind] . . . [and] does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights,' Plessy v. Ferguson, 163 U.S. 537, 554 (1896) (dissenting opinion), has come to represent a long term goal. It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities."

13. The medical college application form specifically listed: Black/Afro-American, American-Indian, Mexican/American or Chicano, Oriental/Asian-American, Puerto Rican (Mainland), Puerto Rican (Commonwealth), Cuban. *See* Petition for Certiorari, Appendix A at 5a, n.4, 98 S. Ct. at 2733 (1978).

Yet, when we examine the pattern of gross national well-being, the most startling and visible fact is that blacks are the poorest and least privileged identifiable ethnic group in the United States. Almost every statistical indicator bears out this conclusion.[14] Indeed, there appears to be an iron law of racial caste; a law operating with the invariable determinism of the physical laws of cause and effect; and that law seems to state that to be black is to be disadvantaged and deprived of what is desirable in the system.[15]

We interpret affirmative action to be a theory of social justice. As we perceive the fundamental ideal of affirmative action, it can be stated simply: affirmative action draws upon the ideal that a major purpose of political society is the welfare and progress of all citizens. That society, by formal and informal processes, may deprive identifiable segments of the population of valuable goods and opportunities. These processes historically may have sufficient impact so as to require a politically and legally significant response; affirmative action is just such a response. It is a program of social dimensions.[16] The difficult moral issue which is raised by affirmative action programs involves the reconciliation of social justice with principles of individual justice. This dilemma is often circumvented by the assault upon affirmative action, by assuming a "melting pot" of ethnic homogeneity.[17] The proponents of affirmative action, on the other hand, while acknowledging a melting pot culture, draw attention to the unmelted lumps.[18] Nevertheless, the real question that remains is how a theory of and about racial equality can be justified under principles of individual fairness. This question seems to be the dilemma with which Justice Powell struggled throughout his swing opinion.

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14. The key indicators of gross national well-being are roughly as follows: (1) infant mortality, (2) maternal mortality, (3) life expectancy, (4) income/poverty, (5) educational opportunity, (6) access to satisfaction of health expectations through life, (7) minimal needs, (8) political and civil rights, (9) special mobility, (10) freedom of choice in lifestyle, (11) access to and use of leisure time, (12) physical activity, (13) aesthetic enjoyments, and (14) ecological decay.

15. In the economic sphere, the marginality of the black American is most pronounced. Black unemployment figures for 1976 stood at 13.1% or nearly double the national average. Moreover, black unemployment has nearly doubled since 1968. Unemployment for blacks in their late teens and early twenties revolves between 30% to 40% and averages about 35% for the entire country. The following are the figures of unemployment for 1976:

White unemployment	7.0%
Black unemployment	13.1%

See 1977 Statistical Abstract of the United States XVIII (Dep't Com.). *See also* Ayers, *Decade of Black Struggle: Gains and Unmet Goals*, N.Y. Times, April 2, 1978, at 1, col. 4 and at 18, col. 1; Marks, *Life in the Ghetto Still Without Hope*, THE OBSERVER, March 5, 1978, at 8, col. 3, 4 & 5.

16. *See, e.g.*, Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Kerckhoff & Campbell, *Race and Social Status Differences in the Explanation of Educational Ambition*, 55 SOC. FORCES 701 (1977); Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

17. *See generally* N. GLAZER, AFFIRMATIVE DISCRIMINATION (1975); Novick & Ellis, *Equal Opportunity in Educational and Employment Selection*, 32 AMER. PSYCHOLOGIST 306 (1977).

18. Dworkin, *Why Bakke Has No Case*, THE NEW YORK REVIEW, Nov. 10, 1977, at 9.

While we admire Justice Powell for coming to grips with the issue of reverse discrimination, we respectfully disagree with his conclusion. Furthermore, because four members of the Court did not speak to the constitutional issue in *Bakke*, while four others would have upheld the Davis plan, the validity of the Davis-type program under the Equal Protection Clause remains unresolved.[19]

The question of reverse discrimination will continue to occupy the Court's time; other cases are already destined for a constitutional showdown.[20] Presumably then, the "silent four" of the *Bakke* "majority" will be forced to confront the constitutional issue squarely. Our intention in this article is to focus on the Powell opinion, the only one to find constitutional infirmity in the Davis plan. In our opinion, regardless of the post-Civil War governmental efforts to incorporate the newly freed slave into American society, they nevertheless have failed. The vestiges of slavery still exist even after the constitutional and legal emancipation proclamation of the 1950s and 1960s.[21]

THE VESTIGES OF SLAVERY

From 1619 to 1865 the social environment for the majority of North American blacks was the slave plantation.[22] American slavery, although created in the plantation system, constituted a social system which extended far beyond the plantation's physical confines. Appreciation of this phenomenon requires a thorough examination of the pre-Civil War slave society.

Black slaves had been forcibly separated from the familiar environments of tribal Africa. There the black individual drew important support from the extended family and its culture and systems of communication, roles, rituals, and rites of passage. The wholesale transfer of African humanity to America made no attempt to provide cross cultural adjustment or transition. Instead, the black was viewed as subhuman, akin to the plantation animal. Rather than accommodate the tribal institutions, the plantation owners directed their efforts toward the creation of suspicion, distrust and conflict among the blacks

19. Justice Powell was the only member of the Court to characterize the Davis plan as unconstitutional reverse discrimination. Justices Stevens, Stewart and Rehnquist and Chief Justice Burger preferred to invalidate the Davis program on statutory grounds. Four members, Justices Brennan, White, Marshall and Blackmun concluded that the Davis plan survived constitutional challenge.

20. To understand the predictive value of *Bakke* the reader should examine Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977); it would seem that legislatively created "reverse discrimination" quota programs would survive a constitutional attack. *See also* Scherer, *Bakke Revisited*, 7 HUMAN RIGHTS 22 (1978).

The Public Works Employment Act of 1977 may draw the "Stevens Wing" out as to the constitutionality of an act of Congress setting specific minority quotas. Various cases already in the appellate process promise adjudication of parallel issues. *See, e.g.*, Rhode Island Chapter, Assoc. Gen. Contractors of Amer. v. Kreps, 450 F. Supp. 338 (D.R.I. 1978).

21. *See* Williams, *Legal Restrictions on Black Progress*, 21 How. L.J. 47 (1978). The Supreme Court decisions beginning with Brown v. Bd. of Educ., 347 U.S. 483 (1954), through at least Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) tell the same tale.

22. *See generally* D. BELL, RACE, RACISM AND AMERICAN LAW (1973).

themselves. The orientation to the new institution of the slave plantation was harsh in its shock, its physical deprivation, its loss of humanness, its emotional trauma.

The profitability of the plantations was facilitated by the master-slave structure and the treatment of slaves, in practice and in legal theory, as property. Yet that same structure conferred none of its benefits on the slave. In fact, maximum exploitation and control were encouraged.

The black slave was given a regimented schedule and was deprived of privacy, power, property, and geographic mobility. Even education and religion, which were in the 1700's encouraged on economic and moralistic grounds, were later throttled because of fear that they would promote rebellion. Indeed, the property theory of slavery undermined the rationale for mass improvement: as subhumans, little significance was attributed to even the basic human needs of blacks; moreover, it was illogical to accommodate education and Christian religion, which were generally viewed as needs of a higher order.

As individuals, blacks were isolated from society and treated as inferior, unusual and socially undesirable. Even as black individuality was destroyed, so was black culture. The slave perceived himself as powerless. Traditional family subsystems were inhibited under the pressure of white sexual harrassment and forced mobility. Meanwhile, the rudimentary and routine tasks assigned to the slaves and the equation of good behavior with submission undermined the development of an indigenous leadership. Self-organization was thus minimal if not non-existent.

Without the internal and external prerequisites for successful mass defiance, the blacks seldom moved to organize effective revolutions. In the wake of the infrequent attempts at liberation, whether by escape or rebellion, punishment was so severe, and custodial regulation so strengthened, that future reorganization and resistance was effectively quashed. Ultimately, though some slaves may have continued to nurse notions of liberation, most sought to adjust to their situation. The slave mentality flourished, replete with religion, group prayer meetings, and work songs. Untle Tom, like the whites, viewed his predicament as rational: the common church doctrine was that blacks were suffering for prior sinful acts or that, as nonhumans, they were not admitted to the ranks of the chosen.

Thus the ideology of black slavery was non-revolutionary, non-liberating. Rather, under the harsh, hopeless plantation system, the black spirit created techniques and theories designed to reduce tension and cope with problems. Thus, plantation slavery extended far beyond its physical boundaries. It affected freemen, runaways and parolees in geographic areas beyond the South. The theory of blacks as inferior beings reached even into local, state, and national legislation. The Jim Crow laws formalized and enforced plantation attitudes.

The Civil War did in part bring about the dissolution of the plantation institution: it destroyed its physical properties and displaced its personnel. Yet the War did not bring freedom to blacks. The codes were not rewritten. Eradication of the plantations did not confer upon the former slaves either

economic or political power. The South had little need for blacks absent plantations on which they could be made to work. Nor was there leadership or significant organization among the blacks themselves. Individuals and children of individuals who had long been passive did not suddenly become aggressive. Individuals who had been dictated to did not organize overnight. Blacks did not automatically acquire self-respect, political power or, crucial in the capitalistic order, property. As a result, the children of the slave plantation were "freed" only to be adopted by another dehumanizing institution: The slaves moved almost soundlessly from the dirt of the plantation to the concrete of the ghetto.

The ghetto contained many of the institutional characteristics of the plantation. Although no longer directly controlled by an overseer or master, the blacks have been continuously manipulated by white society. As merchants, employers and landowners, whites have retained control over the housing, mercantile, and job arenas and precluded blacks from power and property. Feelings of self-worth continue to be frustrated. Education has been minimal and often distorted. The primary ideological bond—religion—has prospered primarily as a pacifier and offered solace largely through resignation. Without access to the opportunities offered by capitalistic democracy, the defeated, manipulated, apathetic atmosphere of the early slave plantation has been continually reproduced. The institution of plantation slavery did not disappear with the Civil War.[23] Rather, equality was a deferred commitment. The source of power--property—continued to be withheld.

THE SETTING

When the medical school of the University of California at Davis opened its doors to the first class in 1968, there were no minority students. By 1970, however, the medical faculty had implemented a special admissions program to compensate for the effects of social discrimination on disadvantaged appli-

23. The seeds for future fair treatment have always been present. One was founded upon the ideal that "all men are created equal," even though the nation practiced and tolerated unequal treatment of one race of persons. Although the founders argued for an open society, it did not include the black. Thus, after the thirteenth, fourteenth and fifteenth amendments, blacks remained not as slaves but as inferior citizens if indeed "citizen" can be said to be descriptive of their position. *See* G. MYRDAL, AN AMERICAN DILEMMA (1944). The purpose and intent of the fourteenth amendment (as well as the thirteenth and fifteenth) was to insure equality before the state for all regardless of race, color or creed. But the Congress that enacted the 1866 Civil Rights Act, from which would flow the fourteenth amendment, knew that "in some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense." CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866) (remarks of Senator Trumbull, who introduced, reported and managed the bill which became the Act). It was the intention of the Act, and of the fourteenth amendment, to disallow such "custom" as it operated through the sentences imposed by individual judges and juries. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (remarks of Senator Trumbull). However, merely because the black entered the twentieth century armed with the Civil Rights Act and the fourteenth amendment did not mean that the stigmatization he had acquired as a slave was readily removed.

cants of racial and ethnic minorities.[24] The major objectives of the "Davis" plan were (1) to enhance diversity in the medical student body and the profession and (2) to eliminate historic barriers to medical careers for disadvantaged persons of racial and ethnic minority groups.[25]

The special admissions program measurably increased the number of minority students in the student body. In 1970, the first year of the program, eight minority students were specially admitted to a class of fifty.[26] In 1974, in a class of one-hundred, sixteen minority students were accepted through the special program. In accordance with the goal set by the faculty, the sixteen were chosen from a pool of minority applicants only. Thus the selection procedure reduced the number of seats available to eighty-four. Whites were not permitted to vie for any of the sixteen minority seats.

Allan Bakke, a white male, applied for admission to the Davis Medical School in 1973 and again in 1974. There were 2,644 applicants in 1973 and 3,737 in 1974. Mr. Bakke, although a highly rated applicant each year, was not placed in either the hold category or in the admit category.[27] Following his second rejection Mr. Bakke filed a complaint in the state court against the university, seeking injunctive and declaratory relief ordering his admission on the ground that the special admissions program reduced the number of places available to him by sixteen and therefore denied him equal protection under the laws in violation of the fourteenth amendment of the United States Constitution.[28] The main thrust of his argument was that (1) he was denied admission solely because he was white and (2) Davis had no prior history of racial discrimination.[29]

The California supreme court agreed, holding that the Davis program was unconstitutional "because it violates the rights guaranteed to the majority by the equal protection clause of the Fourteenth Amendment of the United States Constitution."[30] Examining the Davis plan under the "strict

24. Petition for Certiorari at 23A-24A. Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978).

25. *Id.* at 5A.

26. By 1974 the application for medical school asked the applicant whether he would describe himself as a "White/Caucasian" or as a member of some other identifiable racial or ethnic group and whether he wanted to be considered as an applicant from one of the specified minority groups, such as Afro-American, American-Indian, Mexican-American, Asian-American: There was a space for the applicant to list a minority grouping not enumerated in the application. *Id.* at 4A-5A.

27. Bakke did not attempt to be considered as a minority applicant. He therefore competed for one of the 84 slots available to all applicants. He was not admitted to any of the 10 medical schools he applied to. Nor was he placed in a hold category. The trial court ruled that Mr. Bakke failed to meet his burden of proving that he would have been admitted in either 1973 or 1974 had there been no minority program. The appellate courts shifted the burden of proof from Bakke to the Board of Regents, thus making Bakke's claim much easier to establish. Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. at 2742-43.

28. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 38, 553 P.2d 1152, 1155 (1976).

29. Brief of Respondent, Petition for Certiorari to the Supreme Court of California, Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152 (1976).

30. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d at 63. The court considered neither the constitutionality nor the applicability of Title VI of the Civil Rights Act of 1964. Nor

scrutiny" standard, the California court conceded that the Davis admissions program served a compelling governmental interest,[31] but found that the method chosen to accomplish that end was too drastic.[32] While upholding all aspects of the Davis plan in which race was not used in a "discriminatory manner," the court suggested that, if non-racial alternatives were available to achieve the same purpose, the university's plan would fail unless the university could meet the heavy burden of demonstrating that the method chosen was the least detrimental "to the rights of the majority."[33] Thus, the court concluded that the trial court had erred when it imposed upon Mr. Bakke the burden of proving that he would have been admitted in the absence of the Davis plan, and remanded to the trial court for a determination of whether Bakke should be admitted.[34]

In its petition for rehearing, the California Board of Regents conceded that because of Mr. Bakke's high ratings in the admission process, the university would be unable to sustain the heavy burden of justifying his rejection,[35] the burden placed upon the Regents by the California supreme court. The petition was denied and the issue of affirmative action programs and "reverse discrimination" went to the United States Supreme Court on a petition for certiorari.[36] The Supreme Court upheld the order requiring Davis to admit Bakke, but produced six contradictory opinions, no one of which commanded a majority of five on a single issue.[37] Only four of the justices joined even in the affirmation of the admission injunction, which was granted on the ground that race should not be a determinant of admission.[38]

Four justices, led by the opinion of Mr. Justice Stevens, refused to review the constitutionality of affirmative action programs.[39] In doing so, they essentially echoed Justice Rehnquist's conclusion in his dissenting opinion

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did the court analyze the application of the California Constitution. The court based its opinion solely upon the fourteenth amendment to the United States Constitution.

31. *Id.* at 53, 553 P.2d at 1165.

32. "[T]he University has [not] met its burden of demonstrating that the basic goals of the program cannot be substantially achieved by means less detrimental to the rights of the majority." *Id.*

33. *Id.*

34. *Id.* at 64, 553 P.2d at 1172.

35. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 252 (1976).

36. Petition for Writ of Certiorari at 10-11, Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978).

37. 98 S. Ct. 2733 (1978). *But see Bakke's Indecisiveness May Be its Strength*, 64 ABA J. 1348 (1978).

38. In brief, Justice Stevens, with whom the Chief Justice, Justice Stewart, and Justice Rehnquist joined, focused exclusively upon the legislative intent of Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d at d5. He concluded that Title VI mandates color-blindness; hence, Bakke should be admitted because Davis failed to follow the command of Title VI. Justice Powell disagreed, asserting that Bakke should be admitted because Davis failed to sustain the burden of demonstrating a governmental need to take race into account on its admissions program. *See* Abernathy, *Affirmative Action and the Rule of Bakke*, 64 ABA J. 1233 (1978).

39. Joining Justice Stevens were Justices Rehnquist, Stewart and Chief Justice Burger. This marked the court's second refusal to review the constitutionality of affirmative action programs. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974).

in *Nixon v. Administrator of General Services*,[40] that as "a matter of original inquiry," the Constitution does not require the Supreme Court to be "the ultimate arbiter of whether one branch has transgressed upon powers constitutionally reserved to another."[41] They refused to consider the constitutional and moral issue of racism in the United States, but instead left to elected legislatures the task of enforcing the anti-majorities provisions of the fourteenth amendment. The issue before the Court, they said, revolved entirely around the interpretation of Congress' intent in enacting Title VI of the 1964 Civil Rights Act. Finding that Title VI was "colorblind," the four justices reasoned that the Davis program illegally considered race as a factor in admission.

The remainder of the Court disagreed. Justices Powell, Brennan, Marshall, White, and Blackmun concluded that the statutory issue could not be analyzed without reaching the constitutional question, because the statute could not without more condemn the Davis plan unless the equal protection clause also condemned the plan.[42] Of these five justices, four concluded that constitutionally, Mr. Bakke had no cause of action. Mr. Justice Powell, on the other hand, agreed that the equal protection clause prohibits specific quotas unless an institution can demonstrate that the specific quotas represent means to achieve goals of compelling importance. For example, a state university might adopt specific quotas if a court of competent jurisdiction or an administrative agency finds a history of institutional rascism to have existed within that jurisdiction.[43] Otherwise, Justice Powell expressly ruled out all admissions programs that targeted admission for specific categories of minorities, while approving programs that had no target number for minority acceptance. He argued that race could be taken into account as one factor in determining whether an applicant would add to the diversity of the student body.[44] Thus, race could tip the balance in favor of a particular applicant, all else being equal.

Moreover, Justice Powell distinguished goals from quotas. According to Justice Powell, if an institution decided through its admissions process that a proportion of the entering class would be filled by minority applicants in order to achieve one of the goals of diversity, the plan would be permissible as long as a fixed number of seats was not mandated. For Powell, goals are permissible because unlike number quotas they do not necessarily prefer one group over another.

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40. 433 U.S. 425, 545 (1977) (Rehnquist, J., dissenting).

41. *Id.* at 599.

42. *Compare* Washington v. Davis, 426 U.S. 229 (1976) *and* Village of Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977) *with* United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

43. *See* Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977).

44. Justice Powell did not rule out diversity in the profession as one of many goals. In *Bakke* the Board of Regents argued that delivery of health care services to communities currently underserved was a relevant consideration, yet they failed to demonstrate why whites could not or would not accomplish that goal as well as minorities returning to their own communities.

Once a challenge is made to the goals, the *Bakke* decision provides little guidance as to the applicable equal protection standard to be employed by a court. The four justices who voted to affirm the Davis plan, Justices Brennan, Marshall, White and Blackmun, argued for a middle tier test.[45] They argued for a three-pronged standard to be employed by the finder of fact. First, "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."[46] Second, an admissions program adopting race as a criteria must be "reasonably used in light of the program's objectives."[47] Third, race cannot be used to "stigmatize any discrete group or individual."[48] For these justices, the key considerations include under-representation in the particular profession and clear evidence of historical and governmental discrimination.[49] The admissions committee ought to be allowed to utilize race as a factor in admission simply because no other method achieves the desired result. Beneficial classification of ethnic groups, however, is valid only if the groups have suffered past discrimination resulting in lower educational achievements.[50] In the instant situation, according to Brennan, no fundamental rights were involved because whites as a class do not have any of the "traditional indicia of suspectness."[51] "[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."[52]

Justice Brennan's statement highlights the crux of the judicial debate surrounding affirmative action programs. As both he and Justice Marshall point out, the history of black Americans is unique. As a group, blacks are the only segment of the population to endure, withstand and overcome slavery. Justice Marshall argued in *Bakke* that in order to fully understand the contemporary black American, one must develop an awareness of the cultural context of the pre-Civil War Negro.

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45. *See* the discussion in Craig v. Boren, 429 U.S. 190 (1976). *See also* Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

46. 98 S. Ct. at 2789.

47. *Id.* at 2791.

48. *Id.*

49. *See generally* Broderick, *Preferential Admissions and the Brown Heritage*, 8 N.C.C.L.J. 123 (1977); Brief of the American Bar Association as Amicus Curiae, DeFunis v. Odegaard, 416 U.S. 312 (1974).

50. *See generally* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967); Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See also* B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973); HENDERSON, NEW ROLES FOR THE LEGAL PROFESSION IN RACE, CHANGE AND URBAN SOCIETY 483 (P. Orleans & W. Ellis, eds. 1971); Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions:* DeFunis v. Odegaard, 49 WASH. L. REV. 1 (1973); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971).

51. 98 S. Ct. at 2783.

52. *Id. See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).

Yet that point escapes a majority of the Court. Unfortunately, in a time when vision and courage were necessary to reaffirm a faith in the unifying force of legal institutions, four justices ignored Justice Marshall's plea. Indeed, those four, joined by Justice Powell and the three silent justices, seemed to reaffirm an earlier Court's assessment of discrimination when that Court concluded:

> When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.[53]

"Discrimination:" Its Definition and Relevance in *Bakke*

One of the problems with the "formal" sources of law attending the control and regulation of the nation's race relations is that the fourteenth amendment does not use the term "discrimination."[54] Similarly, the Civil Rights Act of 1964, although it uses the term "discrimination," does not define it in the statute or in its legislative history.[55] Moreover, according to five justices in *Bakke*, the "majestic" sweep of the language in the Civil Rights Act codifies the intent of the fourteenth amendment, suggesting that standards applicable to Supreme Court review of race-related claims should mirror the general standards the Court has adopted to determine the scope of review under the fourteenth amendment.

Yet in *Washington v. Davis*[56] the Court, considering whether any distinction existed between Title VII of the Civil Rights Act of 1964 and the fourteenth amendment, concluded that discrimination under the equal protection clause differs from discrimination under Title VII. For there to be a constitutional violation, according to the *Davis* Court, there must be a clear showing of discriminatory motive.[57] Thus the majority of seven was placing upon discrete and insular minorities the burden of establishing illegitimate motives on the part of government before the equal protection scrutiny would be triggered.

As to the statutory issue, the Court insisted that a separate test be applied, a test that demands a specific tracking of the particular statute.[58] For example,

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53. Civil Rights Cases, 109 U.S. 3, 25 (1883).

54. *See generally* Brest, *supra* note 16.

55. The precise language of §601 is as follows: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." See B. Schwartz & R. Stevens, Statutory History of the United States 1017-1352 (1970).

56. 426 U.S. 229 (1976).

57. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1253 (1970).

58. In Washington v. Davis, 426 U.S. 229 (1976), Justice White, speaking for the majority, pointed out that invidious discrimination, if challenged constitutionally, must be

in *Bakke* Justice Stevens read Title VI as applying to any person discriminated against solely because of the color of his or her skin.[59] Thus, it is easier to find a statutory violation of racial discrimination than a constitutional violation, at least according to Justices Stevens, Rehnquist, Stewart, and Chief Justice Burger. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*[60] apparently supports such a conclusion. In *Carey*, New York attempted to comply with the Voting Rights Act.[61] The Act required New York to utilize explicit racial criteria in order to avoid diluting voting power of minorities. The Court sustained the New York plan. Although conceding that Hasidic Jews had been injured as a result of the purposeful use of racial criteria to achieve the goal required by the Act, the Court concluded that the disparate treatment was unintended. The injury was inevitable but not purposeful within the meaning of equal protection, because New York was responding to valid federal legislative requirements. The legislative intent was not to invidiously discriminate against the Jewish voters.[62]

Despite varying statutory and constitutional standards, the major emotional issue remains whether affirmative action programs are valid societal responses to past overt and present covert acts of racial inequity. On the emotional level, as well as in the judicial sphere, the issue centers on confusion between the words "race" and "discrimination."

The concepts of "race" and "discrimination" examined outside a context of social and political practices are difficult to define in the abstract. Indeed, the term "discrimination" may reflect usages that are prerogative, neutral or affirmative. Conceptually and normatively, there is nothing intrinsically good or bad in the term "discrimination" or "race." Even when we seek to give empirical reference to these concepts for scholarly purposes, their meaning often tends to be opaque and slippery, and may or may not be attached to moral judgments. On the one hand, these or similar concepts have been used for legitimate policy-making purposes. On the other hand, the concept of "racial discrimination" is imbued with universal moral disapproval. In the United States the term is generally viewed as descriptive of unlawful conduct, as is demonstrated by the flow of decisional and statutory law since at least 1954.

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found to be purposeful. To demonstrate nothing more than a racially differentiated impact would be insufficient to trigger equal protection. The allegation is not irrelevant, however, for as the Court noted in Alexander v. Louisiana, 405 U.S. 625 (1972), once a prima facie case of governmental discrimination has been made, the burden shifts to the government to rebut by a showing "that permissible racially neutral selection criteria and procedures have produced the monochromatic result." 405 U.S. at 632. Where legislation is involved, the Court examines the legislation to determine if it is rationally related to a constitutionally permissible governmental interest, thus leaving Congress a more flexible weapon in the fight against governmental segregation. *See also* Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

59. Justice Stevens cited McDonald v. Santa Fe Trail, 427 U.S. 273 (1976) as an example of the implementation of statutory rather than constitutional standards.

60. 430 U.S. 144 (1977).

61. 42 U.S.C. §1973(c) (1970).

62. United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. at 165.

The problem we perceive in Justice Powell's reasoning is that lexically, the terms "race" and "discrimination" can engender meanings that are pejorative, benign, or affirmative, depending on their context. One would have to be unusually astigmatic, however, not to appreciate the context in which these terms have been used in the operative legislation, or in the specific historical context of American race relations. In that context, it was hardly a problem to determine what discrimination meant to the discriminator or his victim; nor was it difficult to ascertain how the victim was selected as a target for deprivational treatment.

Justice Powell did attempt in *Bakke* to explain the meaning of "discrimination," but achieved no more than a suggestion that, like other highly generalized words, the term may be undefinable. For this, reliance was placed upon a Holmesian insight into the nature of words. Words like "discrimination" and "equal protection" are "the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which [they are] used."[63] Holmesian wisdom is always a promising start in constitutional adjudication. However, the Powell analysis is stronger where it analyzed the idea of discrimination in the context of the major, immediate purpose of section 601 of Title VI. According to Justice Powell, section 601 was intended to guarantee black Americans "equal treatment." He noted that it was discrimination against blacks that was viewed by Congress to be a "pressing problem"[64] and that a recurrent theme of the law's history was the "plight of Negroes seeking equal treatment" in programs receiving federal funds.[65]

The paradox of Justice Powell's view is that it recognizes that the thrust of the concept "race discrimination" is meant to supervise a specific legislative purpose in the Civil Rights Act of 1964 in a clearly articulated context; but he nonetheless severed the notion of "discrimination" from that of "race" when he analyzed the scope of review problem presented by *Bakke*.[66] If Bakke's claim is to have meaning within the specific setting of United States race relations and its historic heritage, it must be a claim that, at least minimally, meets a test of discrimination based on race.[67] Justice Powell

63. Towne v. Eisner, 245 U.S. 418, 425 (1918).

64. 98 S. Ct. at 2746.

65. *Id.*

66. Unfortunately, the drafters of the Civil Rights Act assumed that the concept of discrimination in the United States did not require statutory definition. This omission may be excusable. After all, 1964 was a year that reflected a decisive political response to the problems of racial discrimination, and the operative facts were so apparently unambiguous that it was further assumed that a common-sense practicality would surely inform those charged with the application and enforcement of the Act. Hence, the term "discrimination" went undefined. The statute also leaves "race" undefined, but as most of the speeches on the bill speak of "Negroes," its practical meaning again could be assumed to be settled. See II B. SCHWARTZ, *supra* note 55.

67. In suggesting this mode of analysis, we recognize that the Supreme Court has somewhat ambiguously looked to certain classifications in which volition or free choice is unconnected with a duty or obligation imposed, as the device for triggering the "classification" analysis that has characterized equal protection adjudication. However, this traditional approach does not preclude the Court from refining that mode of analysis. There-

indicated that to uphold an affirmative action program there must be strict scrutiny review by the judicial branch to be certain that the use of a racial classification is lawful. But he did not ask of the white claimant a prior question, one that the Court has apparently demanded of black plaintiffs in discrimination cases—that he prove racial discrimination as an essential part of the claim for relief under Rule 8(a) of the Federal Rules of Civil Procedure.[68]

Powell's analysis of the appropriate standard of review under the equal protection clause separates the concept of "discrimination" from the concept of "race," while at the same time denying the petitioner's "sweeping" claim that the equal protection clause cannot cover "discrimination" against whites—because they are white.[69] Thus, one of the major problems we detect in Mr.

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fore, a rational response to the supervision of race relations claims in the courts requires that one not confuse the distinct concepts of "race" and "discrimination." There is nothing *per se* evil or good in a racial reference, even if it enhances a feeling of racial pride or consciousness. Indeed, studies indicate that a self-proclaimed black middle class has emerged with heightened feelings of pride, self-worth and an affirmative sense of ethnic identity. *See Racial Attitudes of the Black Middle Class: Have They Changed?*, 23 SOC. PROB. 153-65 (1975). It is the peculiar historic circumstances in which racial terms are used that give meaning and significance to such terms. Similarly, there is nothing *per se* malevolent about the concept of "discrimination." In any society, authority structures may manifestly discriminate between groups and individuals in order to manage more efficiently the production and distribution of the demanded values of the system. Discriminations are constantly made to promote or to undermine the delivery of social justice. The value implications of the question "whose justice?" cannot be avoided if one realizes that constitutional decisions, like other authoritative decisions in society, are basically value choices themselves.

68. FED. R. CIV. P. 8(a). *See* Galloway & Hewitt, *Bakke Below: A Constitutional Fallacy*, 17 SANTA CLARA L. REV. 385, 388-90 (1977). *See generally* United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

69. " 'The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro.' [Hernandez v. Texas, 347 U.S. 475, 478 (1954)].

"Once the artificial line of a 'two-class theory' of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived 'preferred' status of a particular racial or ethnic minority are intractable. The concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments. As observed above, the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only 'majority' left would be a new minority of White Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As those preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such ranking simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable." 98 S. Ct. at 2751-52.

Justice Powell's influential opinion in *Bakke* is the analytical and empirical inadequacy with which he handles the specific concept of "racial discrimination." He has (1) abstracted these individual concepts out of the historic and contemporary facts from which they derive meaning for policy-making purposes, and (2) handled them first as separate concepts for the purpose of evaluating the normative and practical basis of the Davis program, then fused them in order to substantiate the assumed effectiveness of *Bakke*'s claim without providing any explanation what "race discrimination" means for the purpose of that claim.

WHAT IS RACIAL DISCRIMINATION?

Inasmuch as Justice Powell has taken judicial notice of ethnological changes in the United States, a theoretical clarification of the racial discrimination phenomenon, focusing primarily on the sociophysiological basis of prejudice, is warranted. Furthermore, given the recent popular turn toward social conservatism, a trend epitomized by the judicial retreat from rigorous affirmative action in the *Bakke* decision, it may be useful to recall the Warren Court's treatment of racial discrimination issues. The judicial statesmanship demonstrated by that Court in such cases as *Brown v. Board of Educ.*[70] is lacking in the present Court. Unlike *Brown*, the opinion of Powell in *Bakke* failed to deal with a cultural identification of "racial prejudice." Justice Powell refused to recognize that there is a dominant or "in" group and a servient or "out" group.

The concepts of "in" and "out" groups refer to the aggregate relative value position of groups and determine the allocation of culturally relevant expectations within the social system. Obviously an inherited cultural pattern which reflects the corollary concepts of domination and subjugation[71] is of crucial psycho-symbolic relevance. Cultural inheritance, moreover, is of key social, political and ultimately, legal significance. Stated another way, the culture's inheritance of values and practices triggers powerful symbol events that shape fundamental cognitive patterns that form the ego and identify the "in" and "out" groups. To the extent that political culture and laws transgenerationally communicate such symbol-events defining the "in" and "out" groups, that system lays the basis for the institutionalization of prejudice-motivated behavior, *e.g.*, racial discrimination. Based on an operative definition of racial discrimination, a prejudice must therefore identify a target "group."

Racial prejudice is a process. First, one needs a cultural definition, an identification of discrete "out" group to serve as a target for the projection of hostile sentiments. Second, the process requires distinctive characteristics which serve to identify the target groups. The scope of ostracism, in addition, must be communicated to sustain that consensus. Third, the process also requires the operational use of resources as bases of power to reinforce and stabilize predispositions regarding the pattern of dominance and subordina-

70. 347 U.S. 483 (1954).

71. *See generally* D. RACE, RACISM AND AMERICAN LAW (1973).

tion. Finally, selective remembering transmitted transgenerationally retains the discrete identity of the dominant and the subject groups.

Thus, racial discrimination and prejudice are complex phenomena requiring examination from many different perspectives—constitutional, sociocultural, psychodynamic, phenomenological.[72] Such examination will reveal a fundamental root cause,[73] the recognition of which will suggest a clearer national governmental role. Historically, the role of the Court has been

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72. It may be important in understanding the character of racial prejudice to examine not only its psychodynamics and psychogenesis, but as suggested earlier, by relating these phenomena to the social context. If such an exercise is justified, it is simply to state more clearly the nature of race prejudice (discrimination) as empirical and historical datum, and to underscore the limited understanding the Court, through Justice Powell, conveyed about it as a key empirical reference in analyzing the *Bakke* case. In Nagan, *Conflict of Laws—Group Discrimination and the Freedom to Marry: A Policy Science Prologue to Human Rights Decisions*, 21 How. L.J. 1, 7-8 (1978), the character of racial discrimination was formulated:

"The context of conditions that may be causally linked to prejudice-prone personality as an outcome to the social process are multiple, complex and varied. [One] important aspect of these conditions refers to the kinds of deprivations that are thought to characterize the insecure, anxiety-ridden personality system, and which are thought to occur during early childhood as a result of the effects of diverse nurturing practices. These early years shape fundamental identification patterns and determine the essential 'I' and the contigent 'we.' Patterns of nurturance and early socialization do not take place in a vacuum. Children are born into contexts in which the facts of social differentiation are ubiquitous. The patterns of social stratification (including a consciousness of social differentiation) represent a culture-context that is transmitted intergenerationally in varying degrees of symbolic intensity to every personality system. The etiology of social differentiation is much disputed. That it exists is undisputed. That it has been accentuated in contemporary society by the division of labor and specializations that attend it is also commonplace. When patterns of social stratification emerge more concretely from the social process, and when these patterns have a close alignment with the distribution of power, wealth, and indeed all other base values which sustain and modify these class and caste divisions, powerful symbol events (generated from these interactions) create the conditions under which the 'I' defines the 'self' by including within the 'we' groups most closely identified with the 'class,' 'caste' or 'ethnic' position of the kinship unit of primary affiliation. The key factor which lays the foundation for the exclusivist identity, lies ultimately in the seemingly innocuous patterns of child rearing and nurturance.

"The ability of the self to identify with an in-group and to identify and exclude an out-group appears to derive from the communication of events relating to identification patterns that are accorded a symbolic character. Thus, such facts as sex, color, race, group affiliation, age, birth, language, religion, political belief. appearance, class, and intellect, are the ubiquitous symbolic pegs that identify and isolate targets for invidious prejudice and discrimination. However, the most important of these indicia for the social process of discrimination [in the United States] has undoubtedly been race, [and] color." *See also* Reisman, *Myth System and the Operational Code*, 3 Yale Stud. in World Pub. Order 229 (1977).

73. "Discrimination is a malignancy of that process which our culture is pleased to call normal personality development. Insofar as we continue to demand this form of personality development, we will produce individuals who are prejudice-prone. Short of reevaluating preferred personality models, there is no 'cure' for prejudice, . . . only a stabilization through self-understanding." Nagan, *supra* note 72, at 44 (quoting Reisman, *Response to Crimes and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 Denver J. of Int'l Law & Policy 29, 40-43 (1971)).

highly influential in this examination.[74] Indeed, it has been argued that without coordinated efforts by the Court and other branches of government to suppress racism, race relations in the United States might have triggered latent genocidal tendencies.[75] Whether or not racial hostility would ever have reached such an inflamed level, the supervision of race relations in the United States is obviously a serious endeavor. What then does *Bakke*'s claim tell us about racial discrimination and about an appropriate governmental response?

Bakke's basic complaint was that he was a victim of racial prejudice because he is a member of the white race. Such a claim implies that the predominantly white medical school admissions committee (acting under a policy of a predominantly white medical school faculty; authorized under the authority of a predominantly white board of regents; acting under the authorization of a political process that is predominantly white), regarded Allan Bakke as an "other"; and with hostile intent precluded him from competing for the sixteen places set aside for the purpose of affirmative minority recruitment in the entire class.[76] To say that Mr. Bakke was excluded from medical school as a victim of racial discrimination erodes the concept of its historic, contextual and scientific meaning and destroys the purpose of the thirteenth, fourteenth and fifteenth amendments; amendments designed to provide normative standards of moral conduct relating to the marginal,[77] deprived and newly freed black people.[78]

Whatever interpretative extensions have attended the development of the fourteenth amendment as constitutional doctrine, the traditional application of the amendment, at least since *Brown*, has been unambiguous.[79] Historically, the target has been the problem of equality in race-relations profile. More specifically, when read in conjunction with the thirteenth and fifteenth amendments, fourteenth amendment protection has been directed by courts toward remedy of unequal treatment meted out to black Americans. Of course, the language of the fourteenth amendment is more inclusive in its sweep; it accords all "persons" the equal protection of the laws. The contentious aspect of the fourteenth amendment, however, lies in what it was meant

74. Nagan, *supra* note 72.

75. *Id.*

76. Or perhaps Mr. Bakke was saying that whites can discriminate against whites in violation of the intent and purpose of the equal protection clause. For an excellent analysis of the intent and purpose of equal protection, *see* Broderick, *Preferential Admissions and The Brown Heritage*, 8 N.C. CENT. L.J. 123 (1977).

77. On the concept of marginality, *see* C. WILLIE, OREO RACE AND MARGINAL MEN AND WOMEN (1975); Johnston, "The Concept of the Marginal Man: A Refinement of the Term," Australian and New Zealand Journal of Sociology 145, 145-47 (June, 1976). According to Johnston, the concept of psychological marginality typical of ethnic groups is generated by life in a bicultural context with a two tier hierarchy in which the ethnic culture is evaluated as inferior. In this context some of the ethnics are assimilated partially and these assimilated ones are rejected. An ambiguity exists both in the ethnic group and also in the dominant culture.

78. *See generally* Baldwin, *DeFunis v. Odegaard, The Supreme Court and Preferential Law School Admissions: Discretion is Sometimes Not the Better Part of Valor*, 27 U. FLA. L. REV. 343 (1975).

79. *See generally* Broderick, *supra* note 49.

to achieve in a narrow sense: the protection of a powerless target group from invidious discrimination on the basis of their racial identity, and in the larger sense, the humane purpose of "color-blindness" and "equality" as a major ideal of our political and constitutional system.[80]

Besides this failure to recognize what racial discrimination is in factual terms, Justice Powell's opinion also ambiguously hovers between an assumption that Bakke was a victim of that malady, and the idea that there is no objective judicially cognizable concept of racial discrimination. Yet at the same time the opinion conceded that section 601 of Title VI was meant to provide remedial assistance to blacks denied full access to the benefits of projects supported by federal funds. We suspect that Powell's wobbly analysis reflects a deeper disquiet concerning appropriate means and appropriate ends.[81] The language of section 601 of Title VI and that of the fourteenth amendment is majestical, establishing an objective ideal: a colorblind society in which presumably "merit" and "need" justify criteria of allocation of the desirable goods and services. But the section also serves another practical remedial function: the maximum federal protection of the black American from the ravages of discrimination and prejudice.[82] Obviously, whites and other "groups" can and should be beneficiaries of the ideal objectives of section 601; but to so construe this provision is to erode its remedial purpose, a purpose related to the factual condition of black America. Such a result is singularly unfortunate, particularly in light of the Court's own admission that "the problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal monies."[83] To extend this analysis to the heart of equal protection analysis is to view this country's past and present race relations patterns in a sterile conceptualistic sense.

Social Justice and Racial Justice

At this point it is important to examine the issue of "racial discrimination" and "justice" in the larger context of prevalent theories of social and political justice. But we do this with one important *caveat, viz.*, that the more formal and abstract the jurisprudence of affirmative action becomes, the harder it is to justify.[84]

The precise contours of the concept of social justice are by no means clear. The idea of justice, whether conceived in relative or absolutist terms, whether buttressed by pragmatic common sense intuitions, hunches, or transempirical postulates, remains a slippery term in the lawyer's lexicon. None-

80. *See generally* Brest, *supra* note 45.

81. *See, e.g.*, Weinberg, *The New Judicial Federalism*, 29 Stan. L. Rev. 1191 (1977); Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 Tex. L. Rev. 1141 (1977).

82. Morris, *Constitutional Alternatives to Racial Preferences in Higher Education*, 17 Santa Clara L. Rev. 279 (1977).

83. Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. at 2746.

84. This does not mean that it cannot be justified or that there are not compelling formal arguments that buttress it. There are. *See* R. Dworkin, Taking Rights Seriously (1977).

theless, the abstractions of "justice" and "social" are relevant to lawyers' work, and, however provisional and tentative our prescribed meanings are for these terms, they do have consequence in the real world. What we mean, therefore, by a concept of "social justice" is an idea — sufficiently inclusive both descriptively to portray and normatively to evaluate the process of decision wherein and whereby all the desirable and, indeed, the less desirable, significant things in life are allocated. In this sense the concept of social justice is related to the affirmative action-type claim.

In its recent report on the meaning of the *Bakke* case for law school admissions policies and race relations, a prestigious American Bar Association task force on the *Bakke* decision stated forcefully that the bottom line of affirmative action must ultimately be read against not only the reality of the social process context, but also against a more inclusive decision process than that of the court system, by implication a larger, more inclusive concept of justice.[85]

According to the committee, "the underlying problems," of affirmative action and the *Bakke*-type claims are "social and humanitarian rather than legal." The committee also maintained that not all the answers to the problems of social and humanitarian justice are subject to resolution by the courts alone. According to this report, there is room for optimism in the aftermath of *Bakke*:

> As indicated above, the underlying problems are social and humanitarian, rather than legal, and it is a mistake to expect to find all the answers through legal proceedings. With the proper development of public attitudes towards the basic equality of every human being, the results of past prejudice can be overcome without imposing new patterns of prejudice and discrimination. With the use of innovation and accommodation by men and women of good will, we can in time achieve what Justice Blackmun called our "professed goal of a society that is not race conscious." The main tasks in this process should be performed by the people. While the courts have a role, in the background and in extreme cases, it is ultimately all the people of America, in industry, in education, in labor and in government, working together, who must do the most to move our society towards racial color-blindness and ethnic indifference. In the meantime, under the decision of the Court, and in proper circumstances, race and similar factors may be taken into account. How much and for how long are not now determined. We know that we must move with caution and with care, and that is surely right. But we must move, and the Bakke decision tells us that we can.[86]

The ABA Task Force is not isolated in its belief that the basis of affirmative action must ultimately depend upon a realistic and satisfactory consensus about social justice. Professor Ronald Dworkin in his recent book *Taking Rights Seriously*,[87] devoted an entire chapter to the problem of "reverse discrimination." Professor Dworkin discussed therein the legal and

85. A.B.A. REPORT OF THE TASK FORCE ON THE BAKKE DECISION, No. 177B (1978).
86. *Id.* at 3.
87. R. DWORKIN, *supra* note 84.

moral basis of the *Bakke*-type claim in the context of the "social policy" of affirmative action. The conceptual basis of his analysis involved a theory of social justice. Dworkin posed the essential question: "What rights to equality do citizens have as individuals which might defeat programs aimed at important economic and social policies, including the policy of improving equality overall?"[88]

The Dworkin essay began the analysis by distinguishing *Sweat v. Painter*[89] from *DeFunis v. Odegaard*.[90] In the former case a black was denied admission to law school because of race; in the latter, a white was ostensibly denied admission because of a racial classification system that allegedly disadvantaged him.[91] Dworkin distinguished the situation in which citizens have a *right* to equal treatment (that is, the same chance for the good and the bad things within the power of the state to allocate), from the situation involving the right to treatment as an equal, which relates less to the equal allocation of the weal and the woe than to the desire to be treated with "equal respect." According to Dworkin, if DeFunis' claim had any merit, it had to repose in the latter category, and as such should have been judged against the larger aggregate interest in "social justice." Dworkin showed that the weighty moral arguments favoring affirmative action rest on premises that are both "utilitarian" and "ideal." He buttressed the argument for the ideal with the proposition that "a more equal society is a better society, even if its citizens prefer inequality." That argument, asserted Dworkin, "does not deny anyone's right to be treated as an equal himself."[92]

Accordingly, Dworkin concluded that the *DeFunis*-type claim is not compelling when weighed against state policy towards advancement of the goals implicit in the affirmative action strategies of the University of Washington Law School Admissions Committee. Finally, Dworkin warned that "we must take care not to use the Equal Protection Clause to cheat ourselves of equality."[93]

What then do we mean by "social justice?" We maintain that the concept of social justice derives from the concept of "distributive justice," as that concept is used by political philosophers to describe the process by which values are authoritatively allocated in a given political and social order.[94]

A leading philosopher has asserted that the phrase "distributive justice" has a more neutral and less value-toned meaning than does the concept of "social justice."[95] There is some justification for this claim, although combining the notion of "justice" with concepts of either "distribution" or "social" must inevitably involve a normative implication, *viz.*, how ought justice be

88. *Id.*
89. 339 U.S. 629 (1950).
90. 416 U.S. 312 (1974).
91. The qualifiers "ostensibly and allegedly" are used in this context to reflect the uncertainty as to the casual relationship in *DeFunis* between the racial classification system and the denial of admission. No doubts of a similar nature were entertained in *Sweat*.
92. DWORKIN, *supra* note 84, at 239.
93. *Id.*
94. *Id.*
95. H. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (1966).

distributed in society? Both terms are ambiguous because they embody both empirical reference to the process of decision and also to pragmatic concerns of how value allocations are made. In simpler terms, we know X's ox is being gored. The next question cannot be avoided: ought X's ox be gored? But the assumptions of social justice are still more concrete. For the "justice" aspect of the phrase suggests that there is an ideal, however provisionally conceived, to which the process of value allocation might aspire. This ideal represents the ideal of substantive equality because equality is perceived in and of itself as a "good" thing. What makes the tension between liberty and equality particularly relevant to analysis of the *Bakke* case is that Mr. Justice Powell's conceptual predicate reflects a fusion of, rather than the tension between, the fairness ostensibly due to Bakke in the process of considering applications for medical school admission, and the constitutional concept of equality as applied to racial classifications in that admissions process.

CONCLUSION

The Jurisprudence of Affirmative Action[96]

The essential character of the flow of authoritative decision we have

96. A preliminary issue obtrudes: There has been implicit in the "jurisdiction of affirmative action" the idea of reparations. It has been maintained that the wrongs of slavery and Jim Crow are the prime cause of the disadvantaged status of the black community as a community. Reparation itself draws upon a respectable theory of justice, *viz.*, "compensatory justice." The area of our law where principles of compensation have been most obvious is tort law. It has been observed that tort law is simply public law in disguise. When viewed from a public law perspective, we find that tort law has favored some groups and discriminated against others. For example, in negligence law, consumers are now favored over manufacturers who labor under a regime of strict liability. Yet it should be noted that we do not impose the same standard of strict care upon doctors. They are the recipients, one might say, of a type of preferential treatment. The fellow-servant rule provides another example. There the workers (servants) were effectually straddled with bearing the risk of job-related injuries—a law that in effect discriminated against compensation of workers, and in favor of employees' immunity. Indeed, there are a host of other laws and institutions that have legitimized, for one reason or another, the allocation of weal and woe under the rubric of compensatory justice which has favored one special interest group over another. Cynics, however, would maintain that these rules and doctrines have always been rationalized as being in the common or public interest.

Historically, Congress did seriously contemplate some kind of modest reparations policy. The Freedman Bureau was established the same year the thirteenth amendment was ratified. *See* E. COULTER, THE SOUTH DURING THE RECONSTRUCTION (1865-1887) at 71-72 (1947). The objective of the Bureau was to abolish slavery *de facto* by providing rudimentary social services for blacks. The Freedman Bank was another special example of compensatory justice—slaves had been excluded from using banks by law and custom. *Id.* at 88. Congress even included the prospect of a property settlement for the emancipated slaves. There are, of course, other examples: the reparations the Federal German Republic provided for Jewish victims of the holocaust in the German Federal Compensation Law is a more contemporary example. More unpopularly, the North Vietnamese have entertained an expectation of compensation (reparations due to the United States' involvement in the Vietnam war). Reparations have often been a major expectation of the victor after war.

Despite these worthy analogies and precedents, compensatory justice under the guise of reparations for wrongs that span centuries makes sense only if we can reconcile such

labelled affirmative action may be simply stated. It is a flow of decision designed to accelerate the realization of racial justice; its justification presupposes a social process still characterized by racial justice. What is the juridical basis of affirmative action? How compatible are affirmative action programs with our deeper constitutional values? In short, how compatible is affirmative action with the common interest our society has in "racial justice" for all its citizens, *i.e.*, in the ideal or objective vision of a truly colorblind society? The issue of contention in a case like *Bakke* is that programs of affirmative action designed to achieve racial justice are intolerable because they institutionalize racism; and as a cure for that affliction, it is worse than the disease. Hence, to require that the authoritative allocation of the desired goods and services of the social order be made according to "racist" criteria is to perpetuate practices that society has sought to proscribe. It is additionally asserted that affirmative action programs, particularly in the university admissions context, not only disadvantage meritorious white students, but also represent a process of dangerous social engineering on the basis of flimsy empirical data and without an adequate, justifying basis.

Supporters of affirmative action see it not so much a principle as a strategy of racial (social) justice. They see affirmative action as a central strategem in the transformation of an already racist society into one that might efficaciously approximate our constitutive ideals that the good and the bad things in life be allocated according to "merit" and "need" rather than a condition of being, such as "race." Opponents of affirmative action would, therefore, have to maintain that whatever the precise workings of the operational social, economic and political code, the formal code always requires the exorcism of race-based classifications in the here and now, and that benefits or detriments allocated on the basis of a racial criterion are bad medicine for the body politic to swallow.[97]

Proponents of affirmative action maintain that the simultaneous existence of a formal code which proclaims the ultimate virtue of a race-blind society, and an informal but no less crucial operational code which routinely, if

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reparations with the major purposes of our political myth, as well as with contemporary and emergent ideas of social justice as they relate to our equalitarian and libertarian ideals. The obvious hypothetical and one which has troubled moral philosophers and lawyers sensitive to moral questions involves giving an upper class, undisadvantaged black a boost via affirmative action, while the poor, deprived and otherwise disadvantaged white is ignored. Why, in short, should a wealthy and privileged minority group member get reparations for past wrongs done to an earlier generation, on the basis of race exploitation, while the poor white, class-exploited Appalachian is neglected? More fundamentally, why should the present generation of whites pay for wrongs the present-generation of blacks "did not suffer?" These are significant issues for any theory of justice, and suggest that a theory of racial justice based on reparations alone may well be insufficiently persuasive to account for these moral dilemmas. We suggest that it can be demonstrated empirically that the effects of past deprivation are transmitted transgenerationally, not to all, but to most. *See generally* G. ALLPORT, THE NATURE OF PREJUDICE (1954); ROSS, THE NEGRO IN THE AMERICAN ECONOMY IN EMPLOYMENT, RACE AND POVERTY 3 (A. Ross & H. Hill eds. 1967).

97. For a discussion of the distinction between the formal and operational codes, *see* Reisman, *supra* note 72, at 230-32.

benignly, mandates the continuance of the discredited doctrines of white supremacy, implies an astigmatism of the law. Hence, formalistic adherence to a norm of "racial equality" and "colorblindness" is thought to be hypocritical, if not morally bankrupt, and politically unwise.

The breakthrough for the pro-affirmative action advocates was, of course, the *Brown* decision. In that case the Warren Court, with all nine justices in accord, took the view that formal equality (separate but equal) would have to be tested against the factual reality of what "separate" really meant and not what it purported to be. According to *Brown* and its progeny, separate but equal policies in education were mere instances of "manifest justification" and were to be tested constitutionally against "real" reasons. Thus, *Brown* not only sought to demolish the institutionalized patterns of racism in the educational process, but also suggested the need for more sophisticated factual data defining the operational code before prescribing and applying constitutional doctrine to particular cases.[98] The irony of *Brown* is that the decision proscribed institutional racism in the educational context as a major expectation of the formal code, yet it did not immediately change the crucial operational code relating to race-relations practices. Rather, the symbolic significance of *Brown* was that it undercut intentional, active, racist behavior, thereby suggesting that the strategy of desegregation would require more coercive incentives to eradicate the residual effects of past discrimination.

The lingering effects of Jim Crow also spawned a legacy of what might be called unintentional racism. The realities of unintentional racism, rekindled after *Bakke*, are obvious when one looks at the value position of the black American in aggregate terms. The lack of representation in the medical profession was a major factor in the Davis program, a response to one of the residual effects of the process of race deprivation underwritten by the coalescence of a formal and an operational code. Today an operational code of covert racism, of indirect discrimination, of social passivity to retain the *status quo*, best symbolized by Senator Moynahan as "benign neglect," is the justification for affirmative action.

Justice Powell would have the Court ignore the fact that affirmative action is not only a means toward racial justice but also a strategy of social change, the objectives of change being the progressive transformation of race relations in the United States by the most direct, peaceful route to a colorblind objective. Instead, he seemed most concerned with the one-sided effect of affirmative action programs. There may be unintended side effects to affirmative action, but not the kind Justice Powell had in mind: an awakening belief among deprived Americans that the American dream still holds promise for a restoration of their dignity and worth as individuals. But a judicial commitment to racial justice will not and cannot solve all the general problems of social justice, equality, fairness, merit and need. Perhaps the justices concurring with Justice Stevens were suggesting exactly that; that society must address the problems of blacks in an aggregate sense, so that the reality of equality of opportunity might be realized. Inequality of condition reflects both the historic and contemporary social facts borne of a

stupendous tragedy that both haunts and underlines our existential dilemma. For the Court in *Bakke* to describe affirmative action as "reverse discrimination" is superficial, because the empirical reference to any notion of "reverse discrimination" must have some rough approximation to "equality of condition" to make sense in today's world.

The widely disparate opinions of the Supreme Court justices who spoke in the *Bakke* case symbolize the ambivalences, anxieties and divisions experienced by the entire nation in its present state of race relations. That condition has reflected a commitment to racial justice at multiple governmental levels, but has evidenced a disquiet as to the appropriate means by which it may lawfully be achieved. In the United States, it is thought that a commitment to racial justice requires a modicum of social engineering, because the goal is to transform the society in ways that promote the common interest of the entire body politic. The means by which the end is sought to be realized is "affirmative action"; the specific means have included the establishment of interim "quotas" and "goals" in areas that deal with recruitment to business, professional and political life. The tension generated by these strategies to achieve racial justice has been measured in terms of the net costs of transformation to a truly colorblind objective, a major purpose of our constitutional values. At some point in the judicial development of race relations in the United States, a majority of the Supreme Court must come to grips with these realities.