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Abstract

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KEYWORDS: reverse, discrimination, principle

Beyond Reverse Discrimination: The Quest For A Legitimizing Principle

STEVEN JAY WISOTSKY*

Is the Constitution colorblind? Should preferential treatment for minorities be construed to violate the equal protection clause of the fourteenth amendment or the Civil Rights Act of 1964? If preferential treatment is permissible, which groups should be favored? These fundamental questions about the meaning of equality remain shrouded in controversy and confusion despite, or perhaps because of, recent Supreme Court decisions and the rapidly burgeoning body of commentary on the cases, both in the popular press[1] and legal literature.[2] At the heart of the confusion is the simple fact that the Supreme Court has been unable to develop a coherent rationale for its decisions approving affirmative action.[3] What is worse, the fragmentation of the Court—witness its six separate opinions in the *Bakke* case—has worked against the attainment of doctrinal clarity.[4] The Court has simply

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1. Commenting upon the confusion, Thurgood Marshall humorously observed: "I have seen so many interpretations of our decision [Bakke] now that it's hard for me to distinguish between what we actually wrote and what the press says we wrote." Address by Associate Justice Thurgood Marshall at the Second Circuit Judicial Conference (September 8, 1978), 82 F.R.D. 221, 224 (1978).

2. The pages of the Index to Legal Periodicals continue to offer an apparently inexhaustible supply of articles on various aspects of the preferential treatment debate. A number of articles is cited in Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 288, n.25 (1978).

3. The origin of the term "affirmative action" has been traced to Executive Order No. 10925 issued by President Kennedy. In bureaucratic practice, it usually means (1) not discriminating against minorities, (2) advertising equal opportunity, and (3) making special efforts to recruit qualified minorities by outreach and special training programs. GLAZER, AFFIRMATIVE DISCRIMINATION 46 (1975). Most commentators use "affirmative action" interchangeably with benign or reverse discrimination to describe preferential treatment for minorities *because* of minority status.

4. Several commentators have expressed this view. "The *Bakke* opinions . . .

failed to provide the authoritative guidance needed in order to facilitate the difficult task of reconciling the demands of racial justice and the commands of equal treatment under the law.

The purpose of this article is to make a contribution to an understanding of the issue of preferential treatment for minorities by (1) reviewing the embryonic legal doctrine that has emerged in *De Funis, Bakke, Weber* and the pending[5] *Kreps* case; (2) arguing that American political and constitutional history, from slavery to segregation to the present, requires recognition of the unique status of Blacks in our legal system; and (3) concluding that affirmative action for Blacks for some indefinite period of time is a legitimate and neutral constitutional principle which ought to be adopted by the Supreme Court as the *ratio decidendi* of future reverse discrimination cases.

I. REVIEW OF CURRENT DOCTRINE

A. *De Funis*

The question of the validity of race-conscious programs has been presented to the United States Supreme Court four times. In the first case, *De Funis v. Odegaard*,[6] an unsuccessful white applicant to the University of Washington Law School claimed the law school had discriminated against him because of his race by admitting several minority applicants with lower grades and test scores. The Supreme Court of Washington rejected De Funis' claim; but because he had been admitted to school *pendente lite* and was about to graduate, the United States Supreme Court, by a vote of 5 to 4, dismissed his claim as moot.[7]

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have complicated rather than simplified both benign discrimination and the understanding of the equal protection clause." Stone, *Equal Protection in Special Admissions Programs: Forward from Bakke,* 6 HASTINGS CONST. L. Q. 719, 742 (1979). "*Bakke* settles so little that it is virtually useless as a precedent." Morris, *The Bakke Decision: One Holding or Two?,* 58 OR. L. REV. 311, 334 (1979).

5. Kreps was argued before the Supreme Court on November 27, 1979, but has not been decided as this article goes to the printer. 48 U.S.L.W. 3365-67 (Dec. 4, 1979).

6. 416 U.S. 312 (1974).

7. Justice Douglas issued a lengthy dissent, arguing that the case was not moot and that the minority admissions program was discriminatory because of its two-track admissions process by which Blacks, Chicanos, American Indians and Filipinos re-

B. *Bakke*

The issue of preferential treatment next arose in *Regents of the University of California v. Bakke,*[8] a prolific source of law review commentary.[9] In *Bakke,* the California Supreme Court invalidated a procedure whereby sixteen of one hundred seats in the entering medical school class were set aside for a special admissions process employing less stringent standards than those for non-minority applicants applying for the remaining eighty-four seats. Alan Bakke, a white applicant, had applied to the University of California at Davis Medical School in 1973 and 1974 and was rejected both times. In both years, minority applicants were admitted under the special program with grades and test scores "significantly lower" than Bakke's.[10] In addition, the minority applicants could compete for all one hundred places in the entering class, while non-minority applicants were restricted to competing for only eighty-four places.

Demonstrating clear antipathy for "a line drawn on the basis of race and ethnic status,"[11] Justice Powell's one-man "opinion of the Court" rejected the concept of benign discrimination[12] and asserted that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[13] In order to pass constitutional muster, therefore, the Davis special admissions program would have to be "precisely tailored to serve a compelling gov-

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ceived preference. He concluded that "[t]here is no constitutional right for any race to be preferred." *Id.* at 336.

Despite the mootness ruling, De Funis is not without significance in terms of the development of reverse discrimination doctrine because the Douglas dissent is relied upon by Mr. Justice Powell in Bakke. *See* note 75 *infra* and accompanying text.

8. 438 U.S. 265 (1978).

9. *See, e.g., Symposium: Regents of the University of California v. Bakke,* 67 S. CAL. L. REV. 1 (1979).

10. 438 U.S. at 277. The issue of qualifications is confused by the fact that other non-minority applicants with higher scores than Bakke were also rejected. Additionally, Bakke's age was a factor considered by the admissions committee; he was 33 at the time of his second application. The implications of Alan Bakke's ambiguous position relative to other applicants is creatively explored in Smith, *The Road Not Taken: More Reflections on the Bakke Case,* 5 S. U.L. REV. 23, 58-60 (1978).

11. 438 U.S. at 289.

12. *Id.* at 294-95.

13. *Id.* at 291.

ernmental interest."[14]

Justice Powell agreed that the admission of a diverse student body was a compelling governmental interest.[15] Nevertheless, the particular two-track procedure used by Davis was held unconstitutional because it was not necessary to the attainment of racial and ethnic diversity in light of the alternative means available. Justice Powell reasoned that race could be considered—that race could be given a "plus" to "tip the balance" in favor of an otherwise qualified minority applicant[16]—so long as majority group applicants were not automatically foreclosed from consideration for any of the available seats.[17] Thus, as an example of a constitutionally acceptable alternative means by which to attain ethnic diversity, Powell placed his imprimatur on the Harvard College Admissions Program, attaching it as an Appendix[18] to his opinion.

Justice Powell concluded by affirming that portion of the order of the California Supreme Court ordering Bakke's admission to the medical school. Justice Stevens, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist, agreed that Alan Bakke had been the victim of unlawful racial discrimination but declined to reach the constitutional question. They concurred on statutory grounds,[19] that is, Title VI of the Civil Rights Act of 1964 imposed a standard of color blindness and barred exclusion on the grounds of race, color or national origin from benefits "under any program or activity receiving

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14. *Id.* at 299.

15. *Id.* at 314. Justice Powell rejected the first three of the four interests asserted by Davis as being served by the special admissions program: (1) reducing the underrepresentation of minorities in the medical profession; (2) mitigating the effects of general societal discrimination; (3) increasing the number of physicians who will practice in underserved communities; and (4) obtaining the educational benefits arising from an increased ethnic diversity among the student body.

16. *Id.* at 316-17.

17. *Id.* at 318.

18. *Id.* at 321-24. The Harvard program establishes a pool of qualified applicants in terms of grades and test scores. It then gives preferences to "equally qualified" applicants who possess desired non-academic attributes: geographical background, athletic or musical skills, or particular racial or ethnic origins.

For a discussion of the implications of Bakke for law schools, see Lesnick, *What Does Bakke Require of Law Schools: The SALT Board of Governors Statement,* 128 U. PA. L. REV. 141 (1979).

19. For Justice Powell, the standards under Title VI and the Constitution were the same. 438 U.S. at 287.

Federal financial assistance."[20] At the other antipode, Justices Brennan, White, Marshall and Blackmun approved the use of race-conscious admissions procedures. They, therefore, joined Justice Powell to form a five-man majority to reverse the California Supreme Court's order "insofar as it prohibits the University from establishing race-conscious programs in the future."[21]

C. *Weber*

The next test of preferential treatment programs came the following year in *United Steel Workers of America v. Weber.*[22] In *Weber,* a new on-the-job training program was created by a master collective-bargaining agreement between Kaiser and the United Steel Workers of America (USWA) covering fifteen Kaiser plants. The agreement between Kaiser and USWA was designed to eliminate "a conspicuous racial imbalance" in Kaiser's craft work force by reserving 50% of the trainee positions for Blacks until the almost all-white craft work force was integrated in proportion to the percentage of Blacks in the local labor force. Both Black and white trainee applicants were selected on the basis of seniority.

At the Gramercy plant where Brian Weber worked, thirteen trainees—seven Blacks and six whites—were accepted from the ranks of production workers. Brian Weber was not among them, even though the most junior Black chosen had less seniority. Weber filed a federal

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20. 42 U.S.C. § 2000d *et seq.* The record reflected that Davis was a recipient of federal funds. 438 U.S. at 412.

21. *Id.* at 326. The net result of these shifting alliances by the Justices was threefold: (1) Bakke was admitted to the medical school; (2) the Davis two-track special admissions program was invalidated as an explicit racial classification; and (3) Davis was free to go back to the drawing board to reformulate its special admissions program.

Davis did not in fact revise its special admissions program in the aftermath of Bakke. A single admissions committee was established to replace the previous dual system which allowed minorities to be screened by a separate group. A minimum of fifteen out of a possible thirty points is required in order for the applicant to advance beyond the first cut in the admissions process. The system awards five points for race or for severe economic disadvantage, allowing a minority student to reach the second level of review more easily than a non-minority student. DREYFUSS & LAWRENCE, THE BAKKE CASE: THE POLITICS OF INEQUALITY 231 (1979).

22. 443 U.S. —, 99 S.Ct. 2721 (1979).

class action law suit against Kaiser and USWA under Title VII of the Civil Rights Act of 1964 alleging that the Kaiser/USWA plan illegally discriminated against white workers on the basis of race.[23] The Supreme Court framed the issue as whether Title VII of the Civil Rights Act of 1964 prohibits employers and unions in the private sector from voluntarily adopting "race-conscious" affirmative action plans "to eliminate manifest racial imbalances in traditionally segregated job categories,"[24] and concluded that it did not.

The opinion[25] by Justice Brennan emphasized the "narrowness" of the decision. Conceding that the Kaiser/USWA plan violated the literal language of Title VII, Brennan wrote that the plan was nevertheless within the "spirit" of the statute because of the long years of discrimination against Black workers and their worsening position in the national labor force:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec., at 6552 (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[26]

Therefore, the Court concluded, a voluntary affirmative action plan designed to correct "a manifest racial imbalance" is not inconsistent with the legislative intention "to open employment opportunity for Negroes in occupations which have been traditionally closed to them."[27]

In upholding the Kaiser/USWA plan, the Court gave considerable weight to the moderate and voluntary[28] nature of the affirmative

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23. Weber's argument focused on McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976), in which the Court held that whites as well as Blacks are protected by Title VII.

24. 443 U.S. at —, 99 S.Ct. at 2725.

25. Justice Brennan wrote for himself and Justices White, Stewart, and Marshall. Justice Blackmun concurred. Chief Justice Burger and Justice Rehnquist dissented. Justices Stevens and Powell did not participate in the decision.

26. 443 U.S. at —, 99 S.Ct. at 2728.

27. *Id.* at 2730, quoting 110 Cong. Rec. 6548 (remarks of Sen. Humphrey).

28. As noted by Mr. Justice Rehnquist in dissent, the voluntariness of the Kaiser/USWA plan was attenuated by pressures exerted by the Office of Federal Contract Compliance. *Id.* at 2737-38, n.2. To the extent such a program is truly voluntary, the Weber decision does not require employers or unions to do anything; it merely permits

action program in terms of its size, scope and duration. First, the craft training program was small; only thirteen jobs were available. Second, it did not require the discharge of any white employee in favor of Blacks. And third, in the words of Mr. Justice Blackmun's concurring opinion, the plan "does not afford an absolute preference for blacks, and . . . it ends when the racial composition of Kaiser's craft work force matches the racial composition of the local population. It thus operates as a temporary tool for remedying past discrimination without attempting to 'maintain' a previously achieved balance."[29]

Moderate or not, Justice Rehnquist excoriated the majority for its approval of the racial quota, which it had refused to uphold in *Bakke.* In a caustic seventeen-page dissent, he denounced the majority for its "Orwellian" interpretation of Title VII and for using tactics reminiscent of "escape artists such as Houdini."[30] He insisted that the majority opinion had turned the legislative history on its head in holding that it permitted voluntary racial discrimination in employment. He condemned the racial quota in the Kaiser/USWA plan as a device "destructive to the notion of equality. . . . Whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another. . . . [N]o discrimination based on race is benign. . . ."[31]

D. *Kreps*

The most recent manifestation of the preferential treatment issue

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those who wish to implement affirmative action plans to do so. It is questionable how many union negotiators will find it politically feasible to risk antagonizing their own constituents by adopting plans that benefit the Black minority at the expense of the white majority. For further ruminations on the practical impact of Weber, see Neuborne, *Observations on Weber,* 54 N.Y.U.L. REV. 546, 556 (1979).

29. 443 U.S. at __, 99 S.Ct. at 2734.

30. *Id.* at 2737. For a critical examination of Justice Rehnquist's analysis of the legislative intent underlying Title VII, see Dworkin, *How To Read The Civil Rights Act,* THE NEW YORK REVIEW OF BOOKS 37 (Dec. 20, 1979).

31. *Id.* at 2753. Chief Justice Burger also dissented on the ground that although he would be inclined to vote for such an amendment to Title VII were he a member of Congress, the "statute was conceived and enacted to make discrimination against *any* individual illegal. . . ." *Id.* at 2735.

is *Fullilove v. Kreps*,[32] in which the Second Circuit Court of Appeals upheld the 10% minority set-aside provision of the Public Works Employment Act of 1977,[33] rejecting a constitutional challenge by associations of building contractors and subcontractors. The challenged provision was an amendment to the Local Public Works Capital Development and Investment Act of 1976,[34] a two billion dollar appropriation designed to alleviate unemployment in the economically depressed construction industry. The set-aside operated by prohibiting grants for any local public works project "unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."[35] A minority business enterprise (MBE) is defined as a business, at least 50% of which is owned by minority group members—Negroes, Spanish-speaking, Orientals, American Indians, Eskimos and Aleuts.[36]

In evaluating the constitutional validity of the 10% set-aside for minorities under the fifth amendment,[37] the Court, in an opinion that is less than a model of clarity, chose not to articulate the appropriate standard of review, stating in dictum that "even under the most exacting standard of review the MBE provision passes constitutional muster."[38] In reaching this conclusion, the Court gave substantial weight to the inferred Congressional purpose[39] to remedy the effects of past dis-

32. 584 F.2d 600 (2d Cir. 1978).

33. 42 U.S.C. § 6705(f)(2)(Supp. I 1977).

34. 42 U.S.C. §§ 6701-6735 (1976).

35. 42 U.S.C. § 6705(f)(2)(Supp. I 1977).

36. *Id.*

37. The fifth amendment contains no equal protection clause. Nevertheless, the Supreme Court, in order to prevent the anomaly of permitting discrimination by the federal government that would be prohibited by a state, has held that equal protection principles are embodied in the due process clause of the fifth amendment. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976); Washington v. Davis, 426 U.S. 229, 239 (1976); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

38. 584 F.2d at 603 (footnote omitted).

39. In order to establish the Congressional purpose of rectifying prior discrimination, the Court referred to statements made by supporters of the amendment in Congress. Statistics prepared by the Department of Commerce and House Committee Reports provided proof of a severe underrepresentation of minorities in the construction industry. 584 F.2d at 605-06. Having inferred a Congressional finding of past discrimination, the Court distinguished Bakke, *id.* at 607, in which Justice Powell emphasized that "[w]e have never approved a classification that aids persons perceived as members

crimination in the construction industry. The Court acknowledged "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority [under §2 of the thirteenth amendment and §5 of the fourteenth amendment] to take appropriate remedial measures."[40]

Finally, the Court of Appeals considered the effects of the set-aside on non-minority business enterprises. "[I]n fashioning remedies for past discrimination, courts must be sensitive to interests which may be adversely affected by the remedy."[41] In this examination, the Court emphasized the small dollar amount of the set-aside in relation to the total 1977 construction industry expenditure of $170 billion,[42] and concluded that the burden[43] imposed on non-minority business was *de minimis*.

The Second Circuit decision in *Kreps* is currently under review. Certiorari was granted,[44] and the case was argued before the Supreme

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of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." Bakke, 438 U.S. at 307.

40. 584 F.2d at 604, quoting Bakke, 438 U.S. at 302, n.41. The reliance is not quite apposite for the Public Works Employment Act is probably an exercise of the commerce power under Art. I, sec. 8, cl. 3. During oral argument in the Supreme Court, however, the government did rely on § 2 of the thirteenth amendment as a power source. 48 U.S.L.W. 3365 (Dec. 4, 1979).

41. 584 F.2d at 607.

42. The court of appeals reasoned that the 1977 amendment appropriated $4 billion, or about 2.5 percent of the total of nearly $170 billion spent on construction in the United States that year. The set-aside was for 10 percent of the total grant, or only .25 percent of funds expended on construction work in the United States. "Furthermore, since according to 1972 census figures minority-owned businesses amount to only 4.3 percent of the total number of firms in the construction industry, the burden of being dispreferred with .25 percent of the opportunities . . . was thinly spread among nonminority businesses comprising 96 percent of the industry." *Id.* at 608 (footnote omitted).

43. For a theoretical consideration of the extent of the burden test in equal protection analysis, see Comment, *Beyond Strict Scrutiny: The Limits of Congressional Power to Use Racial Classifications*, 74 N.W.U.L. REV. 617, 630 (1979).

44. The Court granted certiorari on two questions:

"(1) Is congressional requirement that ten percent of federal grants for local public works projects be set aside for minority business enterprises constitutionally permissible under Due Process or Equal Protection Clauses?

(2) Is minority set-aside program in violation of Title VI of 1964 Civil Rights Act?"

Court. The questioning at oral argument reflected some skepticism by the Justices regarding the inherent illimitability of the concept of preferential treatment predicated upon past discrimination. For example, Justice Rehnquist wanted to know if under that rationale a preference for Norwegian-Americans would be constitutional.[45] Justice Stewart similarly asked if a finding of past discrimination would justify a set-aside for Presbyterians.[46] Justice Stevens questioned whether Republicans could seek affirmative action programs based on past Democratic majority bias.[47] And other comments from the bench questioned the adequacy of the Congressional "findings" of past discrimination, suggesting that the 10% set-aside was simply a political decision to spread the wealth around.[48]

II. PREFERENTIAL TREATMENT: THE QUEST FOR A RATIONALE

A. *Who Should Be The Beneficiaries Of Preferential Treatment?*

The questions posed by Justices Stewart, Rehnquist, and Stevens go directly to the crux of the matter: What is the scope of the proposition that past discrimination is a proper predicate for preferential treatment? Which groups would qualify for the preference? Is a showing of past discrimination sufficient, or must there also be present social, economic or political disadvantage resulting from that discrimination? The statements of the Justices on these matters are hopelessly conflicting and reveal no progress toward the development of a cogent juridical principle.

One of the principal difficulties in arriving at an intellectually coherent and ethically satisfactory resolution of the issue of preferential treatment is the failure of the Court to articulate a rationale rejecting or justifying the grab bag of racial and ethnic minorities favored by the various affirmative action programs. In *De Funis,* Blacks, American

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47 U.S.L.W. 3562-63 (Feb. 20, 1979). *See* note 5 *supra.*

45. 48 U.S.L.W. at 3366 (Dec. 4, 1979).

46. *Id.*

47. *Id.*

48. *Id.* Regarding the danger of purely conclusory legislative factfinding of past discrimination, see Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 CAL. L. REV. 171, 179 (1979).

Indians, Chicanos and Filipinos were favored. In *Bakke,* the favored minorities were Blacks, Chicanos, Asians and American Indians and, in theory, the economically or educationally disadvantaged of any race.[49] In *Weber,* the affirmative action plan for the craft training program was a straightforward quota of 50% Blacks and whites. But in *Kreps,* the favored groups included Blacks, Spanish-speaking, Orientals, American Indians, Eskimos and Aleuts.[50]

It is difficult to discern in this potpourri of racial and ethnic groups any unifying principle. The groups are not similarly situated[51] with respect to either past discrimination or present disability, assuming for the moment, those are the relevant criteria. Orientals, for example, are generally well off in terms of economic status[52] and educational attainment.[53] Notwithstanding a long history of virulent discrimination against the Chinese[54] and the Japanese,[55] it is difficult to

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49. No non-minority disadvantaged students were admitted to Davis under the special admissions program. 438 U.S. at 276.

50. The inclusion of Eskimos and Aleuts in the definition of minorities is apparently attributable to 42 U.S.C. § 6707(a)(1)(Supp. I 1977) providing for a 2-½ percent set-aside "for grants for public works projects . . . to Indian tribes and Alaska Native villages."

51. GLAZER, *supra* note 3, at 74 (1975).

52. The median family income of foreign born and native born (first generation) Japanese in 1969 was $12,772. The parallel figure for Chinese (including Taiwanese) was $10,683. Both figures compare quite favorably, after allowing for inflation, with the 1977 median household income of $14,272 for whites. Based on the rise in the consumer price index between 1969 and 1977, the income figures for Japanese and Chinese corrected for inflation would be approximately 66% higher, or $20,118 and $17,733 respectively. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1978, at 38, Table 43 and at 462, Table 747. [hereinafter cited as 1978 ABSTRACT].

53. Asian Americans comprise .67% of the general population, but 1.05% of total college enrollment. *Id.* at 35, table 38 and at 163, table 265.

54. The Chinese were the first Asians to immigrate to California. A mass immigration made up primarily of laborers from Kwantung province began around 1850 and received impetus from the discovery of gold at Sutter's Mill. By 1879 the Chinese population of California exceeded 111,000. Much of the immigration was the product of the "coolie trade," an arrangement by which Chinese laborers were imported under "contracts" that amounted to a form of slavery.

The efficiency of the Chinese laborers, coupled with their large numbers, earned them the animosity of white labor groups. *See, e.g.,* Yick Wo v. Hopkins, 118 U.S. 356 (1886). Vindictive political measures were enacted by the California legislature and subsequently by Congress.

regard them as disadvantaged. In addition, there is good reason for regarding discrimination against Orientals as a regional concern.[56] The "Spanish-speaking" classification,[57] is absurdly over-inclusive. It encompasses not only the typically low-income Chicanos[58] and Puerto Ri-

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The principle legal manifestation of hostility to the Chinese was the Chinese Exclusion Act of 1882, which suspended the immigration of Chinese laborers for ten years. It also provided that those who had been in the United States since 1880 could leave and enter the United States on an identifying certificate. However, the Scott Act of 1888 voided all outstanding certificates and barred all laborers who had not reentered at the time of the Act's passage. The Supreme Court upheld the validity of the Act in The Chinese Exclusion Case, Chae Chan Ping v. United States, 130 U.S. 581 (1889).

The Geary Act of 1892 extended the "suspension" for an additional ten years. In 1902, it was converted into permanent exclusion. The Geary Act was also upheld by the Supreme Court, Fong Yue Ting v. United States, 149 U.S. 698 (1893).

The hostility to the Chinese subsided considerably when the United States entered World War II as an ally of China. The exclusion acts were repealed in 1943, although highly restrictive quotas were established. In 1965, the special immigration restrictions pertaining to Asians were abolished. *See* BELL, RACE, RACISM AND AMERICAN LAW 69-72 (1972).

55. The Japanese began arriving in the United States in large numbers about 1890. Anti-Chinese feeling was very high, and the hostility was easily transferred to the new Asian arrivals. The victory in the Russo-Japanese War of 1905 aroused fears of a "yellow peril" in the United States.

California agriculture was a principal point of confrontation. Japanese efficiency stimulated the enactment in 1913 of the Alien Land Laws in California. Many states followed suit.

Immigration policy also reflected anti-Japanese sentiment. The Quota Act of 1924 excluded "aliens ineligible to citizenship;" the Japanese did not gain the right to citizenship until 1952. World War II added obvious stresses culminating in the removal of the Japanese from the West Coast. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). *See* BELL *supra* note 54, at 72-76.

56. More than one-third of the 591,000 Japanese live in California, with another third in Hawaii. Similarly, nearly 40% of the Chinese live in California, with Hawaii and New York accounting for an additional 35%. 1978 ABSTRACT at 35, table 39.

57. Statistics for the "Spanish" category are generally not broken down into the constituent national origins. The 1977 median household income for Spanish families was $10,647, compared to $14,272 for whites and $8,422 for blacks. Only 8.4% of Spanish families have median incomes below $3000 per year, compared to 6.3% of the white families and 15.3% of the black families. *Id.* at 462, table 747.

58. The Chicanos are of Mexican origin and comprise the largest single group of Spanish-surnamed people in the United States. About 7,000,000 Chicanos live in the Southwest. BELL, *supra* note 54, at 76-81.

cans, but the relatively affluent and upwardly mobile Cubans, who as recent arrivals have no history of discrimination and who were given refugee assistance[59] in the flight from Castro's Cuba.

It is clear that Blacks are the largest,[60] poorest,[61] and among the least well educated[62] of any of the disadvantaged groups typically included in affirmative action plans. No other group in America, with the arguable exception of the American Indian,[63] has a comparable history of systematic racial oppression and resulting social and economic inferiority.[64] "At every point from birth to death, the impact of the past is reflected in the still disfavored position of the Negro."[65]

B. *Standards For Preferential Treatment*

As demonstrated by the foregoing discussion, the racial and ethnic

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59. *See* 22 U.S.C. § 2603 (1976).

60. The 1970 census reflects a total United States population of 203,212,000. Of that number, 177,749,000 are whites; 22,580,000 are Blacks; 793,000 are Indians; 591,000 are Japanese; 435,000 are Chinese; and 343,000 are Filipino. Spanish-speaking persons are included in the white category. *Id.* at 35, table 38.

61. *See* note 57 *supra.*

62. Blacks comprise 11.11% of the total population, but only 6.95% of college enrollment. Whites are enrolled in proportion to their percentage of the population. 1978 ABSTRACT at 35, table 38 and at 163, table 265.

63. The brutal, at times genocidal, policies of the American government with respect to the Indian tribes cannot be denied. However, for purposes of this article, there are significant practical and legal considerations justifying consideration of Indians as *sui generis.* The physical concentration of the Indians on reservations in the Western States, their limited numbers (793,000), and their unique statutory, administrative, and treaty status renders it difficult, if not impossible, to fit their situation within the analytical framework relevant to preferential treatment. In Morton v. Mancari, 417 U.S. 535, 551 (1974), the Supreme Court acknowledged "the unique legal status of Indian tribes under federal law and . . . the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian ward' status. . . ." The Court also cited Title 25 of the United States Code as further evidence of the unique historical and legal position of the Indian tribes. *Id.* at 552. *See also* note 135 *infra.*

64. *See generally* Lewis, *Parry and Riposte to Gregor's "The Law, Social Science, and School Segregation: An Assessment,"* DEFACTO SEGREGATION AND CIVIL RIGHTS 115 (O. Schroeder, Jr. & D. Smith eds. 1965).

65. Bakke, 438 U.S. at 396. For a further discussion of the disadvantaged status of Black Americans, see Justice Marshall's opinion, *id.* at 395-96. *See also* THE STATE OF BLACK AMERICA 1979 (National Urban League, Inc. 1979).

groups selected for inclusion in affirmative action plans are not similarly situated. Nevertheless, two common factors are apparent: a history of discrimination and/or a presently disadvantaged status. These factors are frequently identified by writers as the basis of affirmative action. For example, prior discrimination corresponds roughly to a compensatory rationale and present disadvantage to a distributive rationale, two of the four justifications for racial preference identified by Paul Brest.[66]

The distributive rationale "holds that it is prima facie unjust for any racial or ethnic group in our society to be appreciably less well off than other groups,"[67] regardless of the reason for the inequality. Its use is thus independent of a showing of prior discrimination.[68] The compensatory rationale, on the other hand, focuses on past injustices and would justify compensatory treatment or reparations[69] for historical

66. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 544-45 (1975). The preventive rationale is primarily concerned with institutional self-preservation, *i.e.*, to avoid a charge of *de jure* discrimination. *Cf.* Weber, 99 S.Ct. at 2730-32 (Justice Blackmun's opinion discussing the "arguable violations" theory); and 99 S.Ct. at 2737-38, n.2 (Justice Rehnquist's questioning of the voluntariness of the Kaiser program). The instrumental rationale is concerned with institutional or societal improvement. It is exemplified by Justice Powell's opinion in Bakke in which he accepted educational enrichment resulting from ethnic diversity of the student body as a compelling governmental interest.

67. *See* BREST, *supra* note 66, at 545.

68. A distributive rationale is the basis of all anti-poverty programs, which are the most efficacious way to address the problem of have-not groups. Payments to or preference for an entire race or ethnic group which is poor as a race or group would necessarily be over-inclusive and under-inclusive. For example, Blacks would be compensated, rich or poor, while whites would not. On the other hand, there are substantial savings in administrative costs to be realized from using race as a proxy for other characteristics, such as poverty. *See generally* Posner, *The De Funis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1.

69. The compensatory rationale is analogous to the shifting of losses from victim to wrongdoer which forms the basis of our civil justice system. As applied to racial or ethnic groups, the compensatory rationale is similar to the payment of reparations for injustices committed by one nation or race against another. The outstanding contemporary example is the payment of $820 million by the government of West Germany to the government of Israel in 1967 as reparations for the Holocaust.

On May 4, 1969, James Forman interrupted the Sunday morning service at Riverside Church in New York City and read the Black Manifesto which demanded that the churches and synagogues pay $500 million as "a beginning of the reparations due us as people who have been exploited and degraded, brutalized, killed and persecuted." BITT-

wrongs, regardless of present disadvantage. The compensatory rationale was given short shrift by Justice Powell in *Bakke*.[70]

Intuitively, neither rationale standing alone seems sufficient to justify preferential treatment based on race. But a combination of the two rationales was relied upon by the Court to validate a state law preferring women over men. In *Kahn v. Shevin*,[71] the Supreme Court upheld preferential tax status for women because of prior discrimination and their inferior economic position. Nevertheless, in *Bakke* Justice Powell rejected the analogy to preferential treatment based on sex because racial and ethnic preference "presents far more complex and intractable problems. . . ."[72] Fearing to tread upon the slippery slope, he was unwilling "to evaluate the extent of the prejudice and consequent harm suffered by various minority groups."[73] He asserted that there would be "no principled basis for deciding which groups would merit"[74] preferential treatment and that the rankings of minority groups "simply does not lie within the judicial competence. . . ."[75]

Thus, the thrust of Justice Powell's position is that "no principled basis" can be found to justify preferential treatment even for those

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KER, THE CASE FOR BLACK REPARATIONS 4 (1973). *See also* SCHUCHTER, REPARATIONS (1970).

70. 438 U.S. at 306, n.43. Undoubtedly, there are serious ethical problems inherent in the concept of reparations and its practical administration. How are victims to be identified? If payment is made to the group as a whole, then non-victims will be gifted with a windfall. In addition, many persons in the "majority" have no connection with the historical wrongs. These and other issues are explored in sophisticated detail in GROSS, DISCRIMINATION IN REVERSE: IS TURNABOUT FAIR PLAY, (1978). *See also* Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U.L. REV. 427 (1979). Professor Calabresi is one of the few advocates of a reparations rationale for the solution of the Bakke issue. *See* note 135 *infra*.

71. 416 U.S. 351 (1974). In Kahn, Justice Douglas relied upon the traditional economic disadvantages imposed upon women in the marketplace and the fact that women's median annual income was only 57.9% that of men in 1972. *Id.* at 353. Other cases have sustained sex-based preferences on a compensatory rationale. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975).

72. 438 U.S. at 303.

73. *Id.* at 296-97.

74. *Id.* at 296.

75. *Id.* at 297. Justice Powell quoted from Justice Douglas' dissent in De Funis that "[t]he reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded. . . ." *Id.* at 297, n.37.

groups who have been historically oppressed and who are currently disadvantaged. The remainder of this article will attempt to demonstrate that Mr. Justice Powell's conclusion is significantly mistaken insofar as it lumps together all racial and ethnic groups for the purpose of constitutional analysis. Without resorting to the compensatory or distributive rationale, or to any extra-constitutional justification, a neutral principle[76] for preferential treatment for Blacks can be anchored in the concrete foundation of constitutional legitimacy.[77] All that is required is a recognition that the Constitution and laws have not been color blind and that they have a special mission to fulfill with respect to the Emancipation of Blacks.

III. THE UNIQUE ROLE OF BLACKS IN THE FORGING OF THE AMERICAN LEGAL SYSTEM: THE UNCOMPLETED EMANCIPATION

The history of Black slavery, segregation, and discrimination was summarized with great eloquence by Mr. Justice Marshall in the separate opinion in *Bakke:*

> Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime.[78]

The advent of the Constitution did not undermine slavery; on the contrary, the acknowledgment and protection of slavery were made explicit in the Constitution.[79] The Supreme Court itself, beginning with

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76. Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 15 (1959).

77. *See* Wisotsky, *Beyond Legitimacy,* 33 U.MIAMI L. REV. 173 (1979) for a general discussion of the concept of legitimacy in Supreme Court adjudication.

78. 438 U.S. at 387-88. The American slave trade is thought to have begun in Jamestown in 1619. "By 1776, there were about 500,000 Negroes held in slavery and indentured servitude in the United States. Nearly one of every six persons in the country was a slave." *Rep. of Nat. Comm. on Civil Disorders, Rejection and Protest: An Historical Sketch* 95 (1968), cited in BELL, *supra* note 54, at 1.

79. Article I, § 2 treated each slave as 3/5ths of a person for purposes of appor-

the Marshall Court,[80] reinforced the institution of slavery in several early decisions. The most infamous case, *Dred Scott v. Sanford*,[81] held that the Missouri Compromise prohibiting slavery in the portion of the Louisiana purchase territory north of the Missouri River was unconstitutional because it deprived slave owners of their property without due process of law. In rejecting Dred Scott's claim of citizenship, Chief Justice Taney wrote that Negroes were not intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. . . ."[82]

The status of the Negro as property and as a non-citizen was officially transformed by the Civil War and by the post-war constitutional amendments. The thirteenth amendment abolished slavery and involuntary servitude; the fourteenth amendment conferred citizenship upon the freedmen; and the fifteenth amendment guaranteed the right to vote, at least in theory. But the promise of Reconstruction and the Civil War Amendments was nullified by the systematic enslavement of the freedmen:

> The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.[83]

In every other area of social, political and economic life the freed-

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tioning representatives and taxes among the states. Article I, § 9 specifically denied Congress the power to end the slave trade until the year 1808. Article IV, § 2, cl.3, the fugitive slave clause, required that a slave who escaped to another state must be returned upon the demand of his master.

80. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532 (1969).

81. 60 U.S. (19 How.) 393 (1857).

82. *Id.* at 407.

83. 438 U.S. at 390 (opinion of Mr. Justice Marshall).

men were degraded, humiliated, and relegated to a position of inferiority. But most of all, it was the absolute inability of the law to protect their personal safety that was responsible for the subjugation of Blacks. Starting immediately after the Civil War and easing for a short period during Reconsturuction when federal troops were present in the South, a reign of white supremacist terror was carried on by the Ku Klux Klan, the White Camellias, and other secret societies.[84] By intimidation, burnings, beatings and lynchings—a reign of terror that could justifiably be called an American pogrom—the freedmen were wantonly victimized and brutalized. Approximately 5,000 lynchings have been documented.[85]

The physical degradation and persecution of Blacks was reflected in the law by physical separation of the races in public accomodations and virtually all other aspects of life. The Supreme Court itself contributed to this process of segregation by creating the state action doctrine in the *Civil Rights Cases*,[86] which had the legal effect of immunizing "private" racial discrimination from constitutional scrutiny and the psychological effect of encouraging the South in its oppression of Blacks. The *coup de grace* was delivered in the Court's "separate-but-equal" ruling in *Plessy v. Ferguson.*[87] The enforced separation of the races in railway cars upheld in *Plessy* was accurately interpreted in Mr. Justice Harlan's dissenting opinion to mean that "colored citizens are so far inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."[88] The effect of the *Plessy* decision was to encourage the Southern States to expand the scope of the Jim Crow laws to include segregated residential areas, parks, hospitals, theatres, waiting rooms and bathrooms.[89]

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84. The lawlessness was so vindictive and destructive that Congress was moved to enact the Ku Klux Klan Act of 1871 and related civil rights statutes now codified as 42 U.S.C. §§ 1981 *et seq.*

85. *See* BELL, *supra* note 54, at 857.

86. 109 U.S. 3 (1883).

87. 163 U.S. 537 (1896).

88. *Id.* at 560.

89. Jim Crow laws also infected the legal system. In the South, there were segregated jury boxes, witness docks and even a Jim Crow Bible for colored witnesses to kiss. 438 U.S. at 393 (opinion of Mr. Justice Marshall), citing C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 68 (3d ed. 1974).

These pernicious practices were not confined to the South. Segregation spread to the Northern States and even to the practices of the federal government. "Under Presi-

> The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like—is also well established.[90]

The first major blow to segregation—to separate-but-equal as a constitutional doctrine—did not transpire until nearly a century after the Civil War. In *Brown v. Board of Education,*[91] the Supreme Court held that the segregation of public school children on the basis of race "generates a feeling of inferiority as to their status in the community and may affect their hearts and minds in a way unlikely ever to be undone."[92] The Court concluded that "[s]eparate educational facilities are inherently unequal."[93] *Brown* was rapidly extended in a series of *per curiam* decisions to a full range of public facilities such as beaches,[94] buses,[95] golf courses[96] and parks.[97] The pernicious separate-but-equal doctrine of *Plessy* was interred. Blacks were no longer to be excluded by law from public facilities used by whites.

Of course, the process of desegregation of public facilities, particu-

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dent Wilson, the federal government began to require segregation in government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated." *Id.* at 394.

90. *Id.*

91. 347 U.S. 483 (1954).

92. *Id.* at 494.

93. *Id.* at 495. The companion case of Bolling v. Sharpe, 347 U.S. 497 (1954), has special symbolic importance in that segregation of the races by law was practiced in the capital city of the United States until the Supreme Court declared it unconstitutional.

94. Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955), *aff'g* 220 F.2d 386 (4th Cir. 1955).

95. Gayle v. Browder, 352 U.S. 903 (1956), *aff'g* 142 F.Supp. 707 (M.D. Ala. 1956).

96. Holmes v. City of Atlanta, 350 U.S. 879 (1955), *vacating* and *remanding* 223 F.2d 93 (5th Cir. 1955).

97. New Orleans City Park Imp. Ass'n v. Detiege, 358 U.S. 54 (1958), *aff'g* 252 F.2d 122 (5th Cir. 1958).

larly schools,[98] was not accomplished without a struggle and violent resistance. There were freedom marches, demonstrations in the streets and elsewhere,[99] sit-ins at lunch counters,[100] stand-ins at voting registration centers. The nightly news in the early sixties was a kaleidoscope of villainy: Bull Connor's men using cattle prods and high pressure hoses on demonstrators; Lester Maddox chasing Black customers with his pick handles; George Wallace standing in the schoolhouse door; Orval Faubus at Little Rock defying the mandate of *Brown v. Board of Education.*[101] And there were killings: four young girls bombed to death while attending church services in Birmingham, Alabama; Viola Luzzo, the civil rights worker from Detroit gunned down by three Klansmen in Alabama; James Chaney, Andrew Goodman, and Michael Schwerner shot in the night and buried in shallow Mississippi graves; Medgar Evers, NAACP field secretary, shot by an assassin while marching for freedom; and finally Martin Luther King, assassinated by James Earl Ray in Memphis, Tennessee in 1968. Many were martyred in the Civil Rights Movement.[102]

The second phase of the modern Black Emancipation began with the intervention of Congress. After a decade of virtual torpor on civil rights issues (excepting only voting rights)[103] while under the domina-

98. "A decade after *Brown,* only 1.17 percent of black children in the eleven states of the old Confederacy attended school with whites." BARRON & DIENES, CONSTITUTIONAL LAW: PRINCIPLES & POLICY 607 (1975). A variety of evasive tactics, ingenious and disingenuous, for avoiding desegregation was utilized: pupil assignment laws, Orleans Parish School Board v. Bush, 242 F.2d 156 (5th Cir. 1957), *cert. denied,* 354 U.S. 921 (1957); student transfer plans, Goss v. Board of Education, 373 U.S. 683 (1963); freedom of choice plans, Green v. County School Board of New Kent County, 391 U.S. 430 (1968); and even the closing of the public schools, Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964). The close-down maneuver was also employed to avoid desegregation of public swimming pools in Palmer v. Thompson, 403 U.S. 217 (1971).

99. *See, e.g.,* Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Adderley v. Florida, 385 U.S. 39 (1966).

100. *See, e.g.,* Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963).

101. *See* Cooper v. Aaron, 358 U.S. 1 (1958). Faubus' defiance caused President Eisenhower to mobilize federal troops in order to effect the admission of Negro students to Central High School.

102. *See* EMERSON, HABER & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1000-03 (Student ed. 1967).

103. The Civil Rights Act of 1957, 42 U.S.C. § 1971 (1976).

tion of Southern Congressmen vested with seniority and therefore powerful committee chairmanships, Congress was roused to take legislative action. Under the pressure of international condemnation and domestic dissent, the latter brought to a climax by the People's March on Washington, Congress broke through the obstruction of racist fillibusters and enacted the first modern comprehensive civil rights law, the Civil Rights Act of 1964.[104] Continued Southern denial of Black citizenship necessitated the Voting Rights Act of 1965,[105] and a series of broadening amendments. After the adoption of the 1965 Voting Rights Act, Johnson Administration proposals for additional omnibus civil rights legislation were repeatedly blocked in the Senate.[106] Once again, dramatic political developments—in particular, the assassination of Dr. Martin Luther King, Jr.—broke the impasse and Congress enacted the Civil Rights Act of 1968.[107]

This abbreviated review of the Civil Rights Movement and of congressional civil rights legislation is intended to underscore the extent to which the American legal system has been preoccupied with issues of slavery, segregation, and their aftermath, the extent to which special consideration of Blacks is an institutionalized feature of our laws. This leads to a second point. The legacy of white supremacy has been a legacy of subjugation, persecution, and degradation which has uniquely burdened the Black race. As Mr. Justice Marshall put the matter:

> 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.[108]

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104. 42 U.S.C. § 1971 (1976); and 42 U.S.C. §§ 2000(a)-(e) (1976). The act limited the use of exclusionary voter tests (Title I), outlawed discrimination in places of public accomodation (Title II), authorized suits by the Attorney General to desegregate public facilities (Title III), provided for the desegregation of public education (Title IV), banned discrimination in federally funded programs (Title VI), and prohibited discrimination in employment by employers, employment agencies, and labor unions (Title VII).

105. 42 U.S.C. § 1973 (1976).

106. GUNTHER, CONSTITUTIONAL LAW 905 (9th ed. 1975).

107. 42 U.S.C. § 3601 *et seq.* Perhaps the most important provision was Title VIII, prohibiting discrimination, *inter alia,* in the sale or rental of property.

108. 438 U.S. at 400.

The question now becomes one of determining the legal significance of that enduring mark.

IV. THE CONSTITUTIONAL RIGHT OF NEGRO FREEDOM: THE LEGITIMIZING PRINCIPLE

In *Bakke,* Justice Powell acknowledged the original interpretation of the equal protection clause, which viewed its "one pervading purpose" as securing "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[109] But, he argued, the late nineteenth century wave of European immigration transformed the United States into "a Nation of minorities. . . . As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination."[110] It was "no longer possible," Justice Powell concluded, "to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority."[111] "The clock of our liberties . . . cannot be turned back to 1868."[112]

Although Justice Powell's rhetoric is seductive, his conclusion is predicated upon a false dichotomy: Either the equal protection clause protects all groups equally, or there is "no principled basis" for choosing one group over another for preferential treatment. But Justice Powell's premise may be rejected. It is a judicial value preference, of course. It is not historically compelled; nor does it reflect sufficient sensitivity to the problems of "a Nation confronting a legacy of slavery and racial discrimination."[113] More fundamentally, Justice Powell's universe of discourse is unduly restrictive in its exclusive focus on the contours of the equal protection clause. The constitutional dimensions of the issue are broader.

The inadequacies of Justice Powell's analysis are revealed by comparison to the force and clarity of Arthur Kinoy's 1967 essay, *The*

109. *Id.* at 291, quoting Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 71 (1873).
110. *Id.* at 292.
111. *Id.*
112. *Id.* at 295.
113. *Id.* at 294.

Constitutional Right of Negro Freedom.[114] Kinoy's argument, focusing on the debate between Justices Bradley and Harlan in the *Civil Rights Cases,* persuasively establishes that the Civil War Amendments embody a continuing national commitment to complete the process of Emancipation begun in the Civil War.

Kinoy explains that in *Dred Scott,* the Supreme Court had articulated, largely in dictum, "a full blown legal and constitutional theory designed to serve as a national justification for the preservation of the institution of slavery."[115] That rationale was the non-citizenship of Blacks, which was justified because they were "a subordinate and inferior class of beings who had been subjugated by the dominant race."[116] After the Civil War, the *Dred Scott* opinion was directly repudiated by ratification of the thirteenth, fourteenth and fifteenth amendments. The effect of these amendments was to free the Negro "from any discrimination by reason of race or color in the exercise of rights or privileges hitherto enjoyed by white men. . . ."[117] Yet, the nature of the rights created by the Civil War Amendments was not merely to be free of oppression by the states, but as an essential attribute of the newly conferred citizenship "to be free from the stigma of inferiority implicit in the institution of slavery. . . ."[118]

Of course, *that* degree of equality was antithetical to the political realities of the time. The dominant fact of political life was the Compromise of 1877, a genteel phrase for the sell-out of the freedmen, which was accomplished by the withdrawal of federal troops from the South in exchange for southern Democrat support in the deadlocked House of Representatives for the election of Republican candidiate Rutherford B. Hayes as President.[119] This Compromise represented the abandonment "in the *political* arena . . . of national responsibility for the enforcement of the newly created rights of the race of freedmen."[120] Justice Bradley's opinion in the *Civil Rights Cases* was the constitutional counterpart of that abandonment, shifting the focus of responsi-

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114. 21 RUTGERS L. REV. 387 (1967).

115. *Id.* at 391.

116. *Id.*, quoting Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404-05 (1856) (footnote omitted).

117. *Id.* at 394.

118. *Id.* at 395.

119. The Compromise of 1877 is pithily summarized by Kinoy, *id.* at 396, n.31.

120. *Id.* at 396 (emphasis in the original) (footnote omitted).

bility back to the individual Southern States. Thus, Justice Bradley argued that the fourteenth amendment was essentially negative in character, prohibiting state denials of Black equality, but vesting no corrective power in Congress over "private" discrimination. This is the etiology of the state action doctrine which was used to strike down the Civil Rights Act of 1875.

More fundamental and more enduring in its destructive impact was the denial of the special mission of the Civil War Amendments to ameliorate the oppressed condition of the freedmen:

> Once he had been granted citizenship the freedman's right not to be discriminated against by reason of his race had no special constitutional significance distinct from any citizen's right not to be discriminated against in the equal enjoyment of rights and privileges. Like the ordinary citizen's right under the laws of a state to be treated equally with any other citizen, the freedman must now look in the first instance for protection in the exercise of these rights to the original source of the "ordinary" civil rights of all citizens, the individual state. It is time, said the Bradley Court in 1883, to eliminate any preferred status for the freedman.[121]

It is almost as if the shield of the Civil War Amendments were transformed into a sword against the mythical "preferred status" of the freedmen. Kinoy labels this transformation "a rather extraordinary piece of legal legerdemain."[122]

> Discrimination against the freedman in all areas of public life had become, by this skillful process of judicial reasoning, wholly merged into the general phenomenon of any discrimination against any class or group of citizens. The problem legally as well as politically was no longer to be verbalized in terms of the special and unique national responsibility of the elimination of the influences of an entire social and economic institution—human slavery—from the life of the country.[123]

But the right of the Negro not to be discriminated against "is *not* identical to the general right of all citizens not to be arbitrarily discrimi-

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121. *Id.* at 400-01 (footnotes omitted).
122. *Id.* at 401.
123. *Id.* at 402.

nated against,"[124] and it is not an "ordinary civil right."

> It is a nationally created right essential to the establishment of a paramount national objective, the elevation of the black man from the status of slave and inferior being to the status of a free and equal member of the political community of the United States, an elevation without which the grant of citizenship to the Negro would become meaningless. For, as Justice Harlan prophetically warned, unless this nationally created right was protected by the national government the race of freedmen would inevitably sink back into a "second-class" citizenship equivalent in essential respects to the former status of "inferiority" and "degradation" which was the legal and social hallmark of the slave society.[125]

And that is exactly what happened. The withdrawal of federal troops from the South, the enactment of the Black Codes, the spread of segregationist practices to the North, made a mockery even of Justice Bradley's grudging grant of formal equality under the law. Instead of steady progress toward the goal of Emancipation of the freedmen, the next ninety years were spent confronting the racial animus of slavery and the Civil War in the streets and the courtrooms, while Blacks remained in a conditon of political, social, economic, and legal inferiority.

Although he does not explicitly consider the issue of affirmative action in his 1967 essay, the power of Kinoy's analysis is remarkable. First, it clarifies the nature and meaning of the Civil War Amendments, demonstrating them to be an overriding national commitment to elevate the status of the former slaves to a position of full equality in society. "Until this change in status is achieved the national objective remains unfulfilled and the national responsibility for its accomplishment remains in force."[126]

Simultaneously, Kinoy's broader conceptualization of the issue succeeds in developing the sought-after neutral jural principle that legitimates affirmative action. Indeed, it is difficult to imagine a more neutral principle, assuming such a thing exists at all,[127] than the force of the national commitment embodied in the extraordinary majorities

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124. *Id.* (emphasis in original).
125. *Id.* at 403 (footnote omitted).
126. *Id.* at 404.
127. *See* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication,* 27 U. CHI. L. REV. 661, 671 (1960).

required to ratify three constitutional amendments in five years. Kinoy's *Constitutional Right of Negro Freedom* thus offers a principled justification for affirmative action for Blacks. By simply acknowledging the special mission of the Civil War Amendments and the national failure to complete the Emancipation begun over a century ago, we are liberated from the intractable constitutional dilemmas so widely thought to be inherent in preferential treatment. More than a century after the Civil War, the status of Blacks remains inferior; the badges of slavery have not been eradicated. As recently as 1968, the Supreme Court obseved that racial discrimination against Blacks is a "relic of slavery."[128] Substantive equality has not been achieved, nor is it likely in light of a century of post-Civil War oppression to come about without "reverse discrimination."

CONCLUSION

The acceptance of the duty to complete Emancipation as the operative juridical principle justifying affirmative action will not put an end to the difficult issues which will arise in the course of implementation. Foremost among these is the allocation of benefits and burdens—which Blacks shall be benefitted and which whites burdened by preferential treatment?[129] In addition, the abandonment of fuzzy thinking (or expediency)[130] reflected in a nebulous concept of affirmative action for racial and ethnic minorities generally in favor of one for Blacks only[131] is

128. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).

129. DREYFUSS & LAWRENCE, *supra* note 21, at 260 titled their last chapter "A Choice of Victims." One writer suggests that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). Professor Bell also discusses the pressures militating toward social class divisions among whites on the issue of affirmative action in Bell, *Bakke, Minority Admissions and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3 (1979).

130. *See* text accompanying note 48 *supra*.

131. Professor Calabresi, *supra* note 70, at 432, in his proposed reparations solution to the issue posed by the Bakke case, would limit "benign quotas" to Blacks "and perhaps to American Indians. . . ." Professor Sedler, less attentive to principle, offers no justification for the cognitive leap from Professor Kinoy's *Constitutional Right of Negro Freedom* to the inclusion of "Puerto Ricans, Chicanos and Native Americans" in racially preferential admissions programs. Sedler, *Racial Preference, Reality and the*

certain to be politically troublesome. It would require, for example, the invalidation of the set-aside in *Kreps*.[132]

Consideration of these and related questions has been avoided by the Court because it has failed to undertake the antecedent task of developing an analytical framework for the adjudication of affirmative action cases.[133] Thus, the failure of the *Bakke* opinions (excepting Justice Marshall's) is their failure to confront squarely and cleanly the issue of race in light of the national "legacy of slavery and racial discrimination,"[134] and to use the decision as another opportunity to fulfill the Court's continuing mission of national consciousness-raising on matters of racial justice. It could fulfill that mission most effectively by a judicial acknowledgement of the truth[135] about American racism.

Constitution: Bakke v. Regents of the University of California, 17 SANTA CLARA L. REV. 329, n.3, and 365-68 (1977).

132. The invalidation of the minorities set-aside in Kreps would be required under the incompleted Emancipation analysis suggested here. However, it remains possible that the Court could uphold the set-aside under the plenary power of Congress to regulate interstate commerce. *Cf.* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). The latter decisions, of course, were predicated on the injury to commerce resulting from racial discrimination against Blacks.

An alternative theory for upholding the Kreps set-aside is a Congressional affirmative action power under § 5 of the fourteenth amendment, suggested by Comment, *supra* note 43, at 635-37.

133. Although Weber was correctly decided, it deals with benign quotas in the private sector and does not, therefore, address the more prickly issue of publicly funded "reverse discrimination," as in Bakke.

134. 438 U.S. at 294. The failure is also ironic in view of the fact that Justice Brennan's opinion, joined by Justices White, Marshall and Blackmun, attempts to justify the Davis special admissions program almost exclusively in terms of the history of discrimination against Blacks. *Id.* at 324 *et seq.*

135. It has taken almost eighty-five years and an unprecedented upsurge of the descendants of the freedmen for the nation to begin to face frankly the extraordinary fact of American history—that the "universal freedom" which the Emancipation Amendment was supposed to enact was never achieved; that the social institution of slavery was never fully uprooted; that its badges and indicia continued to mark the Negro with the hallmark of slavery, the stamp of an "inferior race." Neither the Court nor the nation could face this reality. For some it was an evil lived with but never discussed; for some it was an unfortunate but inevitable concomitant of American society; for others it was a welcomed reestablishment of a former way of life. But all shared one common unspoken agreement—the reality was not to be discussed; the phenomenon was not to be named; the

unpleasant truth could not be faced. It can be argued, as the first Justice Harlan might well have argued, that this strange and deep-seated reluctance to face the reality of the incompleted Emancipation lies not only at the root of the complicated conceptual problems which still beset the Court in interpreting the scope and thrust of the Wartime Amendments but, in a more important sense, remains at the heart of the most difficult unresolved problems of contemporary national life.

Kinoy, *supra* note 114, at 414.