Equal Protection in Special Admissions Programs: Forward from *Bakke*

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Introduction

Few United States Supreme Court decisions in recent years have been so widely anticipated as the "reverse discrimination case," *Regents of the University of California v. Bakke*.[1] The purpose of this article is to analyze *Bakke*'s equal protection holding and to offer an assessment of what the decision means for academic special admissions programs. In particular, discussion will focus on how race may be used as a factor in admissions decisions consistently with the equal protection clause of the Federal Constitution.[2]

I. Issues and Outcomes of *Bakke*

The California Supreme Court in *Bakke v. Regents of University of California*[3] handed down two rulings which were subsequently appealed to the United States Supreme Court. The first, reversing the trial court, was that Alan Bakke was entitled to an injunction ordering his admission to the medical school of the University of California at Davis. On the second issue, the state supreme court upheld the trial court's ruling that the special admissions program used at Davis was invalid, since it made admissions depend on considerations of race, in

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1. 438 U.S. 265 (1978).

2. *See e.g.*, W. MCCORMACK, THE BAKKE DECISION: IMPLICATIONS FOR HIGHER EDUCATION (1975); A. SINDLER, BAKKE, DE FUNIS AND MINORITY ADMISSIONS 284-325 (1978); *Symposium: Regents of the University of California v. Bakke*, 67 CAL. L. REV. 1 (1979) [hereinafter the articles contained therein will be cited individually]; *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 131-48 (1978).

3. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

violation of the equal protection clause of the Fourteenth Amendment.[4]

In a complex decision, the United States Supreme Court affirmed in part and reversed in part the decision of the California court. The dramatic and rather Solomonic divisions in the Supreme Court hinged partly on the distinctness of the two issues and partly on the rules invoked by the various Justices to decide them. On the first issue, a majority of five affirmed the California Supreme Court's order that Bakke should be admitted because of the illegality of the U.C. Davis special admissions program which had excluded him. This majority consisted of Chief Justice Burger and Justices Stevens, Stewart and Rehnquist in a common judgment[5] and Justice Powell, who announced the judgment of the Court.[6]

The four Justices other than Justice Powell comprising this majority decided the first issue in Bakke's favor on a ground involving neither the equal protection clause nor even the prohibition against discrimination contained in section 601 of Title VI of the Civil Rights Act of 1964.[7] Bakke, they said, must be admitted because section 601 prohibits not only discrimination in a federally funded program against any person on grounds of race, color or national origin, but also no less peremptorily prohibits exclusion on these grounds from the benefits of such a program. Section 601, they insisted, is a congressional prohibition of a wider ambit than the equal protection clause; exclusion is prohibited independently of discrimination. "[T]he meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program."[8] Since sixteen out of the one hundred places at Davis were reserved for minor-

4. In the trial court, but not in the California Supreme Court, article I, section 21, of the California Constitution and the Federal Civil Rights Act were cited. *See* paragraph 3 of the trial court opinion *quoted in* 438 U.S. at 409 n.2 (Stevens, Burger, Stewart and Rehnquist, JJ.). The California constitutional provision, now article I, section 7, states: "(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the legislature may be altered or revoked." (West Supp. 1979).

5. 438 U.S. at 408-21 (Stevens, Burger, Stewart and Rehnquist, JJ.). Hereinafter these four justices will be referred to as the Stevens Four.

6. *Id.* at 269-324 (Powell, J.). Concurring in part and dissenting in part were Justices Brennan, White, Marshall and Blackmun [hereinafter referred to as the Brennan Four].

7. Title VI, section 601 of the Civil Rights Act of 1964 provides: "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." 42 U.S.C. § 2000d (1976). *See* 438 U.S. 408-21 (Stevens, Burger, Stewart and Rehnquist, JJ.).

8. 438 U.S. at 418 (Stevens, Burger, Stewart and Rehnquist, JJ.).

ity applicants, Bakke was unlawfully excluded from the benefits of the funding for those places.

For the Stevens Four it was thus not necessary to resolve general questions of the lawfulness of benign discrimination grounded on race in admission programs. And, in view of the Court's policy of not deciding constitutional issues in a case which can be fairly decided on a mere statutory ground, they found it improper to rule on the equal protection aspect of benign discrimination.[9] Important for admissions programs as the correct interpretation of section 601 may be, it is not of major interest for the present article, which is focused on the equal protection standard.[10] Correspondingly, the discussion shall proceed forthwith in this and the following sections to the second issue, as to which the opinions do address the equal protection question.

Justice Powell, while agreeing that Bakke's exclusion was unlawful, did so because in his view section 601 merely incorporates the constitutional requirements of equal protection as the standard governing federally funded programs. It must therefore be held "to proscribe only those racial classifications that would violate the equal protection clause or the Fifth Amendment."[11] Measuring the Davis special admissions program against this constitutional standard, he first found (contrary to the Brennan Four, and for reasons to be explored later) that it utilized a suspect class and called for strict scrutiny.[12] He recalled that this required a showing that the state's "purpose or interest is both constitutionally permissible and substantial," as well as a showing that the challenged classification is "necessary . . . to the accomplishment of its purpose. . . ."[13] At the threshold of this scrutiny, he declared that while the purpose of assuring percentage racial

9. *Id.* at 411. (Stevens, Burger, Stewart and Rehnquist, JJ.).

10. For the same reason the question of whether section 601 confers private rights of action for breaches shall not be pursued. The Stevens Four held that since this question was not raised below by the Regents, it was not properly before the Court. 438 U.S. at 418-19 (Stevens, Burger, Stewart and Rehnquist, JJ.). Justice Powell, for the same reason, *assumed* that a private action would lie, *id.* at 283-84 (Powell, J.), and the Brennan Four (except for Justice White) agreed. *Id.* at 328 & n.8 (Brennan, Marshall and Blackmun, JJ.). Thus the private right of action was assumed rather than determined by eight of the nine Justices. The ninth, Justice White, devoted his entire separate opinion to negativing, on the basis of the legislative proceedings, the existence of any private right. *Id.* at 379-87 (White, J.). To recognize such a right, he said, would "jeopardize the administrative processes." *Id.* at 386 (White, J.). He also affirmed that "apparently" four justices held that a private right arose, *id.* at 379-80 (White, J.), but there is nothing in the written opinions to support this.

11. 438 U.S. at 287 (Powell, J.). This is a point on which the Brennan Four agreed.

12. *Id.* at 289-91 (Powell, J.). This accords with the California Supreme Court decision. *See* 18 Cal. 3d at 50, 553 P.2d at 1163, 132 Cal. Rptr. at 690.

13. *Id.* at 305 (Powell, J.) (citing *In re Griffiths*, 413 U.S. 717, 721-22 (1973)).

representation at U.C. Davis by means of a racial quota met the test of being substantial, it was still constitutionally impermissible for it preferred some persons for "no other reason than race or ethnic origin."[14] The exclusion of Bakke was thus unlawful for Powell on constitutional grounds, and he joined the Stevens Four in affirming the California court on this first issue.

On the second issue, however, concerning the California court's ruling that prohibited U.C. Davis "from according any consideration to race [of any applicant] in its admissions process,"[15] Justice Powell held for reversal. His judgment, combined with that of the Brennan Four, constituted another majority of five.[16] As will shortly be seen in detail, the reading of equal protection law on which Powell proceeded permits the use of race in the admissions process only within the following limits:

(1) the process should not use numerical racial quotas to achieve the purpose of assuring percentage racial representation;

(2) where the purpose of non-governmental bodies is voluntarily to take affirmative compensatory action to alleviate disadvantages arising from past racial discrimination, such action is not lawful until and unless there has been a state or federal determination, whether legislative, judicial or administrative, that such disadvantages exist; and

(3) since the rights conferred by the equal protection clause are rights of individuals and not of groups, remedial action should be predicated on the disadvantages suffered by individuals. The mere fact that a racial group has been discriminated against does not justify automatic compensatory preference to *every* member of the group. These limits still left a large ambit within which race could be considered in designing benign discrimination (compensatory preference); the California court's blanket proscription of *any* consideration of race had to be reversed. The Brennan Four, as will be seen, held that there was no constitutional or other basis for these three limitations on the consideration of race for purposes of benign discrimination insisted on by Justice Powell. For them, therefore, the California Court's proscription was a fortiori wrong and had to be reversed.[17]

As against the California court's wholesale proscription of the use

14. *Id.* at 307 (Powell, J.).

15. *Id.* at 272, 320 (Powell, J.).

16. As already seen the Stevens Four found it unnecessary and indeed improper to pass on the second issue. *See also* note 82 and accompanying text *infra*.

17. 438 U.S. at 356, 369, 378-79 (Brennan, White, Marshall and Blackmun, JJ.). As to limits (1) and (3), see Justice Blackmun's separate opinion, *id.* at 402-08 (Blackmun, J.).

of race in admissions programs, there was sufficient solidarity between Justice Powell and the Brennan Four to ensure reversal. In a future case, however, this majority would disintegrate, with Justice Powell opposed to the Brennan Four, if the limits insisted on by Powell were not respected—either because of the use of numerical racial quotas, or because a non-governmental public body has acted before there has been a state or federal determination that disadvantages are being suffered as a result of past unlawful discrimination, or where the compensatory benefits are conferred on a racial group in a manner foreclosing the question of whether the *individuals* concerned have been disadvantaged by past denial of equal protection rights. Outcomes would then depend on how the members of what was the Stevens Four—who in *Bakke* declined to address the equal protection issue—aligned themselves on that matter as between the opposing standpoints.

II. Whether and How Far Admissions Programs May Be "Race-Conscious": Justice Powell

A. Individual or Group Equal Protection

Justice Powell's ground for joining with the Stevens Four in a majority affirmance of the order for Bakke's admission was that his exclusion by dint of the numerical quota for racial minorities went beyond the ambit of constitutionally permissible consideration of race as a factor in admissions programs. This holding on the first issue flowed from Powell's specification of the permissible limits of race consideration. And what these limits are, in turn, constituted the second issue in the Bakke case, on which he joined in another majority holding, this time with the Brennan Four.

Justice Powell began with the assertion (with which the Brennan Four unqualifiedly concurred)[18] that the terms of Section 601 of Title

18. These justices recognized that they were abandoning the view which they had taken in Lau v. Nichols, 414 U.S. 563 (1974), that the Title VI prohibition might be wider than that of the equal protection clause. *Id.* at 352 (Brennan, White, Marshall and Blackmun, JJ.). They supported their changed view by reference to the legislative proceedings, *id.* at 328-40 (Brennan, White, Marshall and Blackmun, JJ.), and took issue with the Stevens Four's reading of the same proceedings. *Id.* at 340-42, n.17 (Brennan, White, Marshall and Blackmun, JJ.). The effect is that they denied the Stevens Four's reading of Title VI as forbidding exclusion and denial of benefits as well as discrimination.

Neither Justice Powell nor the Brennan Four really offered an answer to the Stevens Four on how exclusion and denial of benefits are to be read out of the prohibitions in section 601, or how, if they are left in, some meaning in addition to the prohibition of discrimination is to be avoided. Two answers at least might have been worth offering: (1) that section 601 refers to exclusion and other actions merely as extreme examples of violations of equal pro-

VI and its legislative history show that it "must be held to proscribe only those racial classifications that would violate the equal protection clause or the Fifth Amendment."[19] The learned Justice thus equated the issue of whether race could be considered in special admission programs under Title VI of the Civil Rights Act with the question of whether it could be so considered under the equal protection clause. His basic exposition, therefore, is in terms of the history and present ambit of that constitutional provision.[20]

Justice Powell saw the following propositions as established. First, rights enuring under the Fourteenth Amendment are rights of individuals and are guaranteed to individuals. Accordingly, as between individuals of different races, "[i]f both are not accorded the same protection, then [treatment] is not equal."[21] Second, whites are entitled to this protection even if they do not constitute such a "discrete and insular minority" as would make them a suspect class entitled to special solicitude under the equal protection clause.[22] Third, the mere fact that the Court's reinterpretation of equal protection since the 1950's focused on the rights of the black minority should not conceal its basic meaning that all "[d]istinctions between citizens solely because of their ancestry" are "odious to a free people" and thus violative of equal protection.[23]

So much Justice Powell thought clear on authority.[24] But he also questioned the sociological validity of a "two-class theory" which treats minorities in one way and the majority in another, authorizing discrimination against whites merely because this operates benignly toward blacks. "Majority whites" themselves consist, he thought, of various minority groups, unless that class refers only to "White Anglo-Saxon Protestant," and at that point they would be just another minority. Preferred status for some minorities as against others, free of strict scrutiny, would in these circumstances require constant rankings and

tection; and (2) that Bakke was not excluded from the total pool of applicants for admission, but only from the 16% of reserved places, and only the former would constitute exclusion.

19. *Id.* at 287 (Powell, J.).

20. *Id.* at 291-99 (Powell, J.).

21. *Id.* at 290 (Powell, J.).

22. *Id.* at 290 & n.28 (Powell, J.).

23. *Id.* at 290-91 (Powell, J.), (quoting Loving v. Virginia, 388 U.S. 1, 11 (1967) and Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

24. The language of the Fourteenth Amendment speaks of personal rights: "No state shall . . . deny to any person. . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1. *See* Shelley v. Kraemer, 334 U.S. 1, 22 (1948). Justice Powell noted that racial distinctions have been subjected to strict scrutiny without any necessity for finding a discrete minority. 438 U.S. at 290 (Powell, J.) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) and Carrington v. Rash, 380 U.S. 89, 94-97 (1965)).

rerankings among them, presupposing ongoing "sociological and political analysis [which] simply does not lie within judicial competence," even if it were desirable.[25]

As to desirability, the very demand for benign preference raised "serious problems of justice."[26] What is benign may not be evident on the face of things. Does the Constitution require individuals to bear otherwise "impermissible burdens" to enhance the "societal standing" of ethnic groups? What principle requires that grievances be remedied by burdening persons innocent of any wrong? Would not the ranking and reranking of groups for preference inevitably reflect "the ebb and flow of political forces," thus exacerbating rather than alleviating racial and ethnic antagonisms? May not such preferential programs "only reinforce common stereotypes" that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth? Underlying most of these questions is the principle of justice that burdens as well as benefits should fall on the individual as such and not flow from membership in a particular group.[27] When this principle is departed from by a discriminatory measure, the individual concerned is entitled to ask for strict judicial scrutiny to ensure that any departure is "precisely tailored to serve a compelling governmental interest."[28]

B. Strict Scrutiny

Since, in Justice Powell's view, Fourteenth Amendment rights inhere in individuals and not in groups, he accepted Bakke's argument that strict scrutiny was applicable to any discrimination against a racial group, including whites, and was therefore applicable in this case. Correspondingly, he rejected the Regents' submission that strict scrutiny was inapplicable. They had argued that strict scrutiny only be applied when the challenged discrimination was against discrete and insular

25. 438 U.S. at 297 (Powell, J.). This comports with the California Supreme Court's analysis. *See* 18 Cal. 3d at 50 n.16, 553 P.2d at 1163 n.16, 132 Cal. Rptr. at 691 n.16. *See also* Lavinsky, *De Funis v. Odegaard: The "Non-Decision" with A Message*, 75 COLUM. L. REV. 520, 527 (1975). The most cogent and comprehensive development of these points and critique of the Brennan opinion in their light appears in A. SINDLER, *supra* note 2, at 301-07. On Justice Blackmun's ambivalent position, *see id.* at 303.

26. *Id.* at 298 (Powell, J.).

27. The contrary view of the Brennan Four is discussed *infra*. The critical factor is not whether a group or a single person is the claimant. It is rather whether the rights claimed by the litigants are claimed in their capacity as members of a racial or ethnic group (impermissible), or as individuals subject to substantially the same admission criteria as all other individuals (permissible). *See* A. SINDLER, *supra* note 2, at 303.

28. 438 U.S. at 299 (Powell, J.).

minorities; discrimination against whites cannot be suspect insofar as it is benign towards blacks.[29]

Justice Powell distinguished the cases offered by the University of California to avoid strict scrutiny.[30] The school desegregation cases were preceded by judicial findings of constitutional violations which the challenged racial classifications attempted to remedy in due proportion.[31] In the employment discrimination cases, the exemption from strict scrutiny was predicated on prior "proven constitutional or statutory violations."[32] The controversial decision on reapportionment, *United Jewish Organizations v. Carey*,[33] was based on a finding by the Justice Department under the Voting Rights Act of 1965 that blacks were subjected by the existing apportionment to an unlawful dilution of voting power. And in *Lau v. Nichols*,[34] the Supreme Court's order, issued without strict scrutiny, that remedial English instruction be provided was preceded by regulations under Title VI of the Civil Rights Act which required this in cases where inability to understand English excluded children from educational programs. Thus, there was at least an implied administrative determination of prior discrimination.[35]

The only non-strict scrutiny precedents which lacked a prior determination of past discrimination were, in the Justice's view, those relating to gender-based classifications. He distinguished these by noting that only two classes were involved, making class-wide adjustment more feasible.[36] Preferential treatment based on ethnic origin, by contrast, presents serious classification problems. With what could be characterized as male complacency, Powell added that, as a matter of history, gender-based distinction does not carry the odiousness of racial discrimination.

29. *Id.* at 287-99 (Powell, J.). "It is far too late to argue that . . . equal protection to *all* persons permits the recognition of special wards entitled to . . . protection greater than that accorded others." *Id.* at 295 (Powell, J.). Though, Justice Powell added, discreteness and insularity were still relevant in identifying new "suspect" classes or in deciding the outcome of strict scrutiny. *Id.* at 290 (Powell, J.).

30. *Id.* at 300-05. (Powell, J.).

31. *Id.* at 300-01. (Powell, J.). *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

32. *Id.* at 302 (Powell, J.). *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1975). The California Supreme Court also so found. *See* 18 Cal. 3d at 57 n.25, 553 P.2d at 1168 n.25, 132 Cal. Rptr. at 696 n.25.

33. 430 U.S. 144 (1977).

34. 414 U.S. 563 (1974).

35. 438 U.S. at 303-04 (Powell, J.).

36. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

C. The University of California at Davis Special Admissions Program[37]

Adopting the formulation enunciated in *In re Griffiths*,[38] Justice Powell held that "in 'order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment of its purpose or the safeguarding of its interest.' "[39] At the outset, as already seen,[40] he ruled that the Regents' first purpose of assuring a percentage racial representation by means of a racial quota was "constitutionally impermissible" since it preferred some persons for "no reason other than race or ethnic origin."[41] What he ruled out as a purpose or policy objective could, of course, equally be regarded as a means towards achieving the other three purposes said by the University to be served by racial quotas, purposes which Powell admitted might be "substantial and constitutionally permissible:" (1) reducing the historical deficit of disfavored minorities; (2) improving the provision of health services to minorities; and (3) securing the benefits of a diversified student body. However, it is clear that he would rule out racial quotas as a means of achieving these purposes, as he ruled out quotas for the purpose of achieving diversity of the student body quite expressly.

Justice Powell detected flaws affecting two of these other three purposes. First, while "reducing the historic deficit of disfavoured minorities" was *qua* purpose and policy objective permissible,[42] he had already ruled that where it was pursued by a non-governmental public body, the cases permit such compensatory action only after judicial, legislative or administrative findings of past discrimination.[43] Until such findings are made, the state has no "compelling justification" for

37. 438 U.S. at 305-15 (Powell, J.).

38. 413 U.S. 717 (1973). *Griffiths* held that a state could not prevent resident aliens from taking the bar examination, a prerequisite to the practice of law. *Griffiths* restated the strict scrutiny test: "The Court has consistently emphasized that a State which adopts a suspect classification 'bears a heavy burden of justification,' . . . a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest. . . ." *Id.* at 721-22 (footnotes omitted). *Griffiths* explained that "substantial" state interest means that the state interest is "overriding," "compelling" or "important." *Id.* at 722 n.9.

39. 438 U.S. at 305 (Powell, J.).

40. *See* text accompanying note 14 *supra*.

41. 438 U.S. at 307 (Powell, J.).

42. *Id.*

43. *Id.* at 301-02 (Powell, J.). California's high court also so reasoned. *See* 18 Cal. 3d at 57-58 n.25, 553 P.2d at 1168 n.25, 132 Cal. Rptr. at 696 n.25.

compensatory preference.[44] Because there were no such findings here and the Regents were not competent to make them,[45] bestowing such competence would allow a capricious privilege to prefer some groups to others.[46] Second, while the purpose or policy objective of improving health services to minorities, asserted by the Regents, could be a sufficiently compelling purpose, there was "virtually no evidence in the record" that the University of California program was "either needed or geared to promote that goal." The special admissions program neither included a requirement that minority applicants show special concern for serving disadvantaged minorities nor gave similar preference to non-minority applicants who did.[47]

The final policy objective asserted by the Regents, that of securing educational benefits of ethnic diversity in the student body, was acknowledged by Justice Powell as important. Since diversity encourages an atmosphere of "speculation, experiment and creation" and "robust" exchange, there is a First Amendment-based constitutional interest in promoting this diversity, and this certainly constituted a compelling interest.[48] Even though diversity in the student body thus "clearly is a constitutionally permissible goal," the question still remained whether the Regents' fixing of quotas on a two-track ethnic basis (even if amended to a multi-track ethnic basis) was a necessary or even feasible means of achieving it. Such quotas wrongly identify ethnic diversity with the diversity sought, for ethnic background is only one element in the desired diversity.[49] Justice Powell specified that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics. . . ."[50] Promotion of beneficial educational pluralism requires qualities such as "exceptional

44. *Id.* at 308-09 (Powell, J.).

45. *Id.* at 309 (Powell, J.).

46. The Brennan Four observed that, in any case, the California Constitution and statutes had delegated to the Regents sufficient "plenary legislative and administrative power" over the University to make such a finding. *Id.* at 366-67 n.42 (Brennan, White, Marshall and Blackmun, JJ.). On this and related questions of other University trustees, see O'Neil, *Bakke in Balance: Some Preliminary Thoughts*, 67 CAL. L. REV. 143, 153-56 (1979). This difference does not affect the basic issues here under examination.

47. *Id.* at 310-11 (Powell, J.). Justice Powell cited studies indicating that underrepresentation of blacks may be due merely to the small pool of qualified black applicants. *Id.* at 311 n.47.

48. *Id.* (quoting Sweezey v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

49. Justice Powell cited the Harvard College admissions program where "critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it." *Id.* at 324 (Powell, J.).

50. *Id.* at 315 (Powell, J.).

personal talents, unique work or service experience, leadership potential, maturity, . . . ability to communicate with the poor" as well as considerations of race or ethnic background.[51]

D. The Interface Between the Issues

On the question of issuing a mandatory injunction, as already seen, Justice Powell agreed with the Stevens Four that Bakke's right to admission must be affirmed. But while their ground was that his exclusion was in direct conflict with the words of section 601, Justice Powell's ground was that it amounted to discrimination under the equal protection clause, to which he equated the proscription of section 601. But the very setting of limits on the permissible use of race criteria which led him to conclude that the use of numerical racial quotas was not permissible so that Bakke was unlawfully excluded, also led him to conclude, with respect to the validity of the U.C. Davis program, that the California court's prohibition of "any consideration of the race of any applicant"[52] in admissions programs was too wide and must be reversed. On this second issue Justice Powell's concurrence moved to the Brennan Four. The delimitation of the permissible consideration of race was the interface between the two issues.

III. Whether and How Far Admissions Programs May Be "Race-Conscious": The Brennan Four[53]

As already seen, the four remaining Justices (the "Brennan Four") who dissented on the issue of Bakke's admission, since they would allow benign discrimination consisting of numerical racial quotas, agreed with Powell that tests could be "race-conscious." They were, with Justice Powell, a majority of five for reversing the California Supreme Court's wide ban on any use of race-based criteria. In the Brennan Four's own formulation, they reversed the judgment below "insofar as it prohibits the University from establishing race-conscious programs in the future."[54]

Strictly, of course, this holding would only permit the use of race-based criteria within the limits common to them and Justice Powell. Indeed, after admitting that none of the opinions in the case spoke for

51. *Id.* at 317 (Powell, J.).

52. *Id.* at 320 (Powell, J.). *See* 18 Cal. 3d at 53-56, 553 P.2d at 1165-67, 132 Cal. Rptr. at 693-96.

53. *Id.* at 324-79 (Brennan, White, Marshall and Blackmun, JJ.).

54. *Id.* at 326 (Brennan, White, Marshall and Blackmun, JJ.).

the Court, the joint opinion of the Brennan Four opened with an offer of a common denominator with Justice Powell:

> But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area.[55]

Or, more briefly, universities are not prohibited from "establishing race-conscious programs in the future."[56] To be accurate, they should perhaps have added the proviso that such programs must not be based *merely* on racial factors, as are numerical racial quotas. For only with this proviso did Justice Powell's opinion and theirs concur to make a majority. And, subject to the same proviso, the Brennan Four and Justice Powell would also certainly be *ad idem* that race could be used as one from among the ingredients necessary in pursuing the policy, approved by all of them as legitimate, of producing diversity in the student body.

A closer analysis discloses that the view of the Brennan Four as to the permissibility of benign discrimination through race-conscious admissions programs was more tolerant in the following respects than the view of Justice Powell examined in Section II.

A. The Distinction Between Criteria Based Solely on Race and Those Based on Race *and* Other Factors

The most obvious difference is, of course, the Brennan Four's rejection of Justice Powell's sharp distinction between the impermissible use of racial quotas either as an end in itself or as a means to achieve a percentage representation and the permissible use of race as one preferential factor among others:

> There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.[57]

Justice Blackmun's separate opinion similarly questioned the validity of the line between the Powell-disapproved "two-track [race] system"

55. *Id.* at 325 (Brennan, White, Marshall and Blackmun, JJ.).

56. Harvard's plan is cited as acceptable. *See id.* at 326 n.1 (Brennan, White, Marshall and Blackmun, JJ.).

57. *Id.* at 378 (Brennan, White, Marshall and Blackmun, JJ.).

and the Powell-approved Harvard College system where race and ethnic background is only one of many factors. "The cynical," he observed, "may say that under a program such as Harvard's one may accomplish covertly what Davis concedes it does openly;" but he thought that the Davis program was constitutional, "though perhaps barely so."[58]

In reply to Justice Powell's argument that a basket of factors, in which the ethnic is only one, avoids the danger that two-track criteria based on race alone will perpetuate, rather than abate, racial antagonisms, the Brennan Four seemed to plead a kind of confession and avoidance. A range of non-ethnic factors would require each applicant to be scored separately, on a case by case basis, as to disadvantage suffered. This, they thought, would be a "virtual impossibility," presumably as a matter of university administration. They thought, however, that even if such separate scoring were possible, universities would not be able to reach the persons disadvantaged by race-based discrimination through the use of non-racial criteria, such as poverty, family, or educational background. For this conclusion they offered two reasons. First, such criteria would encompass a far greater number of whites than of racial minorities, by dint of the simple fact that whites are in the majority. Second, statistics show a far lesser correlation of economic disadvantage with poor scholastic records in whites than in blacks.[59]

The present writer would add a third objection, viewed from the aspect of overall scholastic quality of the student body. It appears that a system of racial quotas, for example in Legal Education Opportunity Programs, tends to introduce students who are marginal in their law school scholastic performance, resulting in a dramatically high failure rate in bar examinations among such students after graduation.[60] Even if the first two objections were overcome, the result of that very success would be to introduce into the student body a further (and much larger) infusion of disadvantaged applicants from the white majority. The total intake of students being fixed by other considerations, the

58. *Id.* at 406 (Blackmun, J.).

59. *Id.* at 376-78 (Brennan, White, Marshall and Blackmun, JJ.).

60. *See* Henkin, *What of the Right to Practice a Profession?*, 69 CAL. L. REV. 131 (1979) (discussing larger constitutional issues concerning entry into the professions). This is, of course, part of the context in which professional schools in universities function. *Cf.* O'Neil, *Bakke in Balance: Some Preliminary Thoughts*, 67 CAL. L. REV. 143, 165-70 (1979); Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 CAL. L. REV. 171, 188 (1979) (regarding financial, scholarship, and search policies after *Bakke*).

result would be a dramatic rise in the proportion of the student body whose expected performance would be marginal.

B. Quotas as a Means to Adequate Representation

It is of consequence to the last point that the Brennan Four squarely rejected Justice Powell's exclusion *ab limine*—as discrimination for its own sake[61]—of race-based numerical quotas, either as a policy objective or as a means, designed to produce percentage representation.[62] For them, the only question was whether the quota size was appropriate for remedying the evil at which it was aimed. Since at U.C. Davis the quota of sixteen percent of all places was less than the proportion of minority groups to the whole population of the state and only qualified applicants were admitted, these Justices found the quota appropriate. The remedial quota was thus substantially related to the correction of past discrimination within the Brennan Four's intermediate scrutiny.[63]

C. Equal Protection and Individual Rights

While the Brennan Four did not frontally reject Justice Powell's view that the equal protection clause confers rights on individuals and not on racial groups as such, they did place caveats on it. Since past discrimination is usually based on race, and the resulting disadvantage therefore attaches to the group, they thought remedial action may still (and probably must) proceed along the lines of direct identification with that group. Thus, since the burdens on individuals left by history may reflect on and derive from membership in the racial group, race grouping must therefore be relevant to the equal protection clause. To this extent, and by the same token, they found that it is not necessary as

61. 438 U.S. at 307 (Powell, J.).

62. *Id.* at 378-79 (Brennan, White, Marshall and Blackmun, JJ.). The Brennan Four added: "The excluded white applicant, despite Mr. Justice Powell's contention to the contrary . . . receives no more or less 'individualized consideration' under our approach than under his." *Id.* at 378-79 n.63 (Brennan, White, Marshall and Blackmun, JJ.).

63. *See id.* at 374-75 & n.58 (Brennan, White, Marshall and Blackmun, JJ.). Although also applying strict scrutiny, Justice Brennan employed what has been labeled an intermediate level of review. *Id. See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as Gunther]. Brennan's review was strict, but not " 'strict' in theory and fatal in fact," because "it is stigma that causes fatality." 438 U.S. at 362 (Brennan, White, Marshall and Blackmun, JJ.). Brennan reasoned that no stigma attached to the white majority by virtue of the special admissions program's preference for other races, and that "[the] purpose of remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions programs. . . ." *Id.*

a foundation for compensatory preference to require proof that victims of past discrimination "have been individually discriminated against"; it is enough to show that each is "within a general class of persons likely to have been the victims of discrimination."[64] When the "virtual impossibility" of "a case by case inquiry" into the burden of disadvantage on each individual applicant is taken into account, they concluded, "there is nothing to prevent a State from using categorical means to achieve its ends, at least where the category is closely related to the goal."[65]

D. White Majority as a Suspect Class

Justice Powell sharply rejected the Regents' argument that discrimination against members of the white majority cannot be suspect if its purpose can be characterized as benign. He observed that "[t]he clock of our liberties . . . cannot be turned back to 1868."[66] The Brennan Four, in applying the current formulas for determining whether strict scrutiny is required,[67] held that whites, a class to which Bakke belonged, were not a suspect class, since they were not so saddled with disabilities, a history of purposeful discrimination, or with political powerlessness as to need protection from "the majoritarian political process."[68] Furthermore, the racial classification was relevant to the legislative purpose.

Although Justice Powell treated whites as a suspect class, triggering strict scrutiny, the Brennan Four denied that strict scrutiny was called for but asserted that the level of scrutiny must still be more severe than the laxest standard traditionally used in "old" equal protection cases. This standard involved asking merely whether the challenged measure had a conceivable rational relation to the legislative purpose.[69] For the Brennan Four, however, discriminatory quotas

64. *Id.* at 363 (Brennan, White, Marshall and Blackmun, JJ.) (citing Teamsters v. United States, 431 U.S. 324, 357-62 (1977)).

65. *Id.* at 377-78 (Brennan, White, Marshall and Blackmun, JJ.).

66. *Id.* at 295 (citing Loving v. Virginia, 388 U.S. 1, 9 (1967) and Brown v. Board of Educ., 347 U.S. 483, 492 (1954)). The reference to 1868 appears to be to Justice Marshall's invocation of the Freedman's Bureau Act of 1866 as proving that the Fourteenth Amendment, passed by the same Congress, could not have been intended to prevent differential treatment of blacks and whites. *See id.*, at 397 (Marshall, J.).

67. *See id.* at 355-62 (Brennan, White, Marshall and Blackmun, JJ.).

68. *Id.* at 357 (Brennan, White, Marshall and Blackmun, JJ.) (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)). They also held that no "fundamental rights" of whites were involved. *Id. See* note 63 *supra.*

69. *See Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L. Q. 645-80 (1975).

must serve " 'important [and articulated] governmental objectives and must be substantially related to achievement of those objectives.' "[70] Furthermore, such measures must not "stigmatize" any group or "single out" the politically weak to bear the burden of the benign program. The reasons for this severity, despite the absence of questions of a suspect class or fundamental rights, said the Brennan Four, are threefold. First, the tendencies of racial (as well as gender) classifications to degenerate into paternalism and the stereotyping and stigmatizing of politically weak groups warrant heightened scrutiny. Second, the fact that race (again like gender) is an immutable characteristic which the individual cannot escape indicates that class characteristics, rather than individual ones, mark the individual. For both those reasons, the use of racial classifications tends to divorce the bestowing of individual benefits and burdens from individual merit and achievement. Third, and finally, discrete and insular classes may exist even within the white majority and be vulnerable to "the majoritarian political process."[71]

It will be perceived that the differences at this point between Justice Powell and the Brennan Four are more in the structure of argument than in necessary differences of result in scrutinizing a particular use of race criteria. Their radical disagreement on numerical racial quotas originates not from the difference between the classical strict scrutiny and the Brennan Four's "intermediate" ("quasi-strict") scrutiny,[72] but from Justice Powell's flat assertion that such quotas amounted to discrimination for its own sake.

It may suffice, therefore, to note in summation that quasi-strict scrutiny as applied by the Brennan Four required them to: (1) approve as important the articulated purposes or objectives of the compensatory measure; (2) hold the classification used justified as a means substantially related to their achievement; (3) find that neither the persons prejudiced nor those benefited by its use would thereby be stigmatized; and (4) find that the persons so prejudiced were not singled out to bear the burden because they are politically weakest or vulnerable. The Brennan Four held that Bakke's rejection did not stigmatize him as inferior, nor inflict on him any pervasive lifetime injury comparable to that received by black children from school segregation.[73] Nor did the racial quota stigmatize the members of the beneficiary racial minori-

70. 438 U.S. at 359 (Brennan, White, Marshall and Blackmun, JJ.) (quoting Califano v. Webster, 430 U.S. 313, 317 (1977)).

71. *Id.* at 360-61 (Brennan, White, Marshall and Blackmun, JJ.).

72. *Cf.* Craig v. Boren, 429 U.S. 190, 210-11 (1976) (discussing the intermediate standard of equal protection review).

73. 438 U.S. at 375 (Brennan, White, Marshall and Blackmun, JJ.). *See* the sharp cri-

ties, since they were qualified to enter medical school and were subjected thereafter to the same courses and tests as others.[74]

E. Voluntary Action Absent Findings of Past Discrimination

All the situations in which voluntary compensatory preferences by non-governmental public bodies had been approved were, according to Justice Powell, cases where there had already been a determination by state or federal authorities of the existence of disadvantage to a group flowing from past illegal discrimination.[75] The Brennan Four explicitly rejected this as a prerequisite for such voluntary compensatory action.[76]

Analytically, despite the mass of legislative and judicial examples offered by the Brennan Four,[77] it cannot be said that they met their colleague's argument squarely. Justice Powell's conclusion was that in the cases in question there had always been either a judicial, legislative or administrative finding by a competent state or federal authority. Though the Brennan Four purport to refute his position, the authorities they offer in support seem to show merely that there is no need for a prior judicial determination of past discrimination on which to base voluntary remedial action.[78] And, of course, their prolific use of federal regulations and statutes to illustrate the permissibility of the remedial use of race criteria,[79] and even of numerical race quotas, in no way

tique of the point in Dixon, *Bakke: A Constitutional Analysis*, 67 CAL. L. REV. 69, 85-86 (1979).

74. *See* text accompanying notes 70-71 *supra*.

75. *See* text accompanying notes 30-35 *supra*. Justice Powell admitted an exception for gender-based discrimination. *See* text following note 35 *supra*.

76. 438 U.S. at 348 (Brennan, White, Marshall and Blackmun, JJ.).

77. *See id.* at 347-49 nn. 21, 22, 23 & 24. (Brennan, White, Marshall and Blackmun, JJ.).

78. That they are not too sanguine as to their own analysis is suggested by a footnote. *Id.* at 366 n.42. There they argued that Justice Powell's condition was met in this case since the California Constitution and relevant statutes gave "plenary legislative and administrative power" to the Regents to control the University. The very adoption of the special admissions program implied that the Regents had made the necessary legislative or administrative determination. And these judges then proceeded to make a judicial determination on the point. *See id.* at 372-73 (Brennan, White, Marshall and Blackmun, JJ.).

Other aspects of the Brennan Four's review of the cases permitting voluntary compensatory action by non-governmental public bodies, *see id.* at 365-66 (Brennan, White, Marshall and Blackmun, JJ.), raised no issue with Justice Powell, *Cf. id.* at 341-50 (Brennan, White, Marshall and Blackmun, JJ.) (collating regulations of federal agencies illustrative of the same points) and *id.* at 353 (Brennan, White, Marshall and Blackmun, JJ.) (governmental agencies may require remedial action even from bodies innocent of past discrimination).

79. 42 U.S.C.A. § 6705(f)(2) (Supp. 1979) bears on the use of federal funds for purposes of public works employment. Section 6705(f)(2) provides: "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at

rebuts Justice Powell's argument.[80] Rather, it reinforces his point, for these are themselves legislative or administrative determinations.

IV. Indications concerning the "Newer Equal Protection"

What do the *Bakke* opinions, delivered a full sabbatical cycle after Professor Gunther's "Model for Newer Equal Protection,"[81] indicate as to its pertinence?[82] Against the background of fifteen cases decided during the 1971 Term, Professor Gunther offered a model for delimiting the scope of future judicial review of equal protection claims.[83] The first specification of this model was that it should extricate the courts from the need to make value judgments concerning governmental objectives, by requiring them to abdicate any power of judicial review over actual legislative purposes.[84] The second was that it should provide a substantial though flexible requirement for judging the suita-

least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

80. *See* 438 U.S. at 341-50 (Brennan, White, Marshall and Blackmun, JJ.).

81. Gunther, *supra* note 63.

82. The Stevens Four found that the issues were concluded in favor of Bakke by the prohibition of "exclusion from participation" contained in section 601 of the Civil Rights Act, and that it was therefore unnecessary to pass either on the constitutional issue of the equal protection clause or the anti-discrimination clause of section 601 of the Civil Rights Act. That opinion is not therefore relevant to the present inquiry. *See* Section I of this article *supra*.

83. *See also* Nowak, *Realigning the Standards of Review Under The Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 107 (1974); Wilkinson, *The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

84. Professor Gunther necessarily admitted that the Justices in the fifteen cases studied had not, as the model would require, assumed the constitutional propriety of the actual legislative ends sought by the discriminatory measure and limited equal protection review to the propriety of the means by which these ends were pursued. Some of the very cases which he offers as showing "the strongest pressures to resort to means-focused equal protection" are cases in which the Court's review addressed not merely the propriety of means for achieving legislative ends found or conceived by the Court as given, but also the very propriety of these ends themselves as a basis for discriminatory classification. They undercut his model in this respect. *See* Gunther, *supra* note 63, at 33-37 (discussion of James v. Strange, 407 U.S., 128 (1972), Eisenstadt v. Baird, 405 U.S. 438, 447, 448-52 (1972) and Reed v. Reed, 404 U.S. 71 (1971)).

The fact that Justice White in *Eisenstadt* came to a position via due process, 405 U.S. at 463-65, similar to that reached by Justice Brennan via equal protection reminds us that the "new equal protection" came to be used, despite (or, perhaps, because of) the eclipse of substantive due process, to cover review of substantive legislative ends.

bility, in light of the equal protection clause, of the means adopted towards these purposes. .This requirement, Professor Gunther thought, would be "that legislative means substantially further legislative ends," and equal protection constraints on permissible classification would be "essentially a more specific formulation of that general principle."[85] This, he thought, could extend over the whole range of equal protection analysis short of cases found by the court to involve fundamental interests or suspect classifications. In this latter area, the more demanding requirements of strict scrutiny, that the means be the least restrictive means necessary for achieving the legislative ends, would continue to be applicable.[86]

There is, indeed, some evidence that at least four of the five justices who reversed in part the California court's decision were advertent to Professor Gunther's article.[87] There is, however, little evidence that any of them were directly advertent to the Gunther model; and no attention was paid to that aspect of the model which would place the actual purposes or ends of challenged legislation beyond judicial scrutiny. It is certainly not possible to suggest that any of the justices adopted this feature of the model, even *sub silentio*. For all of them seemed to hold explicitly that rulings on equal protection require that the purposes of the challenged provisions, as well as the means of achieving those purposes, be scrutinized by the Court.

The Justices of the Brennan Four, who dissented from Justice Powell and the Stevens Four as to the admission of Bakke, concurred with Powell in reversing that part of the California court's judgment which seemed to proscribe not merely numerical quotas, but any use of race criteria in admissions.[88] Their reasoning differed from Justice Powell's in many details; it also differed in its analytical framework. On the point here under examination, however, the Brennan Four's

85. Gunther, *supra* note 63, at 20. Though Professor Gunther is addressing legislaive decisions as a type case, he would presumably want the requirement to be applied to all actions challenged under the equal protection clause, including action requested of or volunteered by non-governmental public bodies.

86. *Id.* at 20-23.

87. The article is cited in the opinion of the Brennan Four, though by way of a flourish or rhetoric, on another point. These judges were concerned to deny in advance that their testing would be (as Professor Gunther had characterised the older strict scrutiny) "strict" in theory and "fatal" in fact. *See* 438 U.S. at 362 n.36 (Brennan, White, Marshall and Blackmun, JJ.); note 63, *supra.*

88. It may be noted here that the precise meaning of the California Supreme Court's order on this last point is disputed. The view of the five justices referred to in the text was rejected by the Stevens Four. 438 U.S. at 409-11 & n.3 (Stevens, Burger, Stewart and Rehnquist, JJ.). They read the order as not containing any such proscription.

reasoning is just as resistant as was Justice Powell's to Professor Gunther's proposal that the Court should abjure any "value-laden" review of actual legislative goals and limit itself to a means-focused review for conformity with equal protection.[89]

It was not considered sufficient by the Brennan Four that the University of California at Davis had the "articulated purpose of remedying the effects of past discrimination" which had led to "substantial and chronic underrepresentation."[90] The Justices felt it necessary to pass on this purpose as "[s]ufficiently important to justify the use of race-conscious admissions programs,"[91] and they gave considerable space to prior cases which had ruled on the justification for such a legislative purpose.[92] They did so in obedience to the principle, which they asserted at the outset, that "[our] cases have always implied that an 'overriding statutory purpose' could be found that would justify racial classifications."[93] This would be a strange opening for a court that was abjuring, as Professor Gunther's model recommends, any power to review legislative purposes and limiting its review to whether the means adopted to those ends satisfied equal protection. Even in situations such as the instant one, where these Justices regarded as applicable a level of scrutiny short of strict, they endorsed the principle that "mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[94]

Justice Powell made his position on this same matter no less clear by requiring that the impugned provision be shown to be necessary for protecting "a substantial and constitutionally permissible purpose."[95] And he proceeded on this basis to ask whether each of the various purposes offered in justification of the quota program at U.C. Davis was supported by "a legitimate and substantial interest."[96] He approved as such the purpose of abating the disabling effects of identified past discrimination,[97] and the purpose of improving the delivery of health care services to underserved communities.[98] For institutions of higher edu-

89. *See* text accompanying notes 54-80 *supra*.
90. 438 U.S. at 362 (Brennan, White, Marshall and Blackmun, JJ.).
91. *Id.*
92. *Id.* at 355-62 (Brennan, White, Marshall and Blackmun, JJ.).
93. *Id.* at 356 (Brennan, White, Marshall and Blackmun, JJ.) (citation omitted).
94. *Id.* at 358-59 (Brennan, White, Marshall and Blackmun, JJ.) (citing Califano v. Webster, 430 U.S. 313, 317 (1977) and Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975)).
95. *Id.* at 305 (Powell, J.).
96. *Id.* at 307 (Powell, J.).
97. *Id.* at 306 (Powell, J.).
98. *Id.* at 310 (Powell, J.).

cation, he, as well as the Brennan Four, also found that the purpose of attaining diversity in the student body, so as to promote speculation, experiment, creativity and the like, was a constitutional purpose.[99] One purpose of the U.C. Davis program, however, that of assuring "within its student body some specified percentage of a particular group merely because of its race or ethnic origin," he declared to be constitutionally impermissible—indeed to be "facially invalid."[100]

It was, of course, on this last ground that Justice Powell affirmed, with the concurrence (on other grounds) of the Stevens Four, the decision of the California court that Bakke should be admitted. And the point indicates unambiguously that Professor Gunther's proposal that the Court not review legislative ends is simply not accepted in 1978. Moreover, it raises the even graver objection against his model that the distinction between ends and means, which is its fulcrum, is in itself a very dubious one, at any rate in this area of social affairs. Justice Powell had to confront the licitness of racial percentages both at the level of ends and at the level of means. He not only held that the assurance of a specified percentage of a racial group as such was "facially invalid" as a purpose or end; he also held that even for meeting the three other purposes, which he found to be substantial and constitutionally permissible, the fixing of such specified percentage was an impermissible means because it was not "necessary to promote" those purposes.[101]

On the other hand, the positions of most of the majority Justices who reversed in part the California ruling do fit within the specifications of the Gunther model *concerning the need for intermediate levels of scrutiny*. Justice Powell brought the case within the ambit of strict scrutiny proper, and his opinion therefore adds little on the point.[102] The Brennan Four, however, who on the wider second issue of whether there could constitutionally be any consideration of race in admissions programs, concurred with Justice Powell in reversing the California

99. *Id.* at 311-12 (Powell, J.).

100. *Id.* at 307 (Powell, J.).

101. *See, e.g., id.* at 310-11 (Powell, J.) (regarding delivery of health care services) and *id.* at 311-15 (Powell, J.) (regarding diversity in the student body).

102. *Id.* at 305-20 (Powell, J.). As previously indicated, Justice Powell distinguished the main groups of cases in which voluntary measures constituting benign discrimination remedial of past discrimination had apparently been approved without being subjected to strict scrutiny, on the ground that they were based on prior legislative, judicial or administrative determination of disadvantage flowing from past discrimination. *Id.* at 300-10 (Powell, J.). As to the other purposes (improving health services and diversifying the student body), he concluded that, permissible and even "compelling" as these purposes (ends) were, the particular measures (means) of two-track numerical quotas adopted by U.C. Davis were "neither needed nor geared to promote" them. *Id.* at 310-19 (Powell, J.).

court, followed a structure of reasoning as to the need for such intermediate scrutiny closely matching the model.[103] They explicitly rejected any grounds for invoking strict scrutiny, holding that no fundamental right was involved in admissions to medical schools.[104] The classification of whites was neither suspect in the accepted sense[105] nor irrelevant to the ends sought; nor did the use of a racial classification stigmatize the whites prejudiced or the minorities benefited by it, nor "put the weight of government behind racial hatred and separatism."[106]

At this point the opinion by the Brennan Four articulated with rare judicial clarity the reasoning involved in the extension of judicial intervention into what may be called the no man's land between the judicial deference and passivity associated with the "old" pre-Warren Court equal protection, and the area occupied by the Warren Court's "new" strict scrutiny equal protection. In that no man's land the Brennan Four, having found strict scrutiny inapplicable, could readily have concluded that the special admissions program was rationally related to the objectives of that program. Instead, they were zealous to insist that "the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases."[107] Rather, they declared that certain considerations—to be mentioned below—led them to conclude that racial classifications, aimed at remedying disadvantages stemming from prior discrimination, "must serve important governmental objectives and must be substantially related to achievement of those objectives."[108] While the strict scrutiny of "new equal protection" was not applicable, scrutiny had to be strict and searching nonetheless.

The considerations leading to this conclusion have already been discussed in Section III, but they may be briefly recalled. They included the risk, with racial as with gender-based classifications, of their being used "to stereotype and stigmatize politically powerless segments of society."[109] Distribution of benefits and burdens on the basis of such

103. 438 U.S. at 350-56 (Brennan, White, Marshall and Blackmun, J.J.).

104. *Id.* at 357 (Brennan, White, Marshall and Blackmun, JJ.).

105. *See* text accompanying notes 51-52 *supra.*

106. *Id.* at 357-58 (Brennan, White, Marshall and Blackmun, JJ.). *See* Section III *supra.*

107. *Id.* at 358 (Brennan, White, Marshall and Blackmun, JJ.).

108. *Id.* at 359 (Brennan, White, Marshall and Blackmun, JJ.) (citing Califano v. Webster, 430 U.S. 313, 317 (1977), and Craig v. Boren, 429 U.S. 190, 197 (1976)).

109. *Id.* at 360 (Brennan, White, Marshall and Blackmun, JJ.) (quoting Kahn v. Sherin, 416 U.S. 351, 357 (1971) (dissenting opinion)).

immutable characteristics as race and gender runs counter to the general dedication of the political order to criteria involving individual merit and responsibilities.[110] As the Brennan Four stated, "[T]here are limits beyond which majorities may not go when they classify on the basis of immutable characteristics."[111] It was for these reasons that scrutiny must be "strict and searching," even though (if emulation of judicial lucidity be permitted) "strict" scrutiny was strictly not applicable.

Whatever name is given to this intermediate level scrutiny—"quasi-strict scrutiny" may here be used for the time being—the judicial recognition of it has gone beyond the inchoateness which Gunther noted at the time he constructed this aspect of his model in 1972. There are clear signs of flexibility in the Court's level of scrutiny of the appropriateness of legislative objectives and the nature of the subject of legislation. Of course, all this may have emerged from the inner dialectic of judicial reasoning; but even then it would sustain in 1978 this part of Professor Gunther's model of 1972.

Certainly, the Brennan Four explicitly, and Justice Powell tacitly, approached the question of suitability of means to ends in terms of a demonstrably genuine relation of the means adopted to the achievement of the policy objectives. In contrast, strict scrutiny asks only whether the means were necessary to this achievement and entails the very least possible discrimination between those within the classification and those without. That genuine relation was for the University to show by empirical evidence as to the composition of the student body, the level of medical services to minorities and the like. Even as to the suitability of means, Gunther correctly recognized that the questions for the Court are "neither mechanical nor value-free."[112] He comforted himself with the thought that, even then, the value judgments involved would still be of a lesser scale and range than those involved if the Court ignored that part of his model which called for it to renounce judicial review of the legislative objectives themselves.

One thing shown by the present analysis is that the Justices are certainly not ready to make that renunciation; value judgments of the larger scale and range are still involved in equal protection determinations.[113] And this outcome marches with the present writer's major

110. *Id.* at 360-61 (Brennan, White, Marshall and Blackmun, JJ.).

111. *Id.* at 361 (Brennan, White, Marshall and Blackmun, JJ.).

112. Gunther, *supra* note 63, at 47-48.

113. Professor Gunther further conceded that even if both parts of his model had been accepted, the difficult line between means and ends would often have to be drawn by refer-

theme, expressed elsewhere, that even in decisions implementing the constitutional precept demanding equal protection of the laws, what is crucial is often not the value of equality itself but the other values which must inevitably guide the Court in using or setting limits to it, or in choosing between its conflicting equivocations.[114]

V. Indications for Future Special Programs

> *And the king said, Bring me a sword. And they brought a sword before the king.*
>
> *And the king said, Divide the living child in two, and give half to the one, and half to the other.*
>
> *Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it.*
>
> *Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof.*[115]

The *Bakke* opinions, whatever else be said, have complicated rather than simplified both benign discrimination and the understanding of the equal protection clause. Partition seems to have been an active principle working through the *Bakke* case, though what will eventually be saved, and by whose wisdom, is not yet clear. The question of Bakke's exclusion was partitioned off, by one majority, from the question of the permissibility of any consideration of race in admissions policies.[116] The Stevens Four hung their decision on terms like "exclusion" used in section 601 of the Civil Rights Act but not on the equal protection clause. Justice Powell hung his decision on the rather mysterious reasoning that while it is a substantial and constitutionally permissible end to compensate for underrepresentation of minorities arising from past discrimination, to introduce numerical racial quotas as the means towards this end was to prefer some persons "for no other reason than race or ethnic origin," constitutionally impermissible as either end or means.[117]

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ence to the breadth of value judgments which have to be made. *Id.* at 48. Since this question appears now to be rather moot, we need not examine the possibility that this way of distinguishing ends and means may be circular.

114. *See* Stone, *Justice in the Slough of Equality*, 29 HASTINGS L. J. 995 (1978).

115. 1 *Kings* 3:24-27 (King James).

116. Though sections 703(a)(1) and 703(a)(2) of Title VII of the Civil Rights Act (on employment) do not include the precise term "exclusion," they do include terms of identical meaning such as "fail or refuse to hire," "discharge" and "deprive . . . of equal opportunity."

117. *See* Sections I & II *supra*.

It was not only the issue, however, that was thus partitioned. The justices partitioned the Court itself into the Stevens Four (who declined to speak, on the ground that it was unnecessary to do so, to the permissibility of considerations of race) on the one hand, and the Brennan Four (who spoke directly and rather unambiguously on that issue) on the other, with Justice Powell hovering uneasily in between. The outcome on the question of the permissibility of race as a criterion under the equal protection clause was itself partitioned between one approach—numerical racial quotas aimed at percentage representation—forbidden by the single vote of Justice Powell, and another approach—the use of racial criteria along with other general criteria of disadvantage or contribution—which was held permissible in a rather wholesale manner by the Brennan Four as well as by Justice Powell within limits rather inadequately specified.

The generosity of the Brennan Four's wholesale tolerance of racial criteria, as well as the uncertain limits of Justice Powell's, together suggest that further cases are bound to be presented which will require the wholesale to be made retail, and the limits to be specified further. The solidarity of the Brennan Four, moreover, gives no assurance of how future majorities will swing. The trouble is not Justice Blackmun's aside, to the effect that for him the U.C. Davis program was "within constitutional bounds, though perhaps barely so."[118] It is far more serious, springing from the very first partition mentioned above, under which the Stevens Four refused to touch at all upon the constitutional or even statutory issues of equal protection. Future variations of race criteria in compensatory admissions policies will also depend critically on how some of the Stevens Four divide, and on what specific lines Justice Powell draws for himself in relation to them.

Despite the relaxed attitudes of many American judges to the niceties of precedent, it is well to recall that in the view of the Stevens Four, there was more than one reason why Justice Powell and the Brennan Four ought never to have touched upon the wider second issue of the permissibility of any consideration of race in admissions programs. In the Stevens Four's reading of the California judgment, it included no order enjoining any consideration of the race of applicants for admission to U.C. Davis, other than that of Alan Bakke himself. The injunction only restrained the University of California "from considering

118. 438 U.S. at 406 (Blackmun, J.). It fits with this tentativeness of Justice Blackmun that in *Weber* he emphasized the temporary nature of the affirmative action plan adopted by Kaiser. United Steelworkers of American v. Weber, 99 S. Ct. 2721, 2734 (1979) (Blackmun, J., concurring).

plaintiff's race or the race of any other applicant in passing upon his application for admission."[119] In their view, the final "his" referred to Bakke only and not to applicants generally. On this basis nothing except what has been called "the first issue" (Bakke's right to admission) was before the Supreme Court of the United States. The Stevens Four opened their judgment with the words: "It is always important at the outset to focus precisely on the controversy before the Court," and a few sentences later they stated: "This is not a class action. The controversy is between two specific litigants."[120] It concerned only the numerical racial quota program under which Bakke was excluded. For them, everything uttered by Justice Powell and the Brennan Four on the wider second issue was strictly *obiter dictum*.[121]

The distinction between *ratio decidendi* and *obiter dictum* is not, of course, as clear in American conditions as many English lawyers pretend it to be for theirs. Yet the vehemence with which the Stevens Four made this point at least reinforces the impression that the fate of racial considerations, apart from numerical racial quotas designed to produce percentage representation, is a matter on which some of them feel strongly—and probably differently from the Brennan Four. The future legal fate of quotas may therefore still be in the balance.

The wisdom of the Solomonic stratagem of dividing the child did not, of course, lie in any application of the principle of equality. It lay rather in the wise monarch's understanding of the passions, greeds, dedications and capacity for selfless sacrifice of the human heart, and of the relations which unite and divide human beings. This is a truth to seize and cherish as we ponder the future of racial admissions criteria in universities. The "universitas" which the very name "universities" symbolizes, is as vulnerable to partition as the living child in Solomon's judgment.

119. Paragraph 2 of the California trial court judgment, as affirmed by the Supreme Court of California *quoted in* 438 U.S. at 409 n.2 (Stevens, Stewart and Rehnquist, JJ. and Burger, C.J.). *See id.* at 408-11 & nn.2, 3 & 5 (Stevens, Stewart and Rehnquist, JJ. and Burger, C.J.) for full text and the Stevens Four's analysis.

120. 438 U.S. at 408 (Stevens, Stewart and Rehnquist, JJ. and Burger, C.J.). A footnote to the first sentence above observed that "[the Brennan Four] have undertaken to announce the . . . effect of [the] Court's judgment," but recalled that "only a majority can speak for the Court or determine what is the 'central meaning' of any judgment. . . ." *Id.* at 408 n.1 (Stevens, Stewart and Rehnquist, JJ. and Burger, C.J.). This, of course, questions the authority of the Brennan Four's opening statement. *Id.* at 324-25 (Brennan, White, Marshall and Blackmun, JJ.) (*quoted in* Section III *supra*). *See also id.* at 271-72 (Powell, J.); Sections I & II *supra* (Justice Powell's effort at formulation).

121. 438 U.S. 265, 408-12 (Stevens, Stewart and Rehnquist, JJ. and Burger, C.J.). *Cf.* Blasi, *Bakke as a Precedent: Does Mr. Justice Powell Have a Theory?,* 67 CAL. L. REV. 21, 22-23, 36-61 (1979) for an analysis in terms of precedent).

The cardinal question now confronting efforts to give vitality to the just impulse towards benign discrimination in the universities lies precisely here. Do those concerned, including the judges, have the understanding of human passions, greeds, dedications and capacity for selfless sacrifice to transform a threat of destructive division into a continuing institutional life of mutual compassion and enrichment? This will be the qualitative test of the further guidelines still required for emergent programs designed to grant compensatory preferences in the wide area of tolerance of racial considerations common to Justice Powell and the Brennan Four.

For reasons already hinted at, however, even the permissibility of "two-track" numerical racial quotas of the type involved in *Bakke* cannot be ruled out. As matters stand after *Bakke*, four of the Justices—the Stevens Four—are not committed either way on that issue, for they carefully rested their decision on words in the Civil Rights Act having no counterpart in the equal protection clause.[122] And since four other Justices—the Brennan Four—did find such quotas acceptable, it would require only one of the former group to commit himself favorably on quotas to legitimate them.[123]

In the face of these possibilities, the present writer should not shrink from a final word concerning the stark conflict between Justice Powell and the Brennan Four who concurred with him, precisely on this issue of numerical racial quotas geared to produce percentage racial representation as a means of affording compensatory preference. It will already have become clear that the present writer does not find analytically convincing Justice Powell's condemning *ab limine* as facially invalid "the purpose of assuring some specified percentage of minority groups."[124] For this ignored the question of whether the shortfall itself was not a significant part of the continuing disadvantage resulting from past illegal discrimination. Reference has also been made to related responses to Justice Powell by the Brennan Four, the gist of which was to question as inconsistent Justice Powell's willingness to accept as evidence of disadvantage a basket of factors, including race, even if these were designed to produce an approximation to the same specified percentage of the same groups. "The cynical," said Justice Blackmun in a phrase worth quoting twice, "may say that under a

122. While Justice Stewart, one of the Stevens Four, voted with the majority in *Weber*, it must be remembered that this was a decision based on Title VII rather than Title VI. *See* note 130 *infra*.

123. *Cf.* Dixon, *Bakke: A Constitutional Analysis*, 67 CAL. L. REV. 69, 72-73 (1979) (on this and other fragilities of the ratio by which Justice Powell ruled out quotas).

124. 438 U.S. at 307 (Powell, J.).

program such as Harvard's one may accomplish covertly what Davis concedes it does openly."[125]

Even, however, after any analytical weakness of Justice Powell's presentation has been noted, his conclusion on this matter may nevertheless be found sociologically and ethically preferable to that of the Brennan Four. Space forbids a full presentation of reasons, but the gravity of the issue commands at least their outlines.

VI. Universities and the First Amendment Connection

Section II of this article demonstrated that one element of Justice Powell's position which led him to produce the majority with the Brennan Four was his recognition of the countervailing interest, anchored in the First Amendment, in speculation, experiment, creation and robust exchange. While this interest is compelling throughout the polity, universities have special responsibilities in furthering it: "Academic freedom . . . long has been viewed as a special concern of the First Amendment."[126] Justice Powell held that since the diversity thus sanctified is far wider than mere racial diversity, racial quotas were neither a necessary nor a feasible means towards it, although race could figure among the wider range of relevant factors.[127]

It may be said at once that this approach, assuming it to be otherwise tenable, is jurisprudentially attractive. For it may offer a path by which equal protection can be functionally molded through principles appropriate to that segment of national life, embracing universities and similar institutions, dedicated to the transmission and expansion of knowledge. It must be clear that reasoned elaborations designed to give equal protection sufficient meaning to function within *each* arena is essential if the jungle threatening to engulf that clause is to be reduced. To require that *every* equal protection determination be mechanically transferable to *every* social arena is to compound progressively all the numerous problems rather than to solve any of them.

Accordingly, claims that Justice Powell's First Amendment diversity principle is not transferable to the employment arena may point to a strength rather than a weakness.[128] And it is, of course, consistent with this desideratum that neither the majority nor the minority in *United Steelworkers of America v. Weber*[129] allowed constitutional is-

125. *Id.* at 406 (Blackmun, J.).
126. *Id.* at 312 (Powell, J.).
127. *Id.* at 315-19 (Powell, J.).
128. *See* A. SINDLER, *supra* note 2, at 320.
129. 99 S. Ct. 2721 (1979).

sues, as distinct from the mere construction of Title VII of the Civil Rights Act, to play a part in the decision.[130] There is obviously no First Amendment nexus, similar to that for universities, which calls for a manufacturer of aircraft or refrigerators to have a culturally or educationally diversified board of directors.[131]

Professor Sindler has sought to dismiss Justice Powell's diversity ground as idiosyncratic and not viable as a general rule.[132] His main ground is that if the First Amendment did indeed provide the compelling interest underlying the freedom of universities to promote diversity, universities could use this freedom, not to pursue diversity in the student body as approved by Justice Powell and the Brennan Four in *Bakke*, but instead to pursue conformity and homogeneity.[133] In the present writer's view this is not the more likely, let alone the necessary outcome of his position. Professor Sindler, as well as Professor Dixon, can only conjure up the dread possibility they envisage by interpreting Powell to mean that the First Amendment legitimizes the enterprise which we know as a university, *including whatever objectives a university chooses to pursue, whether these be to promote uniformity or to promote diversity*. However, the far more likely meaning of Justice Powell's position, which is, indeed, quite explicit in the Justice's elaboration from Justice Frankfurter's words in *Sweezy v. New Hampshire*,[134] is that it is the goal of diversity as a means to further robust exchange which is protected by the First Amendment, and that university admission policies *are protected insofar as they promote this goal of diversity*.[135] On that basis the *reductio ad absurdum* offered by these writers can scarcely

130. Of course the employer's impugned action in *Weber* was not state action. It is nevertheless noteworthy that there appears to have been no such references to the relation of Title VII to constitutional restraints as were made in *Bakke* to the relation of Title VI, section 601 to them. In fact, the majority in *Weber* specifically noted that Title VII and Title VI "cannot be read *in pari materia*." 99 S. Ct. at 2729 n.6. By this they appear to mean at least that insofar as Title VI refers to education, an area of direct federal-state involvement, the constitutional standards of the Fifth and Fourteenth Amendments are attracted to it. There is no such necessary attraction in the context of private employment, to which Title VII is addressed.

131. *Cf.* Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 CAL. L. REV. 171, 188-89.

132. A. SINDLER, *supra* note 2, at 311-12.

133. *Cf.* Dixon, *Bakke: A Constitutional Analysis*, 67 CAL. L. REV. 69, 75-78 (1979).

134. 354 U.S. 234, 263 (1957).

135. "Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S. at 313 (Powell, J.).

arise.[136]

It may thus be argued, along the different line here adopted, that the Powell diversity ground establishes that criteria for race-conscious university admissions will only be entitled to First Amendment protection if they are actually (or at any rate "rationally") related to the goal of educational diversity. Though the criteria may include race, they must also include a sufficient range of other criteria which genuinely serve to measure *the potential contributions to diversity of all applicants for admissions*.[137]

The clarity of this *ratio decidendi*—its "rationality" in current jargon—should not be concealed by the cynical observation that preference indirectly produced by a basket of factors, including race, is indistinguishable from that produced by racial quotas. For this observation is false in a crucial respect.[138] It is false even when exactly the same percentage representation of the disadvantaged racial group is achieved by both approaches. The identity of the outcome is only as to the relative sizes of minority and majority groups. When the impact of the two approaches on individual applicants is examined, however, the direct and indirect preferences are seen to be massively different. They are likely to be different as regards which individual applicants win admission, especially in the minority track. More importantly, however, they have different psychological effects on applicants, especially white applicants, who do not gain admission.[139]

136. So also it would remove any basis for Professor Sindler's claim that justice proceeded "on *ad hoc* grounds of whose ox was gored." A. SINDLER, *supra* note 2, at 312. In the sense that uniformity of gender or color within a particular university is argued to promote robust discussion merely in the sense of removing the inhibitions of members of an "in group" arising from the presence of diversity, it would certainly not fall within this ground of Justice Powell.

137. *Cf.* Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21, 22-23, 61, 66 (1979). *See also id.* at 62-67 (regarding various types of race-conscious programs in this light). Mr. Blasi considers alternative *rationes decidendi* for the Powell position centered on dignity of applicants and reduction of racial prejudice. In preferring the diversity ground he insufficiently stresses that this expresses the thrust of First Amendment freedom of expression for which universities are a conduit par excellence. *Id.* at 35-62.

138. So, and for the similar reasons below, is Professor Dworkin's overly facile assertion that it is "either hypocritical or unrealistic" to recommend "that universities pursue racially explicit goals through racially neutral means." Dworkin, *The Bakke Case: An Exchange*, N.Y. Rev. of Books, Jan. 26, 1978, at 44 n.1. *Cf. id.* at 43 (for the converse of some of the above positions). The exchange followed Professor Dworkin's rather unprophetically titled article, *Why Bakke Has No Case*, N.Y. Rev. of Books, Nov. 10, 1977, at 11.

139. In his rather severe critique of Justice Powell's position, Professor Sindler gives too little attention to these different psychological impacts and to the related effects of multifactoral criteria which may encourage applicants towards efforts to improve their prospects for admission. A. SINDLER, *supra* note 2, at 312-14.

In the face of direct racial quotas, as indeed Justice Powell as well as the Brennan Four pointed out, exclusion is felt to be based on an immutable characteristic of the applicant for which he neither can nor should feel any responsibility. It must consequently be felt to be openly and blatantly unjust by him, by his family, and widely (if more diffusely) throughout the white community. The fact that many in the white community are conscious of the grievous past wrongs for which the quota is intended to compensate, does not neutralize the new cause and sense of injustice which, at a certain point, may exacerbate rather than pacify racial tensions.

When, on the other hand, numerous factors are used as evidence of disadvantage of particular applicants, or of possible contributions by them, many of these factors may not have the immutability of race. As to some of them, applicants may even be able to make efforts to improve their prospective scores, and thus their chance of admission. Justice Powell himself listed "unique work or service experience, leadership potential, maturity . . . ability to communicate with the poor."[140] One might add capacity to contribute to minority, urban or other social problems, bilingualism and the like. And all this would remain true however deliberately the various factors are weighted in order to assure that the entrants include the desired number from minorities. No doubt there would still be complaints from excluded whites, but the complaints would not appear, nor indeed be, so clearly well-grounded. There might even be charges that the whole system of factors and weightings is "rigged" against the disappointed applicant. Yet there could then at least be the answer that efforts must continue to make the admission process as fair as possible for him and all other applicants, consistently with the community-approved objective of transitional compensation for wrongs inflicted by past discrimination.[141] Corresponding real benefits in terms of dignity, self-esteem and a sense of the worthwhileness of effort would also seem likely to flow to minority applicants as a result of following the indirect rather than direct technique in granting racial preference.

140. 438 U.S. at 317 (Powell, J.).

141. As Professor Bell does well to remind us, black advances have historically involved—and continue to involve—changes in policies which oppress certain layers of whites, as well as blacks. Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 14-19 (1979). When changes are achieved, "whites usually will prove the primary beneficiaries, and blacks will have paid the major cost." *Id.* at 16. *See id.* at 17-18 concerning the effects of quotas in exacerbating the fears of lower and middle class whites, and the injury to minority self-esteem arising from dual systems in admissions and classrooms. *Cf.* Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21, 64-66 (1979) (for another view on these points).

The final question, be it added, as between the direct "two-track" and indirect multi-factor approaches, concerns neither analytical power nor constitutional or legal propriety. It is the question of what is administratively feasible in the institutions concerned, especially when the number of applicants to be processed is sometimes as much as eight to ten times greater than the number of places. Answers to this question should be awaited from the appropriate administrators, rather than preempted by judicial assumptions. Within the framework established by its First Amendment connection, the diversity multifactoral approach calls, of course, for constant anxiety and vigilance against abuse and *détournement* of the wide discretions involved. Yet it is also true that the very shortcomings of this approach, which stir this anxiety, may also have the redeeming virtues of inviting or even demanding a period of enlightened and imaginative experimentation.[142]

142. Common complaints are that the Powell diversity approach confers (or imposes) too much discretion on university administrators, with too little guidance and control to ensure conscientious application. It might even be used, some have urged, to set up informal statistical limits for the size of particular groups alleged to be "over-represented," as notoriously occurred in the 1920's and 30's. *See, e.g.*, A. SINDLER, *supra* note 2, at 316-17; Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 120-29 (1979). *See also* O'Neil, *Bakke in Balance: Some Preliminary Thoughts*, 67 CAL. L. REV. 143, 158-65, 170 (1979) (discussing other detailed uncertainties within the Powell diversity approach).