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The Unresolved Problems of Reverse Discrimination

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I

INTRODUCTION: A TROUBLED RESPONSE TO A PAINFUL DILEMMA

The current widespread use of remedial affirmative action programs makes the legitimacy of reverse discrimination a pragmatic social concern. That alone, however, would not explain the intense interest generated by *Regents of the University of California v. Bakke*.[1] The question posed in the case compels our attention because it forces a choice between two values that occupy a high place in the liberal conception of justice and claim substantial support in the equal protection clause. On the one hand, justice requires that groups that have previously suffered gross discrimination be given truly equal opportunity in American life; on the other, justice precludes the assignment of benefits and burdens on the arbitrary basis of racial and ethnic characteristics. So long as steps to correct racial injustice were limited to assuring that individual members of minority groups would receive the same benefits and opportunities available to persons like them except in race, the steps implemented both these values (against the competing claim that individuals and organizations should be left free to assign benefits and opportunities on whatever grounds they chose). But when individual blacks and members of other minority groups began to be given benefits at the expense of whites who, apart from race, would have had a superior claim to enjoy them, the values were brought into sharp conflict, dividing previously allied liberal organizations such as the NAACP and the Anti-Defamation League, producing an outpouring of anguished commentary by legal scholars and philosophers, and creating serious doubts about the legality of such practices.

Those who hoped (or feared) that the major legal questions would be decisively resolved by the Supreme Court in *Bakke* have been dis-

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1. 98 S. Ct. 2733 (1978).

appointed (or relieved); but at least the Court finally has confronted the substantive issues.[2] The opinions bear the stamp of the travail that accompanies determination of unsettling problems. The travail is most evident in Justice Powell's opinion, which strikes a middle ground, permitting consideration of race in professional school admissions but barring the allocation of a fixed number of places for minority group members. Justice Powell has won well-deserved respect as a thoughtful moderate who is sensitive to both sides of perplexing issues and who strives with remarkable success for a reasoned accommodation of conflicting interests. If his opinion in *Bakke* fails to persuade, which is one of the central theses of this Article, that is perhaps but a further mark of the enormous difficulty of the problem with which it deals.

The three crucial opinions in *Bakke* resolve very little that was not already obvious. This is partly because each opinion has its own limited focus and ambiguities, but it is primarily because of the manner in which the conclusions of the three opinions relate to one another. One aim of this Article is to indicate what is clear and what is not clear about each opinion, and to demonstrate how very little the case authoritatively "stands for" as a whole. Brief consideration is given to several interesting features of the problem of statutory interpretation faced by the Court, followed by a somewhat more detailed discussion of the merits of the constitutional analysis in the opinions of the five Justices who discussed constitutionality. It is concluded that the sounder constitutional position is that taken in the opinion of Justices Brennan, White, Marshall, and Blackmun.

II

THE VERY NARROW AUTHORITY OF *BAKKE*: A PRELIMINARY OVERVIEW

A. A Summary Version of the Facts

During 1973 and 1974, the two years Allan Bakke applied for admission, the Medical School of the University of California at Davis had set aside sixteen places in the entering class of one hundred for qualified "disadvantaged" students. The committee that decided which students to admit under this special admissions program was different from that responsible for the regular admissions process. The literature distributed by the school did not clearly indicate exactly who qualified for consideration by the special committee, but evidently an applicant had to be both a member of one of four "minority groups"—blacks, Chicanos, Asians, and American Indians—and either educationally or economically disadvantaged. Thus, neither a very poor white nor a

2. As it did not in DeFunis v. Odegaard, 416 U.S. 312 (1974).

wealthy black educated at expensive private schools was eligible for the special program.

In neither of the years he applied was Bakke offered admission. By grades and test scores he was considerably better qualified for medical school than the average admittee under the special admissions program, and his qualifications were good enough so that it was unclear whether he would have gained admission in the absence of that program.

Bakke sued the Regents of the University of California, claiming that the Davis admissions process had excluded him on the basis of race in violation of the California Constitution,[3] the equal protection clause of the fourteenth amendment to the United States Constitution,[4] and Title VI of the Civil Rights Act of 1964.[5] The trial court upheld Bakke's claim on all three grounds, and the California Supreme Court, which took the case directly from the trial court, agreed that Davis had acted in violation of the Federal Constitution.[6] The trial court had assumed that Bakke had the burden of establishing that he would have been admitted but for the special program. The state supreme court, however, decided that once a constitutional violation was shown, the burden shifted to the university. When the university acknowledged that it could not carry the burden, the state supreme court directed the trial court to order Bakke's admission. It was in this posture that the case reached the United States Supreme Court which granted the university's petition for certiorari.[7]

B. The Three Crucial Opinions[8]

Justices Brennan, White, Marshall, and Blackmun, in a joint opinion,[9] interpreted Title VI as incorporating the standards of impermissible discrimination derived from the equal protection clause. That is to say, those Justices do not believe racial differentiations violate Title VI uuless they are also unconstitutional.[10] They further assert that race-

3. CAL. CONST., art. I, § 21 (recently repealed; content now added to art. I, § 7).

4. U.S. CONST. amend. XIV.

5. 42 U.S.C. § 2000d (1976).

6. 18 Cal. 3d 94, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

7. 429 U.S. 1090 (1977).

8. Six opinions were actually delivered in the case. Justice Marshall, 98 S. Ct. at 2798, and Justice Blackmun, *id.* at 2806, each wrote to explain their adherence to the position taken in an opinion of which they, with Justices Brennan and White, are joint authors. *Id.* at 2766. The joint opinion is obviously a better indication of positions commonly held by the four Justices than is any opinion of a single Justice. Justice White, *id.* at 2794, wrote to assert that Title VI creates no private cause of action. Four Justices disagreed (opinion of Stevens, J., *id.* at 2809-15); four others assumed the existence of a private right of action without settling the question (opinion of Powell, J., *id.* at 2744-45; opinion of Brennan, White, Marshall, and Blackmun, JJ., *id.* at 2768).

9. *Id.* at 2766 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

10. They, of course, do not mean to suggest that Title VI incorporates the "state action"

conscious programs designed to counter inequality of opportunity produced by past discrimination are constitutionally permissible even if they allocate a specific number of places for members of minority groups. Justice Powell agreed that Title VI incorporates the constitutional standard.[11] But he disagreed as to the content of that standard, deciding that the only justification for the voluntary use of racial criteria in admissions by an academic institution is its interest in student body diversity, and that this interest does not justify the fixed number allocation by the Davis medical school.[12] The remaining four Justices, in an opinion by Justice Stevens, did not resolve or even discuss constitutional questions, asserting that the Title VI prohibition against exclusion from participation "on the ground of race, color, or national origin" bars preferential treatment for members of minority racial groups.[13] On this basis they joined Justice Powell in declaring the Davis program to be invalid, and dissented from the Court's determination that reliance on race in admissions programs can be permissible.[14]

requirement of the fourteenth amendment. Thus, according to this theory, Title VI still does make illegal some forms of discrimination that would be unconstitutional if the government authored them but are not unconstitutional when engaged in by private entities that receive federal money.

11. 98 S. Ct. at 2745-47 (opinion of Powell, J.).

12. *Id.* at 2760-64.

13. *Id.* at 2810-15 (opinion of Stevens, J.).

14. Since the Stevens opinion reads the statute as requiring the government to be "color-blind," it is at odds with the substantive position that race may be given independent weight in admissions. But it also sharply disputes the view of the other five Justices on whether it was necessary and appropriate for the Court to resolve that question. *Id.* at 2809-10. The disagreement focused on the question of what the California courts had decided. The trial court had directed the Regents to consider Bakke's application "without regard to his race or the race of any other applicant," and in response to the Regents' cross-complaint urging the validity of Davis' admissions process, declared that the special admissions program was unlawful on the three grounds urged by Bakke. The California Supreme Court affirmed the judgment of the trial court "insofar as it determines that the special admissions program is invalid" and further directed the court to order Bakke's admission. Justice Powell and the Brennan group interpreted the actions of the California courts as barring consideration of race in the admissions process and reversed that portion of the court's judgment. Justice Stevens objected that the Regents had not actually been enjoined from considering race generally in the admissions process, and said sharply: "It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate." *Id.* at 2810.

At the very least, the trial court declared that the Davis program was invalid, and the state supreme court agreed. The reason according to both courts was that the program gave independent weight to the race of minority applicants, a practice they viewed as forbidden under the equal protection clause. Justices Brennan, White, Marshall, and Blackmun believed that the Davis program was not illegal; in voting to sustain it, they necessarily had to determine that race could be a permissible factor in admissions. But Justice Powell agreed with the California courts in condemning the Davis program. Should he have accepted Justice Stevens' invitation to decline to consider whether uses of race other than that in the Davis program might be permissible? Certainly it was appropriate for him to offer his own reason for invalidity, explaining why he considered a fixed allocation to be distinguishable from other approaches. Of course, he might have reserved for another day the validity of any other approach, but it is a common judicial technique to describe the impermissible by explicating the limits of the permissible, and that is precisely what Justice Powell essayed. That technique seems particularly appropriate when an institution

C. *The Uncertain Future Posture of Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens*

Members of the Supreme Court usually accept in subsequent cases an interpretation of a statute agreed to by a majority in an earlier case.[15] The theory is that since Congress is free to change the statute if it wishes, in the absence of legislative action the Court should not overturn readings previously rendered. In *Bakke*, a majority of the Court interpreted Title VI as barring racial classifications only if they are unconstitutional. If the issue presents itself again, Justice Stevens and his three brethren will have to decide whether to accept that interpretation.

Two possibilities come to mind. A Justice might simply stick with his original view, taking the position that because the decision was so close, because the five members agreeing on the point of statutory interpretation did not agree on the validity of the Davis program, and because Congress is not likely to embroil itself in the controversial task of rewording the statute, the usual deference accorded to earlier interpretations is inappropriate in this case. Or a Justice might accept the majority's interpretation of the statute in a subsequent case, thus looking to the Constitution to see whether a racial classification is forbidden.[16]

As a practical matter, the choice between these two alternatives may be very important. We do not know the constitutional position of each Justice joining the Stevens opinion. Chief Justice Burger may think that all classifications that favor one racial group are forbidden,[17]

awaits guidance as to what it may legitimately do, and has been misled (in the opinion of the reviewing judge) by the lower courts. Thus, whether or not Justice Stevens' reading of the judgments below is technically to be preferred—which is anything but "perfectly clear"—his conclusion that Justice Powell's discussion of permissible uses of race was inappropriate is itself wrong. Nor can Justice Powell's discussion on this point conveniently be viewed as mere dicta. Since he, with four other Justices, viewed the judgment below as barring use of race, his discussion is crucial to the Supreme Court's contrary disposition of that issue. Moreover, the discussion is critically implicated in Justice Powell's rationale for concluding that the admissions process used for Bakke was illegal.

15. For an extreme application of this doctrine, see Flood v. Kuhn, 407 U.S. 258 (1972).

16. A third alternative should be mentioned. Suppose Justice *X* thinks the Constitution is much more permissive of racial classifications than does Justice Powell. He could conceivably take the position that since he really believes the statute bars all racial classifications, and since in *Bakke* five members of the Court, albeit on different theories, agreed that the statute does not permit greater use of race than Justice Powell would admit, he, Justice *X*, should go no further than interpreting the statute to permit those classifications that Justice Powell thinks it allows. The problem with this approach is that it ties another Justice's view of the statute to Justice Powell's view of the Constitution in any given case. The unacceptability of this position is most manifest if one considers the situation after Justice Powell retires. Would it be appropriate for the Justices to interpret a statute in light of what Justice Powell might have divined about the Constitution? Obviously not.

17. He was strongly opposed to the use of racial quotas in districting, casting the only dissenting vote in United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 180 (1977) (dissenting opinion).

but it is difficult even to guess at the positions of the other three.[18] Given Justice Rehnquist's narrow views of the ambit of equal protection in other situations,[19] one would suppose it fairly likely that he, at least, would not find any constitutional bar to reverse discrimination of the sort practiced by Davis. If he accepted the majority's view of Title VI and incorporated his own interpretation of the Constitution rather than that of Justice Powell, he might well vote to sustain practices Justice Powell would condemn. It is not safe to assume, therefore, that Justice Powell will occupy the "swing position" in subsequent cases as he did in *Bakke*. Nor is it even certain that next year a program identical to that of Davis would be struck down by a Court made up of the same nine men, though probably in that event *Bakke* would be taken as settling the invalidity of the program.

For this reason, conscientious officials need not look to Justice Powell's opinion to find the limits of allowable uses of race; we can not even begin to know the boundaries of the permissible until we see the extent to which the Justices who joined Justice Stevens will accept the majority view of Title VI.[20] I shall argue below that it is fortunate for two reasons that Justice Powell's opinion need not be adopted as a model: first, because it would impose sharper constraints than most advocates of reverse discrimination have acknowledged, at least in the press; and second, because it fails to stake out viable guidelines.

18. Justice Stewart wrote in connection with two "miscegenation" cases that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (concurring opinion); Loving v. Virginia, 388 U.S. 1, 13 (1967) (concurring opinion). But his total rejection of racial classifications in that context does not provide a basis for confident prediction of Justice Stewart's position on preferences for previously disadvantaged groups.

19. *See, e.g.*, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1971) (Rehnquist, J., dissenting).

20. Lower courts that must deal with related issues until the Supreme Court has spoken again do not have an enviable task. For example, in a case vacated and remanded for further consideration in light of *Bakke*, the Court of Appeals for the Fourth Circuit must resolve the constitutionality of requiring minimum gender and minority representation on a state university student council and of a right afforded defendants before a student honor court to a panel majority (four of seven) of a defendant's race or sex. Friday v. Uzzell, 98 S. Ct. 3139 (1978), decision below at 547 F.2d 801, 558 F.2d 727 (en banc) (4th Cir. 1977). If the court of appeals tried to apply the opinion of Justices Brennan, White, Marshall, and Blackmun, it would ask whether these practices are proper remedies for, or perhaps prophylactics against, discrimination; this approach might lead it to reverse its previous direction of summary judgment against the university, at least permitting the university to make a showing of the need for the practices. The educational benefits of diversity, the only justification accepted in the Powell opinion, seem irrelevant to the make-up of the honor court. Conceivably, however, it might be supposed that Justice Powell did not mean to foreclose other compelling justifications, such as "fair trial," not present in *Bakke*. In any event, if the court of appeals judges do not believe that the implications of the Powell opinion and that of the Brennan group lead in the same direction, the "light" shed on their problems by the *Bakke* decision is rather dim.

III

VARIETIES OF RACIAL CLASSIFICATIONS

In order to understand the issue posed in *Bakke*, it is helpful to consider it in the context of the variety of settings in which racial classifications may be used. Much of the debate in the opinions concerns the closeness of the analogy between concededly acceptable racial classifications and the admissions preference of the medical school at Davis. Furthermore, the opinions that would restrict the use of racial criteria in university admissions cast doubt on some of the other uses of such criteria.

For most of the history of this country racial classifications have been employed to deny benefits to otherwise qualified blacks or members of other minority groups, or to separate them from whites. Such classifications have been presumptively unconstitutional since *Brown v. Board of Education*,[21] and perhaps are absolutely barred.[22]

The earliest modern use of racial criteria to redress previous discrimination was in the context of remedies for school segregation. Since schools had been located with the purpose of segregation in mind and housing patterns themselves were partly dependent on school segregation, nonracial geographical assignment to schools appeared insufficient "to eliminate from the public schools all vestiges of state-imposed segregation."[23] Thus, courts that had identified segregated school systems began with Supreme Court approval[24] to require assignment of students to schools on a racial basis in order to assure a reasonable ratio of black and white students in most schools. Many school systems subjected to such orders undoubtedly became more integrated than they would have been if the district had never engaged in de jure segregation,[25] but the sweeping scope of the remedy seemed acceptable for two reasons. First, it was impossible to say how far, in any particular district, housing patterns would have produced de facto segregation in the absence of legally imposed segregation, and thus it was impossible to identify precisely how much integration would remedy the previous unconstitutional racial assignment. Only full integration could assure that the evil would be undone. Second, white students were arguably not denied any legally significant benefit; they were merely sent

21. 347 U.S. 483 (1954).

22. *See generally* Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 566-69 (1975).

23. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

24. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

25. That is to say, housing patterns created by private discrimination would have produced a higher degree of segregation "de facto" than is permitted to exist under the order remedying "de jure" segregation.

to one school rather than another.[26] Desegregation plans adopted at the behest of the Department of Health, Education, and Welfare were similar in principle, but the unconstitutional discrimination was identified by administrative officials rather than judges.

During the 1960's some states and localities decided to promote school integration, even in the absence of any findings of previous discrimination in the school system, by such devices as merging attendance zones and assigning students to schools on the basis of race.[27] Such integration might be perceived as meeting a constitutional obligation to have schools desegregated in fact, or as a remedy either for earlier school discrimination that could not be proved or for the illegal actions of other organs of government (which may, for example, have promoted housing segregation), or for nongovernmental discrimination. But the uncompelled attempt to integrate schools might also be supported simply as a way to create a desirable educational environment. Writing for a unanimous Court in *Swann v. Charlotte-Mecklenburg Board of Education*,[28] Chief Justice Burger indicated in dictum that such efforts were not constitutionally compelled, but he nevertheless endorsed as appropriate decisions of school authorities to have a "prescribed ratio of Negro to white students" in each school "in order to prepare students to live in a pluralistic society . . . ."[29]

In all likelihood, the Court in agreeing unanimously to accept this position was strongly influenced by the view that white students did not suffer a substantial harm by being placed in more fully integrated schools.[30] In most of the other situations faced by courts, racial classifications have definitely disadvantaged those who have objected to them.[31] Typically, the classification is used to allocate jobs or other

26. *See* Fiss, *School Desegregation: The Uncertain Path of the Law*, in EQUALITY AND PREFERENTIAL TREATMENT 155, 171-73 (M. Cohen, T. Nagel & T. Scanlon eds. 1977). [This collection is hereinafter cited as EQUALITY AND PREFERENTIAL TREATMENT.]

27. *See, e.g.*, Offermann v. Nitkowski, 248 F. Supp. 129 (W.D.N.Y. 1965), *aff'd*, 378 F.2d 22 (2d Cir. 1967); Di Sano v. Storandt, 22 App. Div. 2d 6, 253 N.Y.S.2d 411 (4th Dept. 1964).

28. 402 U.S. 1 (1971).

29. *Id.* at 16.

30. *See* Fiss, *supra* note 26, at 159-165 (viewing scarcity as the central difference between preferential admissions and assignment to a particular school on the basis of race).

31. There are exceptions. The race-conscious composition of electoral districts to enhance the power of minority voters, considered in United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977), arguably resembles racial assignment to schools in that it does not deprive whites of their right to vote. Courts have had little occasion to pass upon racial segregation that is responsive to the wishes of members of a minority, such as the provision of a "black" dormitory at a state university. The case of Uzzell v. Friday, 547 F.2d 801, 558 F.2d 727 (en banc) (4th Cir. 1977), *remanded*, 98 S. Ct. 3139 (1978), initially involved a challenge to a black student organization, supported in part by Student Activities Fees, that did not open its membership to whites. That aspect of the case was rendered moot, however, when the organization changed its constitution to permit white members. *See generally* Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553, 1618-25 (1969). The sacrifice of social contact resulting from black separatism is a less obvious disadvantage for whites than the failure to obtain

desirable positions, and only some may enjoy the benefit. If certain blacks receive the benefit because of their race, whites will be denied the benefit on the basis of their race.

Like racial assignments to public schools, racial classifications in regard to benefits may be employed by courts or administrative agencies to remedy prior discrimination. Assume, for example, that a court has determined that a city government has discriminated against blacks in hiring police officers.[32] It may now be impossible to identify with confidence all those who would have been hired but for discriminatory policies. The court may instead instruct the city to hire a certain number of blacks in the future, expecting that the class of blacks who are given jobs will overlap considerably with the class that was previously denied jobs. The court may set a quota of blacks to be hired for other reasons as well. It may fear that a simple directive to hire without racial bias will not prove sufficient to assure nondiscriminatory hiring and to counteract the influence of past discrimination on future hiring.[33] One problem is the difficulty of monitoring whether racial bias continues in hiring—a task that can be especially perplexing when the criteria for employment are amorphous and complex, as with appointments to teaching positions in universities. Another problem is that even if the employer no longer discriminates on racial grounds, the effects of his previous discrimination may continue. Those acquainted

a job or a place in a professional school. Two other practices in *Uzzell v. Friday* created a deprivation to whites that was similarly remote, indeed so remote that a minority of the Fourth Circuit en banc panel concluded that plaintiffs had no standing to challenge the practices. One practice was the assurance of minority representation on the student council; the other was the right of defendants before a student honor court to have a majority of the judges be members of their own race.

When public housing authorities attempt to maintain the integrated character of a project by preferring white applicants to black ones, the rejected black applicants suffer an immediate disadvantage, although the long-term aim may be in part to improve the position of blacks in society. *See, e.g.*, Otero v. New York City Housing Auth., 484 F.2d 1122 (2d Cir. 1973). In contrast, the affirmative action classifications considered in the text both benefit members of minority groups individually and are designed to help these groups more generally.

32. *See, e.g.*, Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 98 S. Ct. 3087 (1978) (firemen); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (police); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *modified on rehearing en banc*, 452 F.2d 327 (D.C. Cir.), *cert. denied*, 406 U.S. 950 (1972) (firemen). Insofar as *Bridgeport Guardians* indicates that "disproportionate racial impact" of hiring practices suffices to prove a violation of the equal protection clause, it has since been disapproved by the Supreme Court, Washington v. Davis, 426 U.S. 229, 244, n. 12 (1976), but that disapproval does not reach what the case says and implies about appropriate remedies for past discrimination. (In questionable consistency with *Washington v. Davis*, the Ninth Circuit has said in Davis v. County of Los Angeles, 566 F.2d at 1340, that disproportionate impact can still "suffice to establish a prima facie case of employment discrimination" in suits under 42 U.S.C. § 1971 (1976)).

33. In Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971), the Supreme Court said that the primary objective of Title VII was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

with employees of an organization are more likely to be aware of its job opportunities, and much hiring is done on the recommendation of present workers. If all present employees are white, with mostly white friends, the termination of employer discrimination will not by itself end the disadvantages of blacks in seeking jobs. Of course, something may be accomplished by requiring the city, or other employer, to publicize job opportunities widely and to cease relying heavily on employee recommendations, but setting a quota or goal of blacks to be hired may promise to be more effective.

So far the rationale for setting a number of blacks to be hired has been cast in terms of providing redress to individuals who are likely to have suffered discrimination and attempting to assure fair hiring in the future, free from the effects of prior discrimination. But a court might believe it should go even further.[34] It might try to estimate how many black policemen would be on the force if it had not been for discrimination, and require that the city fairly promptly bring the percentage of blacks on the force up to that amount by hiring a heavily disproportionate number of blacks in the near future. It is easy to see that under such a program blacks of the generation now seeking employment will actually be substantially favored vis-à-vis whites. If the discrimination against blacks extended back for some time in the past, many blacks who unjustifiably lost the opportunity to obtain police jobs will no longer have the qualifications or the desire to begin as policemen because of age[35] or other employment. Whatever redress these people may deserve, it should not take the form of an offer of a novice police job. Thus, even if the court could assure police jobs for all those who were deprived of them in the past and who wanted and were qualified for them in the present, and could further assure that future hiring would be free of discrimination against blacks and the effects of such discrimination, it would still take a good many years before the percentage of blacks in the force reached the percentage that would have obtained had there never been discrimination in the first place.

34. It is, of course, very difficult to know to what extent any particular remedy is necessary to accomplish the relatively uncontroversial aims of providing redress to those discriminated against in the past and assuring no discrimination in the future and thus difficult to say with confidence when a court has "gone further." But in at least some cases, it seems evident that the remedy afforded can be justified only by reference to some rationale broader than that of attempting to achieve this form of rectification. *See* Davis v. County of Los Angeles, 566 F.2d 1334, 1336 n.3 (9th Cir. 1977), *cert. granted*, 98 S. Ct. 3087 (1978); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1978) ("eradicate the effects of past discriminatory practices"); Carter v. Gallagher, *as modified on rehearing en banc*, 452 F.2d 327, 330 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972) ("erasing the effects of past racially discriminatory practices").

35. Of course, if the age qualification seems more restrictive than is essential for the job, a court may properly lift it temporarily as an aspect of a remedy for previous discrimination. *See* Carter v. Gallagher, 452 F.2d 327, 330 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).

Three rationales might lead the court to try to achieve that result more quickly by favoring the present generation of blacks seeking police jobs. The court might take the attitude that the present generation of job applicants has suffered indirectly from earlier discrimination and also deserves redress. This argument seems plausible only if the discrimination the court may consider is much broader than the denial of police jobs, since relatively few present applicants will have suffered specifically from the denial of police jobs to other blacks in their own opportunities for employment. Or, a court might simply consider blacks as a group, reasoning that discrimination against one black can legitimately be redressed by favoritism toward another. Absent some sort of injury to the black applicant who is now favored resulting from discrimination against other blacks in the past, this theory invokes an ethical claim that appears mistaken[36] and a view of what the equal protection clause permits that is very dubious. That is to say, the fact that some blacks have suffered discrimination is not in and of itself a good reason for giving other blacks a preference. Finally, the court might believe that general community benefits would flow from having a proper proportion of blacks on the police force,[37] a basis for relying on racial classifications that is also controversial (though ethically defensible in my view). Thus, when a court goes beyond redressing instances of prior discrimination and assuring nondiscriminatory hiring in the future, its basis for action becomes more questionable. Indeed, a more extensive remedy seems insupportable unless the sorts of justifications offered in defense of reverse discrimination by institutions that have not themselves previously discriminated are accepted.

In some contexts, the use of racial classifications to assure future nondiscrimination by an organization does not depend upon an individualized determination of previous discrimination. A legislative or administrative body may determine that a high proportion of a class of organizations have discriminated in the past and are likely to do so in the future. Remedies are then applied to the members of this class without any particularized findings that they have discriminated.[38] Under executive order, for example, federal contractors are required to set "goals" and "timetables" for the employment of members of minor-

36. *See* Nickel, *Should Reparations Be to Individuals or to Groups?*, 34 ANALYSIS 154, 157 (1974).

37. *See* Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1978).

38. In its initial operation, the Voting Rights Act of 1965 works in this manner. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973b (1976); United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977); South Carolina v. Katzenbach, 383 U.S. 301, 317-18 (1966). If a "test or device" has been used to qualify voters and fewer than 50 per cent of the voting age residents are registered, the remedial provisions of the act are triggered. A state or locality may, however, avoid their application if it can persuade the District Court for the District of Columbia that its tests have not been used in the preceding ten years to deny the right to vote on racial grounds.

ity groups in jobs where a smaller percentage are presently employed than would reasonably be expected.[39] This affirmative action program is administered generally by the Labor Department, but until recently the Department of Health, Education, and Welfare has been responsible for the controversial guidelines on university employment.[40] A university that has had fewer women or minority group members than would be expected has had to engage in active efforts to recruit persons in those categories and to establish and advertise objective criteria for hiring. But beyond this, the university has, with HEW approval, set "goals" for the hiring of women and minorities, ostensibly as one test of its compliance with the requirements of active recruitment and fair hiring determinations.[41] The assumption has been that a university is not compelled to meet its "goals," which therefore are in theory quite different from rigid quotas. If the university is able to convince government administrators that it actively sought out minority and female applicants and did not discriminate in hiring decisions, it escapes unscathed.[42] But members of universities understandably suppose that if they do meet their goals, they will have a lot less explaining to do, and the goals undoubtedly produce discrimination in favor of women and minorities in some instances.[43]

The racial classification involved in *Bakke* is different from all those discussed so far in that the university has not itself been found to have discriminated against minorities, nor has it been told to pay attention to race in admissions because it fits within a category of institutions many of whose members have, according to some legislative or administrative determination, discriminated. Absent any finding of discrimination, a university or other organization might decide to favor minority group members for a number of reasons. It might seek to redress its own prior undetermined discrimination, or the discrimination of other branches of the government, or private discrimination, or some combination of these. Or it might believe that the academic community or some broader community will benefit in various respects from such favoritism. The issue posed in *Bakke* is whether such justifi-

39. *See, e.g.*, Exec. Order No. 11246, 30 Fed. Reg. 12,319 (1965), as amended by Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967), reprinted in 42 U.S.C. § 2000e note (1976), and implemented by Revised Order No. 4 issued by the Labor Department; Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971); Goldman, *Affirmative Action* in EQUALITY AND PREFERENTIAL TREATMENT, *supra* note 26, at 193-98.

40. 43 Fed. Reg. 38, 297 (Oct. 20, 1978).

41. Goldman, *supra* note 39, at 193-98.

42. *See* Pottinger, *The Drive Toward Equality*, in REVERSE DISCRIMINATION 41 (B. Gross ed. 1977).

43. *See, e.g.*, the exchange of correspondence between Miro M. Todorovich and Howard A. Glickstein, *Discrimination in Higher Education: A Debate on Faculty Employment*, in REVERSE DISCRIMINATION 12-40 (B. Gross ed. 1977).

cations are sufficient to support the university's practice under Title VI and the federal constitution.

IV

THE STATUTORY QUESTION

The Civil Rights Act of 1964[44] 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.

Like virtually all universities, the Davis branch of the University of California receives substantial amounts of money from the federal government, and the statute therefore applies to it. The fact that before *Bakke* the statute received almost no attention in discussions of the legality of admissions preferences for minorities is perhaps some indication of the enchantment of American lawyers and scholars with constitutional doctrine. Even in *Bakke*, although Title VI was claimed and accepted as a ground of invalidity in the trial court, it was not treated as raising questions separate from those arising under the Constitution; neither the California Supreme Court nor the original briefs in the United States Supreme Court even considered the statute. When the Supreme Court, however, requested further briefing on its significance, it emerged as a major issue, one that ultimately divided the Court five to four.

Because the statutory claim had been made and formally relied on by the trial court, it was properly before the Supreme Court as a possible basis for affirming the judgment. Justice White took the view that Title VI related only to termination of government support and did not create a private right of action,[45] but the other members of the Court believed either that the statute created such a private right of action[46] or that it was appropriate to interpret the statute on the assumption that it did, without finally resolving the issue.[47]

Whether Title VI should be interpreted to bar preferences for racial minorities is a troublesome question, and the answers offered by the opinions highlight in interesting ways the dilemmas of statutory construction.

A. Statutory Construction and Avoidance of Constitutional Issues

Justice Stevens and his three brethren construe the statute to bar

44. 42 U.S.C. § 2000d (1976).
45. 98 S. Ct. at 2794-98 (opinion of White, J.).
46. *Id.* at 2814-15 (opinion of Stevens, J.).
47. *Id.* at 2744-45, 2768 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

racial preferences in admissions, thus voting to affirm the decision below without having to determine constitutional questions. En route to this construction, and apparently only to bolster a position believed to be obviously sound on other grounds, Justice Stevens speaks of "[o]ur settled practice . . . to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground,"[48] and quotes a suggestion from an earlier case that constitutional questions will not be decided "if a construction of the statute is fairly possible by which the question may be avoided."[49] If all these statements mean is that courts should not discuss constitutionality when a considered approach to the statutory issue yields an answer that renders such a discussion unnecessary to decision, then the point is widely accepted and applied. But Justice Stevens apparently means more than this; he implies that, given two reasonably plausible constructions of a statute, the one that allows avoidance of a constitutional question should be chosen. Thus, a Justice seriously guided by this maxim who finds construction *A* slightly more plausible than construction *B* should nevertheless prefer *B* if *B* avoids a constitutional issue. This position finds occasional support in opinions of the Court which suggest that a construction is to be preferred *because* it avoids troublesome constitutional questions.[50]

The major reason for this position is wholly inapplicable to *Bakke* and a subsidiary reason is of too little force to be given great weight. Usually when the Court speaks of construing a statute to avoid a constitutional issue, the case involves a claim that Congress has reached beyond constitutional limits. For example, in *Kent v. Dulles*,[51] Rockwell Kent claimed that it would violate his constitutional right to liberty of travel if the Secretary of State exercised unbridled discretion over the issuance of American passports and refused to grant him one. The Court responded by construing the statute that authorized the Secretary to issue passports as not conferring such sweeping discretion. In cases like *Kent*, the Court properly presumes that Congress has not chosen to go to the edge of its constitutional power or beyond it in the absence of a clear indication to that effect. This approach affords Congress an opportunity to face plainly the possible sacrifice of constitutional values before the Court passes on whether its action is permissible. This problem simply is not present in *Bakke*, because those Justices who interpret Title VI in a manner that requires constitutional analysis reach this conclusion not because the constitutionality of

48. *Id.* at 2810 (opinion of Stevens, J.).

49. *Id.* (quoting Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947)).

50. *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 129-30 (1958). The Court sometimes seems to adopt this course without explaining its reason for a particular construction. *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965).

51. 357 U.S. 116 (1958).

the statute is doubtful, but because they view Title VI itself as embodying a constitutional standard of impermissible discrimination.

Thus, the only possible reason for avoiding that interpretation if it is otherwise the most plausible is the general desirability of the Court's avoiding determination of constitutional, or at least controversial constitutional, issues. In judging the strength of that reason, we must consider that the Stevens interpretation of Title VI will bar significant forms of action designed to promote racial justice and harmony taken by federally-financed state agencies and private organizations. Given the controversial nature of reverse discrimination, congressional reformulation of Title VI seems unlikely, however it is interpreted by the Court. In this setting, trepitude about facing constitutional questions is, by itself, a very weak basis for tipping statutory interpretation toward the Stevens position. A Justice should adopt the Stevens interpretation only if the other reasons in its favor are convincing, and should not be influenced by a desire to avoid a significant constitutional issue.

B. Statutory Language

Justice Stevens relies mainly on the language of Title VI and indeed its words do appear to bar deprivations on the ground of race. If Bakke would have been admitted to the Davis medical school but for a racial preference, then apparently he was denied admission on the ground of race and what the medical school did would appear to violate the statute. Nothing in either the opinion of Justice Powell or that of Justices Brennan, White, Marshall, and Blackmun really disputes that the statutory language strongly favors Bakke's position. Both opinions urge that "discrimination" is an open-ended term, consciously chosen to permit a flexible constitutionally grounded view of what constitutes impermissible differentiation.[52] But a statute that says no person shall "on the ground of race . . . be subjected to discrimination" seems to bar disadvantageous treatment on racial grounds, not to leave open what disadvantageous treatment is permissible. Even more favorable to Justice Stevens' construction is that discrimination is only one of three forbidden activities. The statute also says that no person shall on the ground of race be "excluded from participation in" or "be denied the benefits of" any program or activity; by the syntactic arrangement, "discrimination" does not modify these phrases. Thus, however "discrimination" is interpreted, the language seems to bar exclusion from participation or denial of benefits on racial grounds, whether or not they would be constitutionally permissible. As Justice Stevens recognizes, Bakke's deprivation can be characterized as an "ex-

52. 98 S. Ct. at 2745-47 (opinion of Powell, J.); *id.* at 2773-74 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

clusion from participation."[53] Further, if the other two phrases state an absolute bar to racial classification, not dependent on constitutional invalidity, there is a good argument for reading "subjected to discrimination" in the same manner.[54]

C. *Legislative History*

The legislative history is mixed. The two major purposes of Title VI were to require recipients of federal funds to refrain from discrimination against blacks that would be unconstitutional if done by a government agency and to provide for a cutoff of funding when such discrimination took place.[55] The phenomenon of preferential treatment was still in the future and plainly was not a primary focus of concern. Nevertheless, it is also true that major spokesmen for the bill indicated that Title VI would bar racial distinctions, that is, would be "colorblind" in its application.[56]

Justice Stevens takes these statements at face value, arguing that whatever else the proponents may have intended and whether or not they believed "colorblindness" to be the standard required under the Constitution, they did intend the statute to bar disadvantageous treatment of any person on the basis of race. The majority, on the other hand, treats these remarks as isolated comments, not to be given great weight, stressing instead the many statements made during the debates emphasizing that the aim was to make illegal what would already be unconstitutional if done by the government itself.[57] If *Bakke* posed a narrow, technical statutory question that would be unlikely to attract much legislative attention, it would make good sense to accept what the sponsors said directly about the issue, even if they made the comments in passing. But instead *Bakke* raises a fundamental question about how a major social problem of the country is to be handled, and the Stevens interpretation would preclude states and private organizations from employing an important, though highly controversial, technique for dealing with the problem. In such circumstances the majority's unwillingness to foreclose that technique without evidence of a deliberate judgment by Congress that it should be foreclosed is defensible.

53. *Id.* at 2811 (opinion of Stevens, J.).

54. Even if read in the manner suggested, the statute would not necessarily bar every racial classification. A federally financed adoption agency that matched the races of children and adoptive parents might say that no one is excluded from the benefits of its program or subjected to discrimination on the grounds of race. *See id.* at 2773-74 (opinion of Powell, J.).

55. *See id.* at 2768-72 (opinion of Powell, J.).

56. *See id.* at 2811-13 (opinion of Stevens, J.).

57. *See id.* at 2745-47 (opinion of Powell, J.); *id.* at 2769-72 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

D. Administrative Interpretation, Subsequent Legislation, Prior Judicial Interpretation, and Policy

The opinion of Justices Brennan, White, Marshall, and Blackmun advances other arguments in support of its position that Title VI bars only those sorts of discrimination that would be unconstitutional. It urges that the applicable regulations of the Department of Health, Education, and Welfare cannot be squared with a "colorblind" reading of the statute.[58] Those regulations call for affirmative action apparently including race-conscious decisions, by recipients of federal funds who have previously discriminated. More directly to the point, the regulations further suggest that recipients may, even in the absence of prior discrimination, "take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."[59]

The opinion also notes that Congress had before it, and yet did not adopt, an amendment to HEW's appropriation bill that would have barred that agency from imposing race-conscious goals or quotas on recipients.[60] Even that amendment did not purport to bar voluntary race-conscious programs. Congress has, moreover, passed explicitly race-conscious legislation since 1964, including, for example, a 1977 statute that requires that no grants be made "for any local public works project unless the applicant gives . . . assurance . . . that at least 10 percentum of the amount of each grant shall be expended for minority business enterprises."[61] Such legislation would not be consistent with a congressional wish to bar all race-conscious programs.

The Justices also rely on the authority of *Lau v. Nichols*,[62] in which the Court required the San Francisco schools to develop special programs to meet the needs of pupils of Chinese ancestry who did not speak English, and who were therefore unable to benefit from the ordinary public school education. The Brennan group states that the decision stands for the principles that recipients who have not been guilty of purposeful discrimination may nonetheless be compelled "to be cognizant of the impact of their actions upon racial minorities" and that recipients must be accorded latitude in voluntarily undertaking race-conscious programs to remedy the previous exclusion of minorities from the benefits of federally funded programs.[63]

The opinion makes a further argument which, although mistakenly cast in terms of the illogic of the Stevens interpretation, in fact

58. *Id.* at 2775-77.
59. *Id.* at 2776 (quoting 45 C.F.R. § 80.3(b)(6)(ii) (1973)).
60. *Id.* at 2777-78.
61. *Id.* at 2778 (quoting 42 U.S.C. § 6705(f)(2) (1977)).
62. 414 U.S. 563 (1974).
63. 98 S. Ct. at 2780.

raises a subtle and troubling problem of policy. The "colorblind" reading of the statute is called "inconceivable" because it would forbid "voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations" and would further "prevent recipients of federal funds from taking race into account even when necessary to bring their programs into compliance with federal constitutional requirements."[64] The short answer to this point is that the issue is not addressed by Justice Stevens, but there is no reason why his stated views would compel him to assert the propositions so generously staked out for him by those who disagree. Obviously, the four Justices subscribing to the Stevens opinion do not interpret the statute to bar court-ordered race-conscious remedies for previous constitutional or statutory violations.[65] If court-ordered race-conscious remedies are permissible, then presumably so also are administratively-ordered race-conscious remedies. And these Justices might very well say that the statute does not bar voluntary race-conscious remedies that also redress statutory or constitutional violations.[66] Such a position is perfectly consistent with their assertion that the statute bars use of race when there has been no previous violation by the recipient.

The subtle policy question is whether this is a workable response. Suppose a university uses preferential admissions on the asserted ground that it wishes to redress its own previous discrimination. Under the Stevens approach, would the legality of its action turn on whether a court thinks there actually was previous discrimination, on whether there is a substantial likelihood of previous discrimination, on whether the university honestly believed there was previous discrimination, or on some other test? The Stevens standard, in drawing a sharp line between race-conscious remedies to correct earlier violations and other race-conscious programs, would require answers to these nettlesome difficulties and would certainly have the practical effect of deterring any voluntary adoption of such programs even by recipients who believe they have discriminated illegally.[67] The magnitude of the problem is increased by the difficulty of defining precisely what state of mind and external fact actually constitutes impermissible discrimination under various statutory and constitutional standards.[68] In making less turn on the possibility of previous illegal discrimination, Justices

64. *Id.* at 2772.

65. Given the decisions of the Court in North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971), and other cases, a statute that purported to forbid absolutely all race-conscious remedies for constituional violations would itself be unconstitutional.

66. *See* the discussion of this point in Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 223-24 (5th Cir. 1977), *cert. granted*, 99 S. Ct. 720 (No. 78-435).

67. *See id.* at 230 (Wisdom, J., dissenting).

68. *Compare* Griggs v. Duke Power Co., 401 U.S. 424 (1971), *with* Washington v. Davis, 426 U.S. 229 (1976).

Brennan, White, Marshall, and Blackmun effect a more workable approach to administering Title VI.

None of the Justices state that their construction of the statute is affected by their view of the desirability of reverse discrimination, but on such a close statutory point one supposes that such views color a Justice's approach considerably, and perhaps to some extent they should. Considering that Title VI was adopted long before Congress had given the issue of reverse discrimination serious thought, a Justice who is persuaded, as is Justice Blackmun,[69] that reverse discrimination is a crucial requisite for dealing with this country's racial problems, should perhaps be more loathe to interpret the statute to bar that practice than a Justice who views reverse discrimination as unwise, divisive, and unpopular with the public and legislators alike. Since both sides present powerful arguments, the case poses in a fascinating way traditional problems of statutory interpretation, including the legitimacy of judges taking into account their own estimates of the social desirability of alternative courses.

V

THE CONSTITUTIONAL QUESTION

The five Justices who asserted that Title VI adopts the constitutional standard of discrimination next had to determine the application of the equal protection clause to the special admissions program used at Davis. Although it was Justice Powell's view on the legitimacy of the Davis program that, with the concurrence of the four Justices joining the Stevens opinion, prevailed, it makes sense to begin with the opinion of Justices Brennan, White, Marshall, and Blackmun. In part the reason for this sequence is that much of Justice Powell's constitutional analysis responds to the position developed in the opinion of the Brennan group. More significant is the point made earlier that when the four Justices who would have decided the case on statutory grounds alone speak to the constitutional questions, if they do, the perspective of Justices Brennan, White, Marshall, and Blackmun may be adopted by a majority of the Court or come closer to stating a centrist position than the approach of Justice Powell.[70]

A. Standard of Review

One of the unresolved issues about reverse discrimination has been the constitutional "test" to which it would be subjected. Would the Court require that preferences for minority groups withstand strict scrutiny, that is, in the modern articulation, be sustained only if "neces-

69. 98 S. Ct. at 2806-09 (opinion of Blackmun, J.).

70. *See* text accompanying notes 15-20 *supra*.

sary to promote a compelling state interest"?[71] This is the level of review that has been applied to classifications made on "suspect" bases, such as race or national origin, and to classifications that impair the exercise of "fundamental" rights, such as the right to travel. Would the Court instead apply the level of review used for virtually all other challenges made on equal protection grounds, sustaining preferences if they were rationally related to a legitimate government purpose? Or would it adopt some intermediate test, more relaxed than "strict scrutiny" but more rigorous than "rational basis"?[72]

A skeptic might question the significance of the verbal formula chosen for review, rightly doubting whether Justices can apply a standard wholly independently of their estimation whether suggested justifications are powerful enough to warrant approval of challenged programs. Certainly one must look carefully at how standards are applied in practice to see what Justices mean by open-ended terms like "necessary" or "compelling." Nevertheless, the formula for review must be usable in more than one case, and Justices are capable both of striving for consistency and of distinguishing their approval or disapproval of a particular classification from their view of whether it falls within the range of legislative discretion. Thus, it would be unduly cynical to suppose that the standard of review is simply a verbal mirage created after the decision is made whether to sustain or strike down a particular classification.

1. The Intermediate Standard of Justices Brennan, White, Marshall, and Blackmun

Without quite using the label, the joint opinion of Justices Brennan, White, Marshall, and Blackmun clearly adopts an intermediate standard of review, one drawn from recent gender cases.[73] According to this formula, "racial classifications designed to further remedial purposes ' "must serve important governmental objectives and must be substantially related to the achievement of those objectives." ' "[74] This standard is "intermediate" primarily because the Justices self-consciously require an "important" rather than a "compelling" objective. In ordinary English, these two words may not have greatly different connotations, though "compelling" does convey more of a sense of overpowering significance, but in the lore of constitutional law in the last two decades, "compelling" has come to mean an interest of such

71. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

72. The possibilities are explored in greater length in Greenawalt, *supra* note 22.

73. *See* Califano v. Webster, 430 U.S. 313, 316-17 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976), both cited in 98 S. Ct. at 2784 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

74. 98 S. Ct. at 2784 (quoting Califano v. Webster, 430 U.S. 313, 316 (1977) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976))).

importance that when this requirement has been imposed few classifications have survived. By asking only for "important" interests, the Justices indicate that an interest of somewhat lesser magnitude will suffice.

The standard elaborated in the opinion is also intermediate in requiring that the classification be "substantially related" to achievement of the justifying objectives. Though it asks for a more powerful connection than "rational basis," this language does not demand that the classification be "necessary," the word that has been used in connection with "strict scrutiny" and which calls forth very close judicial examination of alternatives. Since the California Supreme Court invalidated Davis' program on the theory that even if the interest it furthered was compelling, alternative means were available to accomplish that interest, the failure of Justice Brennan and those joining him to require necessity can hardly have been inadvertent.

A third respect in which the standard employed by Justices Brennan, White, Marshall, and Blackmun is somewhat more stringent than the traditional rationality test[75] is the requirement[76] that the justifying purpose for the classification be "articulated." When the Court follows this approach, it clearly will not sustain legislation merely on the basis of unsuggested purposes that it can imagine; but the severity of this restriction depends considerably on who must do the articulating. If it is enough that a lawyer defending the classification state a purpose, then, since lawyers can be almost as imaginative as judges and are likely to suggest many purposes in complex and controverisal cases, the requirement of articulated purpose is unlikely often to be crucial.[77] However, if the body initially deciding upon a classification must itself articulate underlying purposes, then failure to state possibly sustaining purposes would be more common. Since the opinion does not indicate when a purpose must be stated and legislative statement of purpose has not been a constitutional requisite, presumably it is sufficient if the articulation occurs during litigation.[78]

Justices Brennan, White, Marshall, and Blackmun explain their use of this intermediate standard of review by indicating the inappropriateness of the two alternatives. They decline to employ the compelling interest test because no fundamental rights are at stake and

75. *See* Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 47 (1972) (suggesting that the requirement of articulated purpose should be employed for all equal protection cases).

76. This appears not in the initial formulation of the test but in subsequent elaboration, 98 S. Ct. at 2785.

77. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1015-16 (1975).

78. For a suggestion that a more exacting requirement would be appropriate, see Greenawalt, *supra* note 22, at 600-01.

because whites as a class lack the traditional indicia of suspectness,[79] that is, they have not been subjected historically to unfair treatment or relegated to a position of political powerlessness requiring special protection from the ordinary political process. Nor does the preference involved in *Bakke* presume the inferiority of one race or place the government in support of racial hatred and separatism, in which event the classification would be "invalid without more."[80]

The joint opinion indicates that something more than rational-basis scrutiny is needed nevertheless, because race classifications have so often been used to stigmatize and "[s]tate programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create . . . [a] hazard of stigma, since they may promote racial separation and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own."[81] Moreover, classifications based on immutable characteristics like race are inconsistent with the deep belief that state-sponsored advancement "should ideally be based on individual merit or achievement, or at least on factors within the control of an individual."[82] In response to the argument that the interest in advancement by individual merit is adequately represented in the political process, the opinion says that legislative weighing "cannot waive the personal rights of individuals under the Fourteenth Amendment."[83] Because even ostensibly benign racial classifications may be "misused," the Justices settled upon their intermediate test.[84] A classification that passes this test will still be invalid if it "stigmatizes any group or . . . singles out those least well represented in the political process to bear the brunt of a benign program."[85]

2. *Justice Powell and Strict Scrutiny*

Justice Powell rejects the proposal that discrimination in favor of disadvantaged groups should be subject to a different test than discrimination against them. Though I shall subsequently question whether his application of his standard of review remains true to this stated principle, I shall for the moment take at face value what he says about the standard. In Justice Powell's view, the rights established by the equal protection clause are "personal rights . . . . The guarantee of

79. 98 S. Ct. at 2782-83 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

80. *Id.* at 2783.

81. *Id.* at 2784.

82. *Id.* at 2784-85.

83. *Id.* at 2785.

84. The opinion calls the test "strict," *id.* at 2785, but nonetheless makes clear that it is intended to be less strict than the scrutiny applicable to fully "suspect" classifications, as to which the opinion repeats Gerald Gunther's observation that the test has become " 'strict' in theory and fatal in fact." *Id.* (citing Gunther, *supra* note 75, at 80).

85. 98 S. Ct. at 2785 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[86] According to Justice Powell racial and ethnic classifications always call for "the most exacting judicial examination" because they are always "suspect."[87] Their suspectness does not depend on whether a "discrete and insular minority" suffers[88] or on whether the classification "stigmatizes."[89] Justice Powell attacks the centrality given the notion of stigma in the opinion of Justices Brennan, White, Marshall, and Blackmun, pointing out that all classifications that assign benefits on a racial basis are likely to be deeply resented by those who are disadvantaged, and cautioning that "one should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies a system of allocating burdens and privileges on the basis of skin color and ethnic origin."[90] Acknowledging that the fourteenth amendment was adopted initially to improve the position of blacks, he notes that it is "framed in universal terms," and that judicial interpretations of the equal protection clause have assumed that it protects all citizens.[91] Given the fact that we are a nation of minorities, Justice Powell does not perceive any principled basis for making some groups special wards under the equal protection clause. He argues eloquently for a standard of review that will not depend on the shifting sands of contemporary sociological and political analysis and undermine the value of "consistent application of the Constitution from one generation to the next."[92] Finally, Justice Powell sees some "serious problems of justice connected with the idea of preference itself":[93] courts may be asked to impose burdens on individual members of a minority group in order to advance the group's general interest; preferences may reinforce existing stereotypes that members of particular groups cannot succeed on their own; and with respect to nonminority group members who may be denied benefits, there is inequity in casting on innocent persons the burdens of redressing past injustices.[94] These problems support the conclusion that it is appropriate to employ a constant standard of justification for racial classifications—one that demands that the classification be "precisely tailored to serve a compelling governmental interest."[95]

86. *Id.* at 2748 (opinion of Powell, J.).
87. *Id.* at 2749.
88. *Id.* at 2748.
89. *Id.* at 2751 n.34.
90. *Id.*
91. *Id.* at 2750.
92. *Id.* at 2753.
93. *Id.* at 2752-53.
94. *Id.* at 2753.
95. *Id.*

3. Analysis of Divergent Views on Standard of Review

The standards articulated in the opinions of both Justice Powell and Justices Brennan, White, Marshall, and Blackmun afford whites significant protection against arbitrary discrimination, thus decisively rejecting the notion that the equal protection clause is exclusively, or even mainly, a protection of special groups.[96] Justice Powell's position is obviously at odds with any favored constitutional status for particular groups. The opinion of the Brennan group is less clearly so. One possible way to rationalize its approach would be to say that the equal protection clause affords all individuals a modicum of protection, but gives even more stringent protection to historically disadvantaged and politically powerless groups. Yet it is hardly necessary to invoke a special theory of group protection, since the opinion can also stand on the theory that all individuals are afforded protection against arbitrary discrimination, but that certain forms of legislation are thought particularly likely to be abusive and therefore require more careful review.

Interestingly, Justice Powell does not eschew altogether the possibility that distrust of the legislative process can properly affect the level of review, for he acknowledges that whether a group is a discrete and insular minority may be relevant in deciding whether to add to the list of suspect categories.[97] But for him confidence in the legislature is irrelevant in determining the standard of review for racial classifications. The joint opinion, on the other hand, seeks to discern the basic logic underlying suspect categorization and concludes that it is not fully applicable to racial classifications that disadvantage whites. In a separate opinion,[98] Justice Marshall emphasizes that the historical intent underlying adoption of the fourteenth amendment was to improve the position of blacks, but the thrust of the opinion he authors with his three colleagues is not mainly historical. Rather it argues that the reasons for judicial invalidation of racial classifications simply do not apply with equal force when whites are the victims.

Justice Powell offers a number of arguments against this view. First, he contends that "stigma" is much too elusive a notion to carry the weight assigned it in the joint opinion. That opinion does not make clear the precise constitutional relevance of stigma, but this defect is not crucial to resolving the issue posed by *Bakke*. Part of the problem with the joint opinion is its apparent assumption that the main dangers of stigma in relation to ostensibly benign classifications are that such

96. For a forceful presentation of such a view, see Fiss, *Groups and the Equal Protection Clause*, in EQUALITY AND PREFERENTIAL TREATMENT, *supra* note 26, at 84. A more traditional approach is powerfully defended in Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976).

97. 98 S. Ct. at 2748-49 (opinion of Powell, J.).

98. *Id.* at 2798 (opinion of Marshall, J.).

classifications may actually be based on "paternalistic stereotyping"[99] or otherwise "misused."[100] In fact, of course, legislation not based on any derogatory stereotyping could still have the effect of causing some stigma in the perceptions of part of the public; and legislation enacted mostly for appropriate reasons could be motivated in part by inappropriate reasons. Thus, the opinion fails to address some complexities of the concept of stigmatization, apparently assuming that all that is involved is the question whether the dominant legislative purpose is to perpetuate a streotype or represents an unthinking acceptance of a stereotype. This difficulty touches not only classifications that ostensibly benefit minority groups but also ones that unambiguously disadvantages them. It is sharply focused in the joint opinion's confident assertion that any categorization that stigmatizes a racial group is *ipso facto* unconstitutional.[101] Of course, any classification that is solely *designed* to stigmatize is unconstitutional because it is not based on a permissible purpose. But what of a classification that is adopted for legitimate reasons but will be viewed by much of society as stigmatizing, or a classification that is motivated in part by legitimate motives and in part by perceptions of inferiority? For example, the curfew, and later exclusion, applied to Japanese-Americans on the West Coast during World War II undoubtedly reflected in part a general suspicion of their loyalty, and these measures certainly did reinforce public views of a stigmatizing sort. But a more acceptable rationale could also be put forward: that even though only a small percentage of Japanese-Americans were likely to be disloyal, it would be too difficult for the government to determine who those were and thus it had to restrict the liberty of all Japanese-Americans. This theory twice won a majority of the Court,[102] and the curfew was sustained by a unanimous vote in *Hirabayashi v. United States*. Was the Court's decision wrong in that case because Japanese-Americans were stigmatized, or was the result possibly correct because of an alternative reason for the action taken? The joint opinion does not begin to give us a clear answer.

However *Hirabayashi* should have been decided, it is inconceivable that a slight dose of unintended stigma could by itself render an otherwise acceptable classification unconstitutional. So long as this principle is granted, the ambiguities in the joint opinion's treatment of stigma bear little relation to the problem posed in *Bakke*. Here the issue is whether classifications clearly designed to improve the position

99. *Id.* at 2784 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

100. *Id.* at 2785.

101. *Id.* at 2783, 2785.

102. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

of a previously disadvantaged minority group[103] are to be reviewed as skeptically as demeaning classifications which perpetuate that position. The conferral of benefits by legislation is not typically an attempt to stigmatize the beneficiaries;[104] certainly that would be a strange explanation for veterans' preferences or benefits to the handicapped. Often benefits are provided to help ameliorate long-standing negative stereotypes, and that is one aim of professional school admissions preferences. Such a classification does impliedly acknowledge that blacks or members of other minority groups are not presently as well qualified, on the average and in specified respects, as whites, but this hardly seems significant stigmatization, perhaps both because the fact implied appears to be accurate and because it would be revealed even in the absence of the challenged government action.[105] As disappointed and possibly even resentful as rejected white applicants may be, they are unlikely to feel stigmatized as inferior to blacks generally. Thus, one can draw a solid distinction, in terms of possible stigma, between these classifications affording preferential treatment to minority groups and those disadvantaging historically disfavored minorities.

Justice Powell raised three problems concerning preference near the end of his discussion of level of review, but none of these problems provides significant support for his position. The first is that individual members of minority groups may be asked to accept burdens to promote the interests of the group. For example, a black might be denied good housing so a project can remain integrated. However, this type of problem simply does not arise with preferential benefits. No blacks have burdens imposed on them; the only blacks affected by the preference benefit from it. It is true that as an indirect and unintended consequence of such policies certain blacks may experience burdens —for example, a black may be unhappy because he finds the work difficult, or a brilliantly qualified black who would have been admitted easily without a preference might sometimes be assumed to be less competent than he actually is by persons who are unaware of his qualifications and are aware of preferential programs. These subtle burdens should not be minimized, but they are quite different from the more direct

103. This classification is unlike many of those that have been drawn on gender lines and have mixed effects on women, either protecting all women against certain harms (*e.g.*, lifting heavy loads) at the expense of sacrificing certain benefits (employment in jobs that require such lifting), or benefitting some women (*e.g.*, widows of male workers insured by social security) and detrimentally affecting others (women insured by social security).

104. Personal charity is occasionally accompanied by this motive. And possibly in some earlier historical period relief to the poor was partly a method of labelling as inferior those unable to support themselves.

105. Abolition of the preference would straightforwardly reveal any average difference in qualifications by producing a small number of minority admittees, so that whatever negative inferences about minority groups may accompany the preference would also accompany the alternative course of action.

burdens Justice Powell apparently has in mind, and are not significant enough to warrant the strictest scrutiny rather than an intermediate standard. Justice Powell's second problem is the possibility that preferential programs may actually reinforce some negative stereotypes about minority groups. Although somewhat more apt than the first problem, this is still an insufficiently weighty reason for invoking the strictest form of review, particularly when one considers that such programs often help alter negative stereotyping by bringing whites and members of minority groups together in situations of rough equality and by increasing the proportion of "status" positions in society held by members of minority groups. The third problem, that innocent individuals bear the burden of redressing grievances against society, while relevant to the process of weighing justifications, does not necessitate the choice of a strict standard of review, since it does not involve special consideration of a politically underrepresented group that would warrant particular skepticism of resolutions by the political branches.

More persuasive is Justice Powell's argument that constitutional interpretation demands consistency over time, and that it is inappropriate to have a standard of review that will vary as social conditions change. But Justice Powell is far from urging static constitutional law. He acknowledges that the application of any given test may properly yield one result now and a different result one hundred years from now because, for example, remedies currently necessary to serve an important interest may no longer be needed in the future. But if a single standard of review can yield changing results, it is not clear why the standard of review itself cannot also properly change. Greatly altered conditions may result in legislatures that are more representative on some issues one hundred years from now than they are today. For example, a change in the level of review for gender-based classifications might someday be appropriate if women and men become equally well represented in state legislatures. But surely the distinction between legislation directed against historically disfavored minority groups and legislation whose burden is borne by whites (even if it be true that "whites" may be broken down into various minority groups) is based on a semipermanent fact of our social life—the general dominance of whites in the political process. If an intermediate level of review raises the conceptual possibility of a changing test for some kinds of racial classifications over time, it introduces no confusing uncertainty into constitutional law in any practical sense for the near future.

Justice Powell's exacting scrutiny raises its own difficulties in drawing tenable lines, difficulties that parallel those raised by the Stevens reading of Title VI.[106] Upon proof of prior discrimination, courts

106. *See* text accompanying notes 64-68 *supra*.

have used race-conscious remedies when they seemed the best way to redress the violations. Neither the original courts nor appellate courts expressly ask if there is a compelling interest, apparently presuming that the correction of previous violations is compelling enough. Nor do the courts necessarily reject the use of racial criteria simply because alternatives might conceivably suffice. Justice Powell draws a sharp distinction between race-conscious classifications that are remedial in a narrow sense and race-conscious classifications not so clearly tied to specific violations. It then becomes crucial to identify which is involved in any one instance. Justice Powell's attempts to deal with this problem are considered below,[107] but it suffices to note here that the line-drawing difficulties he creates are more serious than those for which he criticizes his four brethren.

There is one aspect as to which the standard of Justices Brennan, White, Marshall, and Blackmun is formulated less strictly than might be appropriate. They require only that a classification be "substantially related" to the achievement of the supporting objectives. If means other than race-conscious classifications are identifiable for accomplishing particular objectives, however, the use of race should be eschewed as a basis for differentiation, and courts in constitutional cases should make that inquiry with some diligence.[108] Suppose, for example, a university states that it is really interested only in helping educationally and economically deprived applicants generally, but it uses race as a criterion because most blacks are poor. Even a strong correlation between race and poverty should not be deemed a sufficient basis for employing a racial criterion rather than educational and economic criteria. In sum, the inquiry into possible alternative means should be more rigorous, and more crucial to validation, than the words of the joint opinion imply. Inasmuch as the Brennan group concludes that no alternative means would suffice to achieve the purposes that justify the Davis program, the Justices' view of the proper outcome of the *Bakke* case would not have been any different had they adopted this suggestion.

None of the Justices criticize the standard of the joint opinion as being too severe. Essentially for the reasons indicated in the opinion, the intermediate test is preferable to the very relaxed scrutiny applied to equal protection claims involving neither a suspect classification nor a fundamental interest.[109]

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107. *See* text accompanying notes 145-62 *infra*.

108. The New York Court of Appeals, in adopting an intermediate test for preferential admissions, indicated that a racial classification would be valid only if no "less objectionable alternative" would suffice. Alevy v. Downstate Medical Center, Inc., 39 N.Y.2d 326, 336, 348 N.E. 2d 537, 546, 384 N.Y.S.2d 82, 90 (1976). *See also* Greenawalt, *supra* note 22, at 577-79.

109. My own views on this subject are developed in Greenawalt, *supra* note 22, at 571-75.

B. *Justifications and Permissible Programs*

The Davis special admissions program purported to serve the following purposes as summarized by Justice Powell: "(i) 'reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession' . . .; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body."[110]

1. The Joint Opinion: Remedying the Effects of Past Discrimination

Justices Brennan, White, Marshall, and Blackmun accept the purpose of "remedying the effects of past societal discrimination" as sufficient to justify the Davis program in light of the "sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school."[111] What the opinion regards as adequate is a combination of past discrimination and present disadvantage, so we do not know whether either of those alone would be sufficient. As written, therefore, the opinion does not cover a situation in which a group already well represented in a profession is given preferences simply to compensate for past societal mistreatment[112] or a situation in which preferences are given to a group badly underrepresented but not victimized by past discrimination, in order to bring the group within the mainstream of the community.[113]

The joint opinion casts the argument for the sufficiency of the remedial purpose primarily in terms of prior law. The four Justices mention race-conscious remedies in school segregation cases and the unanimous dictum in *Swann v. Charlotte-Mecklenburg Board of Education* that school boards could voluntarily assign pupils on a racial basis even in the absence of prior discrimination.[114] They also rely on employment cases approving race-conscious remedies under Title VII, which has been interpreted to bar employment practices having a racially disproportionate impact in some circumstances even when

110. 98 S. Ct. at 2757 (opinion of Powell, J.) (footnotes omitted).

111. *Id.* at 2785 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

112. Although Asian Americans may have continued to receive a preference at Davis when they were overreprensented in the student body, it seems unlikely that a concious choice would be made to compensate for past discrimination by preferring members of a group already well represented in a profession.

113. In Yugoslavia, for example, places in universities are reserved for members of disadvantaged national minorities, such as Albanians, not so much because they have suffered discrimination by Yugoslav society, but because the government wishes to ameliorate sharp inequalities in economic and cultural growth among various geographical regions and nationalities.

114. 98 S. Ct. at 2785-86 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

there may not have been intentional discrimination.[115] The opinion points out that in employment cases disadvantaged white applicants have not been responsible for earlier discrimination, even if it existed, and thus they are every bit as much "innocent" victims as the white applicants to Davis, yet the presence of such innocent potential employees has not been considered constitutionally relevant. Justices Brennan, White, Marshall, and Blackmun conclude:

> Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.[116]

The opinion then notes that only about two percent of the medical profession is black, that historically most black doctors have been educated at two primarily black medical schools, that the persistent underrepresentation of blacks in medical schools and in the medical profession has been caused largely by massive past discrimination against blacks at all stages of education, and that access of blacks to the medical school at Davis would be sharply limited in the absence of a special program.[117] The Justices further note that HEW regulations imply that race-conscious programs are an appropriate means for overcoming the lingering effects of past discrimination.

The Justices urge that the Davis program neither imposes any stigma nor discriminates against any members of the group it purports to benefit.[118] They reject the conclusion of the state supreme court that, given the program's objectives, the use of race was unreasonable.[119] Because of the great number of whites who are educationally and economically disadvantaged, a "colorblind" admissions program keyed to either of those indicia would not produce a significant number of blacks in the medical school. Finally, the joint opinion asserts that if a decision is made to give a preference to members of minority groups, it is constitutionally irrelevant whether a fixed number of places is set aside, as at Davis, or the program is administered more flexibly, as at most institutions.[120]

If the opinion authored by the four Justices is a relatively bland attempt to bring legal authorities and arguments to bear, Justice Marshall's individual opinion includes an eloquent, though summary, account of the injustices inflicted on blacks in this country. He writes:

115. *Id.* at 2786-87.
116. *Id.* at 2789.
117. *Id.* at 2789-91.
118. *Id.* at 2791-92.
119. *Id.* at 2792.
120. *Id.* at 2793-94.

> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to insure that America will forever remain a divided society.[121]

He places more emphasis than does the joint opinion on the approval of race-conscious programs, such as the Freedmen's Bureau Act of 1866, by the same Congress that proposed the fourteenth amendment, and he finds it difficult "to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination."[122] Putting his finger on what many people would perceive as the crucial aspect of professional school preference, he says that because of the legacy of past discrimination "we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence and prestige in America."[123]

Justice Blackmun also writes of the original purpose of the fourteenth amendment and suggests that the ensuing enlargement of principle does not mean the amendment "has broken away from its moorings."[124] He notes other preferences, such as those for veterans and the handicapped, and remarks upon the many criteria other than merit which have traditionally influenced admissions decisions, finding it somewhat ironic that only preferential admissions for minority groups have raised so much concern. Probably the most critical reflection of his own view, however, is in the following comment: "In order to get beyond racism, we must first take account of race. There is no other way."[125]

2. *Application of the Rationale of the Joint Opinion to Members of Groups Other Than Blacks*

In focussing upon the main beneficiaries of preferential programs, blacks, the joint opinion and the separate opinions sidestep a somewhat troublesome question. Is a justification which may be sufficient as to blacks sufficient as to members of other minority groups that are also made the beneficiaries of preference? The Davis special admissions program for the years Bakke applied included "Chicanos," "Asians," and "American Indians."

Without question American Indians have been the subject of long-standing and acute mistreatment by the dominant society and are

121. *Id.* at 2803 (opinion of Marshall, J.).
122. *Id.* at 2805.
123. *Id.*
124. *Id.* at 2807 (opinion of Blackmun, J.).
125. *Id.* at 2808.

greatly underrepresented in the professions, so a strong showing could be made that they are appropriate beneficiaries of preference if the purpose is to remedy the effects of past discrimination.[126]

The argument is less simple respecting "Chicanos" and "Asians." In most parts of the country where they have resided for some years Chicanos have been victims of serious discrimination, and they are now underrepresented in the professions. But some Chicano applicants will be children of recent immigrants, whose disadvantageous position in American society will be primarily the product of economic and educational conditions in Mexico and of the strain of beginning life anew in a country whose dominant tongue is unfamiliar, not a result of American discrimination.[127] In some instances, the parents also will have faced the special impediments to advancement present for those who have entered illegally, but if classification as an illegal alien be deemed "discrimination," it is certainly not discrimination that warrants a remedy, at least unless the country's restrictions on immigration are themselves fundamentally unfair.[128] Sometimes preferences have been suggested for "Spanish-speaking" or "Spanish-surnamed" applicants. If these phrases are taken literally and extended beyond Chicanos and Puerto Ricans to children of any Latin American and perhaps even Spanish parents,[129] they encompass many persons who may not have suffered the effects of significant discrimination in the United States. Why should applicants from such backgrounds be preferred to white non-Spanish applicants who are equally disadvantaged in terms of educational and economic background?

There are some possible answers to these problems. It might be said that discrimination against Chicanos and Puerto Ricans, and many other Latin Americans, is largely racial, and pervasive enough so

126. In one respect, preferences for Indians may be easier to defend than preferences for blacks because the category can be defined in "tribal" rather than "racial" terms and may thus be based on a method of classification that is less "suspect." *See* Morton v. Mancari, 417 U.S. 535, 553 (1974).

127. It might, of course, be contended that the United States is in large part to blame for the fact that educational and economic conditions in Mexico are not better than they are. Since conditions in Mexico are not worse than in other countries that are similar geographically and culturally, it seems doubtful that the argument of American responsibility could convincingly be made, unless the United States is deemed largely responsible for bad conditions in the world generally, or at least in the Americas, or unless the United States is asserted to have a special duty to Mexico based on geographical proximity or unjustified seizure of territory during an earlier historical era.

128. One might take the view that any restrictions on free immigration are immoral, or that the criteria for determining who will be admitted are unjust. But even if our immigration laws are substantially unjust in some respect, it is a further step to say that a remedy is owed to those who know they are entering illegally and suffer the consequences of that choice.

129. Of course, one might have a Spanish surname passed through the male line of descent from one's great, great-grandfather even though none of the other fifteen great, great-grandparents was of "Spanish" descent, and all one's forebears for six generations have been born in the United States.

that any members of these groups living in this country will be subjected to it; a preference cast in these terms would then be defensible as remedying racial discrimination. Under this theory, whites of Latin American origin might be included in a preference on a number of bases. It might be said that the government cannot easily decide which Latin Americans are completely or mostly white in order to draw the line.[130] Or it might be reasoned that the public itself does not draw the distinction and discriminates against white Latin Americans as if they were of "mixed blood," or that Latin Americans have a sufficient sense of identification as Latin Americans that aiding white Latin Americans will benefit Latin Americans who are not white.

A different approach might be to suggest that all recent immigrants who do not speak English will suffer discrimination directed generally at aliens and persons of foreign extraction and that remedying this discrimination is ample support for a preference. But why then should disadvantaged children of Colombian immigrants be preferred to disadvantaged children of Yugoslav immigrants? Perhaps Colombians, or Latin Americans, are more underrepresented in the professions, or having a greater sense of group separateness from the dominant society, stand to benefit more from a preference. Or, it may simply be that in selecting among groups that could appropriately receive a preference, those making the decisions have wide discretion to choose who will and who will not receive it.[131]

Yet a third approach would be to suggest that present disadvantage of a self-conscious group is sufficient for preference, even apart from previous discrimination. Or, more narrowly, that if a preference is given to members of one group because of past discrimination, say blacks, another group which is equally disadvantaged and underrepresented may be given a similar preference whether or not its members have suffered significant discrimination.

These approaches might, of course, be woven together in various

130. A difficulty with this argument is that in some Latin American countries, such as Argentina, there are few residents with African or Indian forebears, so it would be possible to exclude offspring of immigrants from those countries.

131. Justice Powell argues that it is too difficult for courts to assess the status of rival groups who may claim the benefits of preferential treatment, 98 S. Ct. at 2751-52, but the opinion of the Brennan group appears to answer this point adequately in stating that the courts do not decide which groups shall receive preferential treatment, they only pass on the adequacy of the reasons offered for singling out particular groups. *Id.* at 2784, n. 35. In the same discussion the Justices suggest, citing Katzenbach v. Morgan, 384 U.S. 641, 657 (1966), that an institution need have only a rational basis for preferring one group rather than another. The language of *Katzenbach* actually suggests that when engaging in reform measures, a legislature can draw the limits on inclusion on almost any basis it chooses. For a suggestion that any level of review less than a serious application of a reasonable basis standard is inadequate for this problem, see Greenawalt, *supra* note 22, at 599. *Cf.* Greenawalt, *All or Nothing At All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31, 78-80.

ways, and it seems highly likely that a powerful argument for a preference for Chicanos could be built upon the relevant facts. But Justices Brennan, White, Marshall, and Blackmun do not do the work of constructing that argument.

The preference for "Asians" is also problematic, since it is questionable whether immigrants from the diverse cultural traditions of Asia have a strong sense of common identification and doubtful that all groups of Asians have suffered significant discrimination in the United States.[132] Moreover, it is highly likely that some subgroups of Asians, such as Japanese Americans, are well represented in the professions and are not now significantly retarded in educational opportunity by past discrimination,[133] as severe as that has been at some times. Again, the opinion does not construct the argument that extension of the preference to Asians was permissible.

If any substantial part of the Davis preference was unacceptable, Bakke may have been denied his constitutional rights,[134] so it must be assumed that the authors of the joint opinion considered the full scope of the preference constitutionally permissible. Yet they failed to examine all its dimensions with the degree of rigor their own intermediate test demands.

3. Justice Powell and Academic Diversity

Justice Powell's rejection of the position of Justices Brennan, White, Marshall, and Blackmun is based on his much narrower view of the permissible justifications for race-conscious programs. He first rejects any idea that minority group members can be preferred simply because of their membership in those groups, since the Constitution forbids discrimination simply for its own sake.[135] He next turns to the justification of countering societal discrimination, concluding that in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations, classifications that aid members of "victimized" groups at the expense of innocent individuals lack a compelling justification.[136] Justice Powell distinguishes the cases cited by the petitioner primarily on the ground that they involved race-con-

132. Although most Asians are racially different from whites, many Asian immigrants, for example Indians, do not suffer the language disability that affects most European immigrants.

133. In 1973, thirteen Asians were admitted to a class of 100 at Davis through the general admissions process and two through the special program, thus creating doubt that Asians as a class needed the preference. 98 S. Ct. at 2741 n.6. The University of Washington Law School's preference, challenged in *DeFunis*, included Philippine Americans but not others of Asian extraction. DeFunis v. Odegaard, 82 Wash. 2d 11, 17-18, 507 P.2d 1169, 1174 (1973).

134. This statement presumes that the medical school would still have been unable to show that Bakke would have been denied admission even if only a part, rather than all, of its preferential program had been declared invalid.

135. 98 S. Ct. at 2757 (opinion of Powell, J.).

136. *Id.* at 2757-58.

scious remedies applied against organizations that had discriminated.[137] In a passage that reflects the position first suggested by Terrance Sandalow that it may make a constitutional difference what organ of state government decides upon preferential treatment,[138] Justice Powell writes: "Petitioner does not purport to have made, and is in no position to make, such findings [of violations]. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality."[139]

Justice Powell accepts the need for improved medical services in presently underserved communities as a legitimate purpose, but he agrees with the California Supreme Court that a racial classification is unnecessary for its achievement, since a more particularized inquiry to determine which applicants are genuinely interested in the medical problems of minorities is a possible alternative.[140]

Finally Justice Powell reaches the justification he believes is legitimate for race-conscious admissions decisions: creating the "atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—[which] is widely believed to be promoted by a di-

137. *Id.* at 2753-56. Although Title VII cases do not require a finding of discriminatory intent, race-conscious remedies are nonetheless applied only against employers found to have discriminated within the meaning of the statute by using practices having a disproportionate impact on minorities and not based on "business necessity." Lower court cases approving race-conscious pupil transportation plans in the absence of earlier discrimination by school authorities are distinguished by Justice Powell on the basis that in those cases whites were not denied an equal opportunity for education and there was no showing that liberty or privacy interests were threatened. *Id.* at 2754, n.39.

Herein also may lie the explanation for the apparent inconsistency between Justice Powell's views in *Bakke* and in Keyes v. School Dist. No. 1, 413 U.S. 189, 217 (1973) (separate opinion). In *Keyes* he urged that no sharp line should be drawn between de jure and de facto segregation, arguing against the central importance of intentional discrimination by state authorities in that context. Yet in *Bakke*, the existence of past discrimination becomes crucial, in his view, to the justifiability of race-conscious remedies. His belief that whites suffer no genuine infringement of interest when the school a pupil attends is determined on a racial basis may explain his willingness to alter de facto segregation by race-conscious means.

138. Sandalow, *Racial Preference in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 695 (1975). *Cf.* Greenawalt, *supra* note 22, at 573-74 (arguing that a review more stringent than rational basis is appropriate, in part because preferential policies are typically established by educational institutions rather than legislatures).

139. 98 S. Ct. at 2758 (opinion of Powell, J.).

140. Though Justice Powell's conclusion here is sound, he echoes the state court's mischaracterization of the contrary argument as an assertion that " 'one race is more selflessly socially oriented.' " *Id.* at 2759. The argument is not that blacks are less selfish than whites but that blacks are more likely to live among and serve blacks than are whites, and further that at the time of application to medical school, there is really no firmer basis for predicting the sorts of careers individuals will pursue. Particularly in light of the present extreme difficulty of gaining entry to medical school and frequent belief of entrants to professional schools that their own careers will reflect more dedication to humanity than the careers of most others in the professions, it is difficult to assess the statements of applicants about their proposed career plans. Yet Justice Powell seems right in saying that some more particularized inquiry is possible, and it would seem inappropriate for the government to rely on the assumption, even if substantially accurate, that blacks will probably associate with blacks, and whites with whites.

verse student body."[141] The exchange of ideas within universities invokes a countervailing constitutional value, that of the first amendment.[142] Since individuals from different ethnic backgrounds may have different experiences and different contributions to make to the insights of their fellow students, race can be weighed as a factor in admissions decisions. But the aim of creative diversity does not justify reserving a set number of places for minority group students; instead each applicant must be evaluated in terms of his or her own likely contribution to overall diversity of the class. Whereas a program like that of Harvard College which uses this flexible approach is constitutionally permissible, the Davis program is not.[143] To the contention that an approach like Harvard's is "simply a subtle and more sophisticated . . . means of according racial preference," Justice Powell responds, "a Court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system."[144]

4. The Substantial Difficulties with Justice Powell's Approach

Justice Powell's opinion has received considerable attention because he is the swing man in the *Bakke* case. Although, as indicated above, it is by no means certain he will occupy that position in subsequent cases, nevertheless, his attempt to develop a moderate position on the dilemma of race-consciousness warrants close consideration.

The two major difficulties with the Powell opinion are its reliance on a justification that is secondary and its failure to draw a convincing line between remedies for specific instances of discrimination and action designed to counteract more general discrimination.

I have yet to find a professional academic who believes the primary motivation for preferential admissions has been to promote diversity in the student body for the better education of all the students while they are in professional school. Diversity is undoubtedly one reason for such programs, but the justification of countering the effects of societal discrimination relied on by Justices Brennan, White, Marshall, and Blackmun comes closer to stating their central purpose, and Justice Powell offers no convincing reason for rejecting that justification and accepting the diversity argument.

He ties the diversity argument to the first amendment value of free inquiry and that, almost magically, transforms it into a compelling interest. There are two difficulties with this line of analysis. The first is that if some tie-in between a constitutionally protected value and the

141. *Id.* at 2760 (footnote omitted).
142. *Id.* at 2761.
143. *Id.* at 2761-63.
144. *Id.* at 2763.

state interest in a classification is enough to make the interest a compelling interest, then certainly the interest in remedying the effects of broad societal discrimination qualifies. Much of the discrimination inflicted upon blacks since passage of the fourteenth amendment was the product of unconstitutional governmental action, given our modern understanding of what the Constitution requires.[145] Though such discrimination has perhaps largely ended, government discrimination in past years continues to have a devastating influence on the opportunities of the present generation. Thus any program of preferential treatment for blacks bears a significant relation to remedying past violations of the fourteenth amendment and, under Justice Powell's analysis, would seem to qualify as a compelling interest on this basis alone.

It is unclear precisely how Justice Powell would respond to this criticism. Apparently he believes that remedies must be limited to proven violations, but to say this is to take the unattractive position that society can make no response to correct the multitude of long-past violations whose existence or specific effects are now unprovable, but which are known to have continuing and significant effects on the present prospects of blacks.

Alternatively, Justice Powell might rely on his view of respective competences of legislatures and academic institutions. Justice Powell is not precise about what the legislature may do to correct discrimination, perhaps because he did not believe it necessary for him to address this issue to resolve the *Bakke* case. Clearly in his view the legislature is one agency that may determine if illegal discrimination has occurred and prescribe remedies against those guilty of discrimination. A legislature would ordinarily either set out criteria by which courts or executive agencies are to determine whether illegal discrimination has occurred in specific instances, or it would specify that broad categories of institutions must take certain remedial steps because a high percentage of the institutions in those categories have actually discriminated.[146] Justice Powell does not explicitly address whether a legislature could impose a race preference in employment or university admissions on the ground that this is the best way to remedy past discrimination, without any finding or even assumption that particular employers or universities, or employers and universities generally, have discriminated. If Justice Powell would allow this, then the interest in

145. That is to say, school segregation and discrimination in government employment are perceived to have been unconstitutional, even if in some past era they were regarded as permissible.

146. The rules that have been imposed on federally funded employers by the Labor Department and the Department of Health, Education, and Welfare—despite the absence of any particular finding of previous discrimination—may be considered of this variety, although it might be said that the basis for action against any individual employer is the probability of its own discrimination given its underrepresentation of minorities.

correcting societal discrimination could be compelling if asserted on behalf of genuine legislative action and fails in *Bakke* only because the university lacks the policy-formulating competence to make such decisions.

The response of Justices Brennan, White, Marshall, and Blackmun to this suggestion is that a state's distribution of decisionmaking authority is its own business, not a matter of federal constitutional law;[147] but this response may be too hasty. There is something to be said for requiring the legislature to face up to the choice of whether to allow preferences. Something, but not enough. Universities and particularly professional schools have long made decisions about who will have the keys to important societal positions through determinations about admissions and scholarships. Implicit in the exercise of such power is some vision of the public welfare. It would seem approriate for a law school to choose not to limit consideration even to such broad concerns as potential ability as a lawyer and likely area of legal employment. A school might well, for example, admit a student it thought had great potential for political leadership, though believing he might perform less well as a lawyer than some rejected applicant. It requires no substantial extension of the institutional responsibility to determine who will become members of the profession for institutions to make some judgments about the social desirability of broadening the availability of professional positions, in the belief that a more diverse and representative profession will enrich the understanding of all its members of relevant social problems[148] and will otherwise promote a more harmonious and integrated society. Thus, Justice Powell underestimates the capacity of academic officials to make such decisions. And if his argument there does not persuade, we are left with no good reason for refusing to treat the remedy justification as a compelling interest if the diversity justification is a compelling interest.

The more fundamental defect in Justice Powell's argument is that it may be read to suggest that every interest somehow tied to a constitutional value should automatically be treated as compelling. To take such an approach would dilute the safeguard of the equal protection clause against classifications traditionally treated as "suspect." An example will illustrate this point and also test whether Justice Powell really means to examine discrimination in favor of blacks by the same standard as discrimination against blacks, as he asserts. Suppose a state law school decided to give whites a preference in admission over blacks who were somewhat better qualified, offering the following ex-

147. 98 S. Ct. at 2787 n. 42 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

148. It is somewhat artificial to permit schools to consider the education of students during school years, as Justice Powell does, but not allow them to consider the educational and social enrichment of the professionals once they have left school.

planation: "We have never had racial preferences before, and in the recent past about 10 percent of our students have been black. It is the experience of professors that, on the average, blacks talk less in class than whites and tend to socialize only with one another outside class. If we believe a black student, based on his record of activities at college, is likely to communicate with the majority of his fellow students at law school, we are delighted to have him; but if the student has been involved largely in black organizations, our best guess is that he will contribute less at law school to the majority of his fellow students than a white student. Therefore, while we continue to make admissions decisions on an individualized basis, we now give some preference to white applicants." The position of our hypothetical law school, though it would not win much sympathy, is not blatantly irrational, reflecting as it does one possible judgment about maximum effective communication. Willingness to communicate is an obvious requisite for most communication, and some sense of cohesion and community may be as important to effective communication and learning as diversity. It cannot be claimed that the first amendment value is limited to diversity, excluding other modes of interaction that the university deems will promote the most educational growth. Given what Justice Powell says, it is not clear on what basis he could hold the policy of this law school to be unconstitutional, and yet few courts in the country would sustain it.

The interest of a university in choosing its own student body does bear some relation to freedom of thought and inquiry, but it can suffer some restrictions, as, for example, by various statutes that prohibit discrimination on racial and religious grounds, without serious detriment to basic first amendement interests. Thus the Court would be mistaken to hold that every aspect of this power of choice that plausibly can be tied to any theory of improved communication and learning emerges as a compelling interest. If a school's interest in racial diversity is compelling, this may be because that particular kind of diversity promotes greater understanding of serious social injustice and helps promote, by altering student attitudes, the conditions that have sprung from prior discrimination. But the diversity justification in this form is very close to the position taken in the joint opinion.

The second major difficulty with Justice Powell's opinion is his distinction between race-conscious classifications that are corrective of specific instances of discrimination and those that reflect a more general attempt to ameliorate prior discrimination. Although earlier cases are not fully dispositive, they have more bearing on the issue in *Bakke* than Justice Powell acknowledges. In *Swann*, a unanimous court approved voluntary integration through the use of racial categories even by districts that had not previously discriminated. The only basis for distinguishing that sort of race-conscious classification from the one

used in *Bakke* is the absence of any innocent victim,[149] but so long as admissions decisions may generally be made with a view toward the social welfare,[150] excluding some better qualified students in favor of less qualified ones, the presence of rejected better qualified applicants would not appear to bear as much constitutional weight as Justice Powell places upon it. This is particularly true since we can suppose that, if there had not been prior discrimination, many more blacks would be among the best qualified. To some extent, therefore, the whites at the bottom level of those admitted in the absence of a preferential program can be viewed as beneficiaries of earlier discrimination, albeit innocent beneficiaries.[151]

The Title VII cases are relevant to this problem and another. As the joint opinion points out, race-conscious remedies in employment also involve innocent victims. Justice Powell's answer is that Title VII remedies are corrective since the employers covered have discriminated, even if they did so not intentionally but only by using tests that have a disproportionate impact on minority groups and are not related to business necessity. But this approach concedes that legislatures have some power to define impermissible discrimination, reaching organizations that have not consciously discriminated. If so, then a legislature might define discrimination to include practices that have a substantial disproportionate impact whether or not the practices are supported by business necessity; or, more modestly, a legislature might impose a more exacting standard of business necessity than has been evolved by the courts. It could then prescribe race-conscious remedies to correct situations of disproportionate impact newly defined as discrimination. Thus, it could do in two steps what Davis did directly in *Bakke*: first, define disproportionate impact from ordinary admission standards as "discrimination," and second, prescribe preferences as a remedy.[152] The extra step should not make any difference; the only other basis for distinguishing the employment cases is that the policy behind them is adopted by a legislature rather than by an academic organization.

Justice Powell also tries to distinguish Congressional grants for mi-

149. *See* 98 S. Ct. at 2757-58 (opinion of Powell, J.).

150. Indeed it can be argued that the main reasons why applicants with superior qualifications are themselves ordinarily picked has to do with social utility rather than their intrinsic deserts and that they, therefore, have no convincing complaint when reasons of social utility lead to choosing less well-qualified applicants, at least so long as the grounds of the differentiation are otherwise acceptable. *See* Dworkin, DeFunis v. Sweatt, in EQUALITY AND PREFERENTIAL TREATMENT, *supra* note 23, at 88; Nagel, *Equal Treatment and Compensatory Discrimination*, in EQUALITY AND PREFERENTIAL TREATMENT, *supra* note 26, at 3.

151. *See* Greenawalt, *supra* note 22, at 585-86.

152. *Cf.* Zimmer, *Beyond* DeFunis: *Disproportionate Impact Analysis and "Mandated" Preferences in Law School Admissions*, 54 N.C. L. REV. 317 (1976) (arguing that ordinary admissions standards for professional schools could not meet the educational equivalent of even the existing "business necessity" test).

nority activities and organizations, relying again on the absence of any innocent victim.[153] But whether there is an innocent victim depends on how one looks at the problem. One could say that the victims are taxpayers generally because the benefits come out of tax dollars. Or, if the money is going to be spent anyway, say for training, then whites who could benefit from such training and are excluded by a racial preference are innocent victims. This illustration further confirms the judgment that Justice Powell places too much constitutional weight on the presence of innocent victims.

Justice Powell's line between corrective and broader uses of race-conscious criteria requires the drawing of a line to determine what organization discriminated. Even though it may be demonstrable that there was discrimination in California's public schools at the time when the present applicants to Davis attended them, and even though it may be plausible that this discrimination disadvantageously affected some of the minority applicants, nevertheless those facts are apparently not sufficient in Powell's view to justify remedial discrimination by Davis. But why should it be wrong to correct a wrong done by one arm of the state educational establishment through action by another arm of the state educational establishment? It is somewhat artificial to require that the original wrong be done by the very part of the government now using race-conscious programs. More generally, given the lingering effects of discrimination against earlier generations, given people's inevitable advancement through stages of life, and given the tremendous geographic mobility in the United States, people whose opportunities are unequal because of earlier discrimination will typically not have been affected by any discrimination by the organization from which they now seek a job or other benefit. It is not sensible to demand as a matter of constitutional law that that organization itself have discriminated before racial preferences are permissible. The opinion of Justices Brennan, White, Marshall, and Blackmun takes a more realistic view of the prerequisites for combatting earlier discrimination on a nationwide level, not drawing a distinction between discrimination inside the state and out, between governmental and private discrimination, or even between legal and illegal discrimination.[154]

Unlike Justice Stevens who leaves open the question of voluntary use of race-conscious categories to correct constitutional and statutory violations, Justice Powell seems to preclude such voluntary measures,

153. 98 S. Ct. at 2758 (opinion of Powell, J.).

154. That it can be appropriate for a government to combat the effects of discrimination legal at the time it was practiced is illustrated most obviously by reference to the institution of slavery, which was undeniably legal in this country for a long time. If the benefits were granted specially to former slaves soon after slavery was abolished, it would be a strange objection that such benefits were unjustified because slaves had suffered no illegal discrimination.

requiring some authoritative finding of discrimination. That seems anomalous. If a university that discriminated could use race-conscious remedies if required to do so by a court that has found discrimination, why could it not do so pursuant to a consent decree upon agreement with the government agency or private individual bringing suit?[155] And if that is all right, why cannot the university institute measures on its own behalf, or at the suggestion of an injured party or interested agency, before it is sued?[156] Justice Powell would either forbid or strenuously discourage voluntary measures to correct violations of law, a strange posture for a legal system.[157]

If Justice Powell shifted his response to this problem by allowing voluntary action to correct violations, he would be faced with another dilemma. It would often be impossible to determine whether discrimination had taken place earlier, particularly if "discrimination" or its absence turned on something as elusive as the "business necessity" of a facially neutral test.[158]

In summary, Justice Powell's approach requires the courts to engage in very difficult tasks to delineate when race-conscious classification is permissible and to draw lines that bear little relation to the realities of diserimination and its correction. The joint opinion is much more realistic, drawing no sharp line between correction of particular violations and more general attempts to ameliorate the harmful effects of past discrimination.

If Justice Powell's opinion were made the basis for practice, it would likely be as defective in operation as it is in its theoretical underpinnings. His allowance of race-conscious classifications not corrective of specific discrimination is, of course, limited to academic institutions, so they would be able to use critieria other organizations could not. Unlike Justice Stevens,[159] Justice Powell casts doubt on all the administrative programs that encourage voluntary race-conscious action to correct past, or possible past, violations and to assure the absence of future violations. His approach would also call into question the breadth of some remedies granted when prior discrimination has been proved.

155. In Communications Workers of America v. Equal Employment Opportunity Comm'n, 98 S. Ct. 3145 (1978), and companion cases, the Supreme Court on the last day of the 1977 term refused to grant a petition for certiorari challenging aspects of a consent decree agreed to by American Telephone and Telegraph Company.

156. *See* Weber v. Kaiser Aluminum & Chemical Corp., 536 F.2d 216 (1977), *cert. granted*, 99 S. Ct. 720 (No. 78-435), which involved a challenge to a collective bargaining agreement that preferred minority applicants for craft positions. The agreement "was entered into to avoid future litigation and to comply with the threats of the Office of Federal Contract Compliance Programs conditioning federal contracts on appropriate affirmative action." *Id.* at 218.

157. *See id.* at 230 (Wisdom, J., dissenting).

158. *See* Judge Wisdom's suggestion that a "reasonable remedy for an arguable violation" should be upheld. *Id.*

159. *See* text accompanying notes 65-66 *supra*.

Justice Powell correctly infers that the justification he accepts will not support rigid quotas.[160] But the joint opinion rightly asserts that the existence of a fixed number is not a great practical significance. Universities have a good idea of the kinds of students who will apply in any given year and their preestimate of a desirable mix, including a racial mix, is likely to be pretty accurate. I would hazard the guess that even at schools like Harvard College that conscientiously apply a flexible standard, the number of blacks admitted each year, and the number of blacks who would not have been admitted but for their race, remains relatively stable.

One of the most disturbing features about Justice Powell's opinion would be its encouragement of hypocrisy by those for whom honesty should be an especially high value. If a school conscientiously tried to apply the Powell standard it would have to reexamine its preferential admissions program, carefully determining what its scope would be if the only aim were increased diversity and enhanced communication in the student body. One thing a school would almost certainly have to pay more attention to than it does now is the fact that some minority applicants are more likely to communicate broadly than others; and those with some demonstrated interest in and capacity for articulating their perceptions to many of their fellow students would have to be favored. No doubt, some consideration is now given to an applicant's likely interaction with his fellow students, but it would have to become a more major focus.[161]

But Justice Powell suggests the courts should not look too closely at what the universities are doing.[162] The likely consequence of adoption of his position would be that the universities would continue pretty much as in the past, for the reasons the institutions have found persuasive and under the criteria developed to respond to those reasons, not really reacting conscientiously to Justice Powell's standards but able to state a justification in those terms.

160. In some of the popular discussion of the treatment of fixed quotas by Justice Powell and the Brennan group, the underlying justifications accepted in each opinion have been neglected. If the purpose of remedying earlier discrimination is accepted, then there is no real basis for distinguishing a fixed allocation from a flexible standard; but if the only legitimate aim is to maximize the value of interchange among students, Justice Powell is right that a fixed allocation is not justifiable, at least if there are adequate resources to make individualized appointment decisions. Given the painstaking process of medical school admissions, the argument that individualized decisions would be too burdensome is obviously not available.

161. I do not mean to suggest that white students learn nothing from blacks who talk only in class when called on by instructors, but that they are likely to learn more from blacks who communicate with them more frequently in and out of class.

162. 98 S. Ct. at 2763 (opinion of Powell, J.).

CONCLUSION

Because of its encouragement of hypocrisy, its drawing of lines that do not make good sense, and its reliance on a less important reason for race-conscious classification, Justice Powell's attempt to strike a middle position on the constitutionality of preferential treatment is a failure. There are disturbing aspects of any race-conscious classification and they are more disturbing when not employed to correct specific violations of law; nonetheless, Justices Brennan, White, Marshall, and Blackmun state what is, with perhaps minor qualification, the soundest and most viable constitutional standard in this area, and it is to be hoped that in some subsequent case their position will become the posture of the Court.