Santa Clara University School of Law

Santa Clara Law Review

Volume 17 | Number 2 Article 2

1-1-1977

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CONSTITUTIONAL ALTERNATIVES TO RACIAL PREFERENCES IN HIGHER EDUCATION ADMISSIONS

Arval A. Morris*

INTRODUCTION

Two state supreme courts, in Washington and California, have reached diametrically opposed conclusions on the constitutionality of special admissions preferences for minority applicants to professional schools. In *Bakke v. Regents of the University of California*,[1] by a vote of six to one, the California Supreme Court held that a racially conditioned admissions procedure used by the University of California at Davis Medical School violated the equal protection clause of the fourteenth amendment. It said that the medical school's minority preference "violates the constitutional rights of non-minority applicants because it affords [admissions] preference on the basis of race to persons who, by the University's own standards, are not as qualified for the study of medicine as non-minority applicants denied admission."[2] The opposite conclusion was reached by the Washington Supreme Court in *DeFunis v. Odegaard*,[3] by a vote of seven to two, holding that it was constitutionally permissible for the University of Washington School of Law to grant an admission preference solely on the ground of race to applicants from minority groups even though the applicants were not "disadvantaged" and even though it resulted in the exclusion of better qualified non-minority applicants. This article shows that the position taken by the California Supreme Court in *Bakke* is analytically un-

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1. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *modified*, 18 Cal. 3d 252b (1976), *cert. granted*, 45 U.S.L.W. 3555 (U.S. Feb. 22, 1977) (No. 76-811).

2. *Id.* at 38, 553 P.2d at 1155, 132 Cal. Rptr. at 683. Thus, one of the grounds for decision seems to be that a valid claim to a denial of equal protection is presented whenever a person—in this case a Caucasian—suffers any detriment or loss due to a state's explicit use of a racial criterion. That, to say the least, is questionable. *See* note 45 *infra*; Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

3. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated and remanded per curiam as moot*, 416 U.S. 312 (1974).

sound and its effect on admissions procedures would be undesirable.

Racial preferences in higher education primarily are the result of a desire to eradicate self-perpetuating racial underclasses from American society. All reasonable persons will agree that, collectively, members of certain racial groups, such as American Indians, blacks, Chicanos, and Asian Americans, are born with ranges of natural intelligence and innate abilities fully equal to those of whites.[4] But for many reasons these groups historically have been and currently are seriously underrepresented in high executive and political offices, in the medical[5] and legal professions, and throughout the desirable positions in American society. The continuing and systematic underrepresentation of these racial groups shows them to constitute discrete, self-perpetuating racial underclasses, a condition which is neither desirable nor consistent with the ideals of America's representative democracy. This social condition requires attention, and its amelioration requires professional and other higher education for the academically qualified members of the self-perpetuating racial underclasses.

The task of accelerating that change is made more difficult today because there are simply far too many well-qualified applicants for the number of available places in higher education, and because the academically qualified members of these racial groups will seldom be the most qualified due to the handicaps that accompany being a member of a racial underclass. In these circumstances, a university desiring to help racial groups break free from their self-perpetuating underclass status has a number of alternatives. It might reasonably choose an admissions programs which granted a preference only to academically qualified members of the self-perpetuating racial underclasses who are "disadvantaged," excluding the few members of the racial underclass who have "made it" in American society. This type of preferential racial classification is similar to that used by the Davis Medical School which was adjudicated in *Bakke*.

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4. *See, e.g.*, Block & Dworkin, *IQ Heritability and Inequality* (Pts. 1-2), 3 & 4 PHIL. & PUB. AFF. 331, 40 (1974) (and sources cited therein); L. EHRMAN, G. OMEN & E. CASPARI, GENETICS AND ENVIRONMENT AND BEHAVIOR: IMPLICATIONS FOR EDUCATIONAL POLICY (1972).

5. "The total number of blacks, Mexican-Americans, American Indians, and mainland Puerto Ricans enrolled in medical schools between 1969 and 1974 was only 8 per cent. (Ass'n. of American Medical Colleges, Medical School Admission Requirements (1976) Table 6-C, p. 52.)" Bakke v. Regents of Univ. of Cal., 18 Cal. 3d at 52 n.19, 553 P.2d at 1164 n.19, 132 Cal. Rptr. at 692 n.19. But what really counts, of course, is not how many members of these groups are admitted to various kinds of professional education but how many actually wind up in the professions.

The university might also grant an admissions preference to all academically qualified members of racial underclasses, including those few who have "made it," dropping the "disadvantaged" criterion. If the deprivations of the underclass have been so great that too few, academically qualified but "disadvantaged" members can be found, or if it is determined by the university that all members of specified racial underclasses bring a desirable characteristic to the educational process, then it would appear reasonable for a university to extend its racial admissions preference to all academically qualified members of self-perpetuating racial underclasses. This second type of approach is similar to that adjudicated in *DeFunis*.

Although the use of a preferential racial classification in a university's special admissions program in each of the above two situations may be quite reasonable, the issue of their constitutionality poses questions more difficult than that of selecting an efficacious means to help eradicate self-perpetuating racial underclasses. It is submitted that *Bakke* was wrongly decided. Initially, it appears that Bakke failed to meet the burden of establishing his federal standing to challenge the constitutionality of the special admissions program at Davis Medical School and that the California Supreme Court did not adequately address this issue. The court also erred in holding that the medical school's special admissions program was unconstitutional.[6] In its rush to judgment, the court improperly used the fourteenth amendment to strike down the program, failing to consider the dominant purpose of the framers of that amendment which was to achieve for blacks and other minority groups, freedom from their racial underclass status by obtaining their equality with whites, and not to further impede it.

Furthermore, the *Bakke* court's application of the strict scrutiny test is erroneous and frought with difficulties. *Bakke* is most probably *not* an appropriate case for the application of this test. The discrimination involved is clearly not invidious, in the sense required by prior decisions, nor is *Bakke*—in contrast with *DeFunis*—a case where the classification is based

6. I do not seek to determine whether a university's racially conditioned preferential admissions system might violate 42 U.S.C. § 1981 (*see* Runyon v. McCrary, 427 U.S. 160 (1976); Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975) (motion denied that would have dismissed white plaintiff's § 1981 challenge to Sears Roebuck's special internship program for minority persons)), nor whether it might violate Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2 *et seq.* (1970)); *see* McDonald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574 (1976). *See also* Flanagan v. Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976).

solely on race. More serious is the article's claim that close analysis shows that the *Bakke* court misapplied the strict scrutiny test, using it in an unorthodox and unwarranted fashion.

Finally, the article examines alternatives to racial preferences in higher education admissions. It is concluded that if candor and directness are to prevail, then racial preferences are necessary to bring about the goal of breaking down self-perpetuating racial underclasses. Nonracial criteria, such as the alternatives suggested by the *Bakke* court, if applied literally and honestly, would not achieve this goal. On the other hand, any university desiring to pursue the goal of eradicating racial underclasses can actually retain its racially preferential admissions standards cloaked behind nonracial criteria approved by *Bakke*.

THE BAKKE DECISION: THE FACTS, STANDING, AND THE HOLDING

Allan Bakke, an aerospace engineer and a Caucasian, twice applied for admission to the School of Medicine of the University of California at Davis—once in 1973 when there were 2,644 applicants and once in 1974 when 3,737 persons applied. Only 100 places were annually available in the medical school's entering class. That makes the competition for admission close to 37 to 1 for 1974, with the consequence that for each successful applicant there necessarily would be thirty-six who would be disappointed, most of whom would also be qualified. Bakke was among those denied admission each year he applied. He neither asked for, nor received, consideration under the special admissions program,[7] nor was he admitted to

7. Although all specially admitted applicants were initially screened as to their "disadvantage," the 1973 special admissions program differed from that of 1974 in that in 1973 the application form asked only whether an applicant desired special consideration because he was "from economically and educationally deprived background," but in 1974 the applicant was asked to identify his racial or ethnic group and "whether he wished to be considered an applicant from a minority group." Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d at 42, 553 P.2d at 1156, 132 Cal. Rptr. at 684. Bakke could have applied for special consideration as other Caucasians did; however, no Caucasian was ever specially admitted. The trial court found that "members of the white race were barred from participation" in the special admissions program, and, on appeal, the university did not challenge this finding. *Id.* at 44, 553 P.2d at 1159, 132 Cal. Rptr. at 687. Thus, although the special admissions program purported to be one for "educationally or economically disadvantaged" students, including whites, and although Bakke could have applied under it, the California Supreme Court made nothing of these facts because "applicants who are not members of a minority are barred from participation in the special admission program." *Id.* In sum, the program functioned as one of special admission for disadvantaged students from certain minority

any other medical school.

Sixteen of the 100 available places[8] were reserved by the medical school and filled with specially admitted racial underclass applicants who were also disadvantaged.[9] The remaining 84 places were assigned to applicants "by recourse to the normal admissions process."[10] Given the admission pressure from extremely well-qualified applicants, most of whom are from at least middle class families and have been afforded society's finest educational opportunities, it is unrealistic to expect that the few minority-group applicants who are academically qualified for the study of medicine, but not excellently so, will be able to compete successfully for admission with their white, affluent counterparts. Circumstances of this kind insure the continuing underclass status of these racial groups, even though an occasional racial minority member might qualify for professional school admission.[11] The medical school's reservation of sixteen positions in each entering class was intended to ameliorate this condition.

Bakke sued for declaratory and injunctive relief that would compel his admission,[12] alleging that his denial of admission to

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groups, combining racial and socio-economic criteria with those used in the regular admissions process.

8. "The determination that 16 students would be admitted under the special program was made by a resolution of the faculty of the medical school. Whether that figure was randomly selected, or has some rationale, is not revealed by the evidence." 18 Cal. 3d at 38 n.1, 553 P.2d at 1155 n.1, 132 Cal. Rptr. at 683 n.1. It is doubtful that proportional eqality for minorities was the goal because "minorities comprise more than 25 per cent of the state's population." *Id.* at 88 n.16, 553 P.2d at 1189 n.16, 132 Cal. Rptr. at 717 n.16.

9. The faculty chairman of the special admission committee initially screens the applications of those who seek to enter the University as disadvantaged students, to determine if they may properly be classified as disadvantaged. Those who do not qualify as disadvantaged are referred to the regular admissions committee. If a candidate passes this initial scrutiny, his application is reviewed by the special committee for the purpose of determining whether he should be invited for a personal interview. In making this determination the special committee, unlike the regular committee, does not automatically disqualify an applicant who has a grade point average below 2.5.

18 Cal. 3d at 42-43, 553 P.2d at 1158, 132 Cal. Rptr. at 686. In footnote 8, the court further described the admissions procedure: "The chairman determines whether an applicant is disadvantaged by examining his application for such clues as whether he has been granted a waiver of the application fee, which requires a means test, whether he worked during school, and the occupational background and edcuation of his parents." *Id.* at 42, n.8, 553 P.2d at 1158 n.8, 132 Cal. Rptr. at 686 n.8.

10. *Id.* at 38, 553 P.2d at 1155, 132 Cal. Rptr. at 683 (footnote omitted).

11. *See* notes 158 & 160 *infra.*

12. In the alternative, he also asked for a writ of mandate directing his admission, for a show cause order compelling the university to show why it should not be

the medical school by a state university constituted invidious racial discrimination against him, denying him the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution of the United States. Specifically, he claimed that he had been denied equal protection (1) because he was fully qualified for admission; (2) because ultimately, the sole reason why he was denied admission was that he is a Caucasian; (3) because the sixteen specially admitted applicants were disadvantaged members of racial minorities possessing fewer qualifications for admission than Bakke;[13] (4) because the applications of disadvantaged members of favored racial minorities[14] were judged separately from the "regularly"

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enjoined from denying him admission, and for a declaration that he was entitled to admission. 18 Cal. 3d at 38 n.2, 553 P.2d at 1155 n.2, 132 Cal. Rptr. at 683 n.2.

13. The medical school created a combined numerical score for each applicant who was permitted an interview (815 regular and 71 special applicant interviews occurred in 1973, and 462 regular and 88 special ones in 1974), the combined numerical score being based on undergraduate grade point, the Medical College Admission Test scores, information derived from the application form, letters of recommendation and the interview.

> Bakke had a grade point average of 3.51, and his scores on the verbal, quantitative, science, and general information portions of the Medical College Admission Test (expressed in percentiles) were 96, 94, 97 and 72 respectively. His application warranted an interview in both years for which he applied. In 1973, his combined numerical rating was 468 out of possible 500, and in 1974 it was 549 out of a possible 600. He was not placed on the alternate list in either year.
>
> Some minority students who were admitted under the special program in 1973 and 1974 had grade point averages below 2.5, the minimum required for an interview for those who did not qualify under the special program; some were as low as 2.11 in 1973 and 2.21 in 1974. According to Dr. Lowrey [Chairman, Admissions Committee], if an applicant scored lower than the 50th percentile in the science and verbal portions of the Medical College Admissions Test, the committee "would look very hard at other things that would be positive" such as motivation, or some explanation for his low scores. The mean percentage scores on the test of the minority students admitted to the 1973 and 1974 entering classes under the special program were below the 50th percentile in all four areas tested. In addition, the combined numerical ratings of some students admitted under the special program were 20 to 30 points below Bakke's rating.

Id. at 43-44, 553 P.2d at 1158-59, 132 Cal. Rptr. at 686-87.

14. Apparently, the special admissions program operationally favored only disadvantaged applicants who identified themselves as Black/Afro-American, American Indian, Mexican American or Chicano, and Oriental/Asian American. *Id.* at 40 n.4, 553 P.2d at 1156 n.4, 132 Cal. Rptr. at 684 n.4. It should be noted that "between 1970 and 1974, while the program was in operation, 33 Mexican Americans, 26 blacks, and 1 American Indian" (*Id.* at 54, 553 P.2d at 1165, 132 Cal. Rptr. at 693) and 12 Asians were admitted. *Id.* at 54 n.21, 553 P.2d at 1165 n.21, 132 Cal. Rptr. at 693 n.21. "Six Mexican Americans, 1 black and 41 Asians were admitted between 1970 and 1974, without the aid of the program." *Id.*

admitted students,[15] and under less rigorous standards,[16] and (5) because the final result was state action using racial classifications to admit racial minority applicants to the study of medicine who were less qualifed[17] than Bakke.[18]

The university cross-complained, requesting declaratory relief and alleging, *inter alia,* that all applicants admitted to medical school, disadvantaged minority and nonminority students alike, were fully qualified for the study of medicine[19] and asking that the court rule that the university's special admissions program was not an unconstitutional means of achieving its compelling ends; namely, to integrate the medical profession, to eliminate racial stereotypes, to improve the delivery of medical services to self-perpetuating racial underclasses, and "to promote diversity in the student body and the medical profession, and to expand medical education opportunities to persons from [self-perpetuating racial underclasses having] economically or educationally disadvantaged backgrounds."[20]

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15. The selection of students for admission is conducted by two separate committees. The regular admission committee consists of a volunteer group of 14 or 15 faculty members and an equal number of students, all selected by the dean of the medical school. [In 1973 there were more faculty members than students on this committee, but their numbers were equal in 1974.] The special admission committee, which evaluates the applications of disadvantaged applicants only, consists of students who are all members of minority groups, and faculty of the medical school who are predominantly but not entirely minorities. Applications from those not classified as disadvantaged (including applications from minorities who do not qualify as disadvantaged) are screened through the regular admission process. The evaluation of the two groups is made independently, so that applicants considered by the special committee are rated only against one another and not against those considered in the regular admission process. All students admitted under the special program since its inception in 1969 have been members of minority groups.

Id. at 41, 553 P.2d at 1157, 132 Cal. Rptr. at 685.

16. *See* notes 7, 9 & 13, *supra.*

17. *See* note 11 *supra.*

18. Bakke did not challenge the preference accorded to applicants from northern California who planned to practice there; apparently no geographical preferences were granted in either 1973 and 1974. 18 Cal. 3d at 42 n.7, 553 P.2d at 1158 n.7, 132 Cal. Rptr. at 686 n.7. Nor did he complain about the preference that may be given to "an applicant whose combined rating was 'quite high' but not sufficient for admission but who is married to an applicant previously accepted." *Id.* at 42, 553 P.2d at 1158, 132 Cal. Rptr. at 686.

19. The truth of this allegation, although admitted, was deemed insignificant by the *Bakke* court: "The fact that all the minority students admitted under the special program may have been qualified to study medicine does not significantly affect our analysis of the issues." *Id.* at 48, 553 P.2d at 1162, 132 Cal. Rptr. at 690.

20. *Id.* at 39, 553 P.2d at 1155, 132 Cal. Rptr. at 683.

Bakke's Standing

The trial court ruled against the university and in favor of Bakke, but it denied the injunction that would have ordered Bakke's admission because "he would not have been selected even if there had been no special program for minorities."[21] Given that finding, it is difficult to identify Bakke's standing interest and the harmful invasion of that interest by the medical school's special admissions program that justifies Bakke's right to invoke judicial power to challenge the program in the first instance, and similarly, to understand why both the trial and supreme court did not dismiss Bakke's complaint on that ground.

Bakke's application was considered by the medical school under is regular admissions procedures wherein "[t]wo out of three applicants offered admission . . . ultimately enroll at the University."[22] Because only two-thirds of the offers under the regular admissions process are accepted, other applicants "whose ratings will bring special skills or balance to the entering class" or those "whose ratings approximate those admitted may be placed on an alternate list," but Bakke's application "was not placed on the alternate list in either year."[23] In short, Bakke failed to establish a prima facie case of discrimination against *himself.* Perhaps he could have done so by showing that, but for the sixteen places alloted to the special admissions program, his application at least would have been placed on the alternate list, as was the application of Marco DeFunis in the celebrated *DeFunis* case.[24] But Bakke did not, and the burden of showing his standing was solely his. It appears that Bakke's only standing interest lies in the fact that he applied to medical school and was denied admission. It was not shown that Bakke's failure to gain admission could be attributed to the medical school's racially preferential admissions program.

Bakke's failure to make the necessary showing may prove fatal to review in the United States Supreme Court,[25] even

21. *Id.* at 39, 553 P.2d at 1156, 132 Cal. Rptr. at 684.

22. *Id.* at 42, 553 P.2d at 1158, 132 Cal. Rptr. at 686.

23. *Id.* at 42-43, 553 P.2d at 1158, 132 Cal. Rptr. at 686.

24. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated and remanded per curiam as moot,* 416 U.S. 312 (1974); *see* Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions: "DeFunis v. Odegaard,"* 49 WASH. L. REV. 1 (1973); Morris, *Equal Educational Opportunity, Constitutional Uniformity and the "DeFunis" Remand,* 50 WASH. L. REV. 565 (1974).

25. Simon v. Eastern Ky. Welfare Rights Organization, 44 U.S.L.W. 4724 (1976);

though the "University concedes, as it did before the California Supreme Court, that . . . it cannot prove that Bakke would not have been admitted in the absence of the special admissions program at the Davis Medical School,"[26] and even though the California Supreme Court, when it denied a rehearing, amended its original decision and ordered Bakke to be admitted immediately. In such circumstances, California, of course, may have standing requirements different from those required for the exercise of federal judicial power. Nevertheless, federal standing requirements must be present before Supreme Court review will ensue. If it finds that there is no federal standing and if it does not decide the merits of the case, the United States Supreme Court should vacate the decision of the California Supreme Court and remand the case, as it did in *DeFunis*.[27] In this way *Bakke* would not be a precedent even in the state court.[28] Future litigation of this important constitutional issue would, then, not be prejudiced, and, more importantly, constitutional uniformity would prevail because this treatment of *Bakke* would insure that the Constitution would "have precisely the same construction [and] obligation of efficacy, in any two states."[29] If the United States Supreme Court refuses to decide the merits for some reason such as a lack of standing, but does not vacate the California decision, then the amomalous result will be that of constitutional diversity in circumstances of close, but not exact, similarity—the equal protection clause having been interpreted to allow the use of racial preferences for minority group members in law school admissions in Washington,[30] but having been interpreted to

Warth v. Seldin, 422 U.S. 490 (1975); United States v. Richardson, 418 U.S. 166 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972).

26. Application of Regents of the University of California for Stay Pending Review on Certiorari in the Supreme Court of the United States, at 3 (Nov. 3, 1976).

27. DeFunis v. Odegaard, 416 U.S. 312 (1974).

28. Remarks by Paul Freund in SUPREME COURT AND SUPREME LAW 35 (E. Cahn ed. 1954) arguing against the contrary result as exemplified by Doremus v. Board of Educ., 342 U.S. 429 (1952); *see* Morris, *Equal Educational Opportunity, Constitutional Uniformity and the "DeFunis" Remand*, 50 WASH. L. REV. 565, 588-91 (1974).

29. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816).

30. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated and remanded per curiam as moot*, 416 U.S. 312 (1974). Technically considered, *DeFunis* cannot be precedential in the federal court system because it is a state case and because the United States Supreme Court vacated its judgment. Its value as precedent in Washington is less clear because a stalemate occurred on remand to the Washington Supreme Court. Four justices ignored the vacation of judgment by the United States Supreme Court and again voted on the merits to reinstate their prior decision and judgment. Three justices, originally in the majority, refused to reach the substantive

prohibit the use of racial preferences for disadvantaged minority group members in medical school admissions in California.[31]

The Holding in Bakke

Proceeding to decide on the merits, the California Supreme Court ruled the university's special admissions program unconstitutional under the equal protection clause. In evaluating the constitutionality of the racial classification present in the medical school's admissions program, the *Bakke* court relied on the strict scrutiny standard of review. The court assumed that certain "objectives which the University seeks to achieve by the special admission program meet the existing standards required to uphold the validity of a racial classification insofar as they establish a compelling governmental interest."[32] However, the court held that the granting of a racial preference to certain disadvantaged minorities was an impermissible means for obtaining that end because the court was "not convinced that the University has met its burden of demonstrating that the basic goals of the program cannot be substantially achieved by means less detrimental to the rights of the majority."[33] The court's decision turned on the means-related less restrictive alternative test. Because the university failed to carry its heavy burden of showing that a nonracial alternative was not available and because it believed reasonable, nonracial alternatives were avilable to the university, the court ruled that "no applicant may be rejected because of race, in favor of another who is less qualified, as measured by standards applied without regard to race."[34]

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merits again voted that the "DeFunis litigation in its entirety should simply be rendered null and void . . . because the vacation [of the judgment on the federal question by the United States Supreme Court] simply nullified our State Supreme Court judgment and everything incorporated in it—including the Trial court judgment." 84 Wash. 2d at 633-34, 529 P.2d at 447-48. The remaining two justices ignored the vacation and again voted on the merits to reinstitute their original dissent as a dissent from the plurality opinion of the four justices reinstating the prior *DeFunis* judgment. Since five of the nine justices must vote in concurrence on a disposition, then, strictly considered, there is no law of the case, only a stalemate. *See* Morris, *Equal Educational Opportunity, Constitutional Uniformity and the "DeFunis" Remand*, 50 WASH. L. REV. 565, 591-94 (1975).

31. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

32. *Id.* at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693.

33. *Id.*

34. *Id.* at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694 (footnote omitted).

Continuing, the California Supreme Court expressly approved all the remaining elements of the medical school's special admissions program. It held that "the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner"[35] and that the

> University is entitled to consider, as it does with respect to applicants in the special program, that low grades and test scores may not accurately reflect the abilities of some disadvantaged students; and it may reasonably conclude that although their academic scores are lower, their potential for success in the school and the profession is equal to or greater than that of an applicant with higher grades who has not been similarly handicapped.[36]

The court, therefore, substantially adopted the affirmative action position advanced by Mr. Justice Douglas in *DeFunis*[37] and explicitly endorsed the use of "flexible admission standards"[38] which, it said, can be coupled with "aggressive programs to identify, recruit, and provide remedial schooling for disadvantaged students of all races who are interested in pursuing a medical career and have an evident talent for doing so."[39]

Justice Tobriner adamantly opposed the approach taken by the majority. Dissenting from the court's holdings, including those endorsing a very wide range of admissions standards, Justice Tobriner accused the majority of retreating "into obfuscating terminology," of encouraging "the initial vice of disingenuousness," and, in effect, of commanding the medical school to engage in the "manipulation of labels, so that the perfectly proper purpose of the [racial preference admissions] program must be concealed by subterfuge."[40]

THE DOMINANT PURPOSE OF THE FOURTEENTH AMENDMENT

When applying the fourteenth amendment, the *Bakke* court failed to take proper account of the dominant purpose of the amendment, which was to assist blacks and other racial

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35. *Id.*

36. *Id.* at 54-55, 553 P.2d at 1166, 132 Cal. Rptr. at 694 (footnote omitted).

37. DeFunis v. Odegaard, 416 U.S. 312, 336-37 (1974) (dissenting opinion). *See* 18 Cal. 3d at 54 & n.23, 553 P.2d at 1166 & n.23, 132 Cal. Rptr. at 694 & n.23.

38. 18 Cal. 3d at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

39. *Id.*

40. *Id.* at 89-90, 553 P.2d at 1190, 132 Cal. Rptr. at 718.

underclasses to achieve freedom through equality. By immediately and narrowly focusing on the negative aspect of the fourteenth amendment, its anti-discrimination principle, the *Bakke* court neglected to consider its affirmative purpose of achieving racial underclass equality. In cases such as *Bakke*, the affirmative aspect of the fourteenth amendment is directly implicated, and it must be construed in light of the social ends which the framers sought to achieve.

The Framers Did Not Specifically Intend to Prohibit Reverse Discrimination

"So bizarre would discrimination against whites in admission to institutions of higher learning have seemed to the framers of the Fourteenth Amendment that we can be confident that they did not consciously seek to erect a constitutional barrier against such discrimination."[41] That statement by Professor Posner undoubtedly is true, and its generates several propositions governing the proper application of the fourteenth amendment's equal protection clause to *Bakke*. It can be safely stated that the equal protection clause was not specifically intended by its framers: (1) to rule out the use of racial preferences in higher education admissions that award advantages to American Indians or to blacks, or to members of any "self-perpetuating [racial or other] group at the bottom level of our society who have lost the ability and the hope of moving up;"[42] or (2) to prohibit government from ever using a racial classification;[43] or (3) to require that when using a racial classification, the state act only in ways that have racially neutral consequences.[44] The use of a racial criterion may be appropri-

41. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 S. CT. REV. 1, 21-22; *see* Ely, *Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723 (1974); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); *"DeFunis": The Road Not Taken*, 60 VA. L. REV. 917 (1974); *DeFunis "Symposium,"* 75 COLUM. L. REV. 483 (1975).

42. Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 374 (1966).

43. Most uses of racial classifications are considered in Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553 (1969).

44. *Compare* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955), *with* the Supreme Court's declaration in Brown v. Board of Educ., 347 U.S. 483, 490 (1954), that in "the first cases in this Court construing the Fourteenth Amendment [The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)], decided shortly after its adoption, the Court interpreted it as proscribing all state-

ate, for example, where the only way to prevent further violence in a prison might be that of separating prisoners along white and black lines, even though the consequence may be that of stigmatizing the black prisoners significantly more than the whites.[45]

The intent of the framers and the principle of racial neutrality has been examined recently by Professor Sandalow. Relying on current historical research, he states that "the idea that black and white are equal, that race is not a meaningful category, did not gain ascendancy until well into the present century."[46] Regarding the idea that the equal protection clause should be read to prohibit the government from distributing benefits and costs on racial or ethnic grounds, he concludes that the history of the fourteenth amendment "does not require rejection of the principle . . . the point is, rather, that it does not require adoption of that principle."[47] There is no sufficient reason for doubting the correctness of this view.

The Affirmative Aspect of the Fourteenth Amendment

Although the racial preference question presented in *Bakke* may not have been considered by the framers of the fourteenth amendment, their dominant purpose in enacting that amendment materially affects the correct resolution of the issue presented in *Bakke*. There is general agreement that the framers of the fourteenth amendment had one dominant and overriding purpose: to obtain an effective equality for blacks and for certain other minority racial groups, identical to the equality enjoyed among whites. An *effective* equality of rights was considered a necessary part of being free men.[48] It can

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imposed discriminations against the Negro race." *See generally* G. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND 325-32 (1971).

45. *See* Lee v. Washington, 390 U.S. 333, 334 (1968) (concurring opinion) (per curiam). The concurring opinion of Justices Black, Harlan and Stewart specifically emphasizes "that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Id.*

46. Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 664 (1975).

47. *Id.* at 665.

48. After exhaustive inquiry Professor Charles Fairman concludes that the "Fourteenth Amendment, in Bradley's apt interpretation [in his *Slaughter-House* dissent], expressed a national aspiration that 'every citizen of the United States might stand erect in every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman'" and that "[a]fter a century, the nation is stirred anew by a yearning to attain that goal." C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE

appropriately be stated that the fundamental purpose of the fourteenth amendment was to achieve equality in the service of freedom, and to the uplift of subservient and self-perpetuating racial underclasses so they could enjoy the blessings of freedom. In a significant sense then, the dominant purpose of the fourteenth amendment can be considered as a type of affirmative action by the nation.[49] The framers of the amendment sought to provide the members of racial underclasses with constitutional equality of opportunity including educational opportunity, so that by their own actions, they might end their class's subservience.

Absent attempts to aid a discrete, self-perpetuating underclass the soundest working rule of the fourteenth amendment is that, without a compelling justification, race and ethnicity criteria are not constitutionally relevant and, except for appropriate judicially prescribed remedies, and for certain statistical purposes, government is precluded from using these criteria. To this extent the Constitution is color blind. The principle of racial neutrality[50] properly prevails as the usual standard for constitutional adjudication, and assuming that American society does not contain any permanent or semi-permanent, self-perpetuating underclass, it strives to maintain equal access[51] to

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UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, Part I, at 1388 (1971). *See* K. STAMPP, THE ERA OF RECONSTRUCTION, 1865-77 (1965); J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

49. The affirmative action aspect of the fourteenth amendment was recognized by the Supreme Court in the first case in which it construed that amendment. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Declaring that the affirmative action aspect of the amendment requires it to be seen in the social context of its times, the Slaughter-House Court stated:

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freedman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

Id. at 71. *See also* Strauder v. West Virginia, 100 U.S. 303 (1879).

50. For a discussion of this principle, see Brest, *The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Cohen, *The DeFunis Case: Race and the Constitution*, 220 THE NATION 135 (1975).

51. Congress has incorporated this principle into certain aspects of recent legislation. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.* (1970); Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1970); Fair Housing Act of 1968, 42 U.S.C. §§ 3601-31 (1970).

society's opportunities. So long as that assumption is valid and no racial or ethnic underclass exists, a person's race or ethnicity is not constitutionally relevant.

However, the identification of a racial or ethnic group as a self-perpetuating underclass changes this state of affairs. In such circumstances, a person's race or ethnic classification becomes a socially significant "characteristic and can assume constitutional dimensions. In these circumstances, the question whether American Indians or blacks, or certain other racial or ethnic underclass members, are substantially represented in medical or law school classes, and in the professions and other societal positions generally, assumes considerable social and constitutional importance."[52]

The reasons why it may be constitutionally correct in certain circumstances to award a racial preference to qualified members of a self-perpetuating underclass are: (1) some groups do not, in fact, enjoy substantially equal rights, resulting in their becoming or remaining self-perpetuating underclasses; (2) the existence of a self-perpetuating underclass is inconsistent with the basic constitutional requirements of American representative democracy; and (3) qualified members of an underclass are constitutionally entitled to the effective equality of opportunity enjoyed by other Americans of comparable abilities.

Because race and ethnicity assume significance in these circumstances, it is spurious to argue, as have some commenta-

52. In these circumstances, the question whether blacks and other racial and ethnic minorities are substantially represented . . . assumes considerable importance. Gross underrepresentation of these groups has consequences quite different from those that would result from, say, the gross underrepresentation of men with one blue and one green eye or of left-handed women. Individuals who share these latter characteristics do not identify with one another. Their associations are not significantly determined by their common trait. They do not share a distinctive cultural background which may make it easier for them to communicate with one another than with others. Governmental decisions do not affect them differently than they affect other persons, and, conversely, their views on issues of public policy are likely to be distributed in the same way as in the general population. In all these respects, individuals defined by these characteristics differ from the members of racial and ethnic minorities. And it is precisely because of these differences that gross underrepresentation of the latter . . . poses a significant social problem.

Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 684 (1975); *see* B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973); Bayles, *Reparations to Wronged Groups*, 33 ANALYSIS 182, 183 (1973); Taylor, *Reverse Discrimination and Compensatory Justice*, 33 ANALYSIS 177, 179 (1973).

tors, that ameliorating affirmative action programs that award racial preferences to qualified members of self-perpetuating underclasses necessarily are unprincipled. Their argument is that if, in an attempt to eradicate self-perpetuating underclasses, either an ethnic or racial admissions preference is awarded to fully qualified American Indians, blacks, or others, because they are members of self-perpetuating racial underclasses, then there can be no stopping point; there can be no adequate justification for not similarly creating racial preferences for all other minority groups, such as, say, Lithuanians or Australians, because there is not a proportionately equal number of Australians, or Lithuanians found in all of America's professional and other coveted social positions. Ultimately, the argument goes, the practice of awarding an ethnic or racial preference is self-defeating because America is a society made up of members of minority groups and no justifiable principle exists that precludes everyone a preference if any is awarded.

There are two short answers to this: first, proportional equality is *per se* neither constitutionally allowed nor morally good.[53] Second, although Lithuanians and Australians and almost all other racial groups constitute a minority, as do millionaires, they can not properly be identified as a permanent or semi-permanent, self-perpetuating ethnic or racial underclass in American society. It is the criterion of a self-perpetuating underclass that constitutionally justifies and simultaneously identifies and limits the use of a racial or ethnic, or other type of, preference under the "dominant purpose" construction of the fourteenth amendment. Sadly, but truly, most American Indians, blacks, Chicanos, and Asian Americans have been severly disadvantaged and find themselves occupying a status properly identified as that of a self-perpetuating racial underclass. Moreover, because of this criterion, affirmative action programs that are carefully designed to uplift and eradicate self-perpetuating underclasses become self-liquidating as they become successful. They help severely disadvantaged people to help themselves and are in the noblest American tradition.

In summary, it can be said that the fourteenth amendment's equal protection clause serves two special functions.

53. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

One of these functions is negative: it requires the government, particularly the judiciary, to protect all classes and persons, including racial minority groups, from hostile or detrimental state action against them which, because the action is purposive and detrimental, qualifies it as "invidious discrimination."[54] In this negative dimension, the fourteenth amendment can be seen as incorporating an anti-discrimination principle, protecting members of minority groups against purposive state action that aims to subordinate them and which, if systematically carried out, would ultimately create a subordinated underclass.

The second and positive dimension of the "dominant purpose" construction of the fourteenth amendment is that it empowers Congress to legislate affirmatively in order to ameliorate the status of persons who Congress properly concludes are members of self-perpetuating underclasses, and to protect any subordinated class from becoming a self-perpetuating underclass.[55] Clearly, Congress constitutionally is empowered to enact properly conceived affirmative action programs favoring underclass members. Because states, through their police powers, already possessed all powers needed to ameliorate the status of persons identified as members of self-perpetuating underclasses, there was no need for the framers of the fourteenth amendment further to empower states. The important problem the framers faced was not that the Southern states lacked power to uplift the condition of a recently freed underclass of slaves, but that the states refused to exercise their powers in that way. States were, and are, constitutionally empowered through their police powers to enact properly conceived affirmative action programs favoring underclass members. It follows that it would be highly improper, except in the most unusual and absolutely clear case, for any court to use the fourteenth

54. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Strauder v. West Virginia, 100 U.S. 303 (1879).

55. *See, e.g.*, Lau v. Nichols, 414 U.S. 563 (1974), where the United States Supreme Court held that the San Franciso school system's failure to provide English langauge instruction to Chinese students violated section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The Court in *Lau* expressly approved HEW's guideline requiring that federally funded school districts in the United States affirmatively act "'to rectify the language deficiency in order to open' the instruction to students who had 'linguistic deficiencies.' 35 Fed. Reg. 11595." 414 U.S. at 567. Moreover, it appears that Congress must show only that a rational basis supports its legislation, at least where Congress benefits one racial group without causing detriment to any other. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 651, 657-58 (1966).

amendment as a device to prevent a state from taking the affirmative action necessary to aid in the general social elevation of qualified members of self-perpetuating racial underclasses. In light of the seeds of discontent and potential social violence sown by the very existence of any self-perpetrating underclass, the state simply cannot be racially neutral. What is desperately needed from the state is amelioration of the maligant social condition by an affirmative action "plan that promises realistically to work, and promises to work *now*."[56]

The Challenge Presented by Bakke

Given the materially disadvantaged and permanent underclass status of most American Indians, blacks, Chicanos, and Asian Americans—the racial groups that actually received the medical school's preference in *Bakke*—the proper constitutional framework and approach to the equal protection issue in *Bakke* required an act of judicial statesmanship. This the California Supreme Court did not do. The court should have considered the question presented by *Bakke* in light of its generating social considerations and the dominant purpose of the fourteenth amendment. Moreover, it should have construed the equal protection clause so as to achieve that purpose by using the familiar technique of constitutional construction employed some fifty-seven years ago by the United States Supreme Court speaking through Mr. Justice Holmes:

> [W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.[57]

That the *Bakke* court did not accept this challenge and rise to the occasion is only too painfully obvious. The California Supreme Court did not recognize the human and social sweep of *Bakke*'s question, and did not explore all the sources of the

56. Green v. County School Bd., 391 U.S. 430, 439 (1968).
57. Missouri v. Holland, 252 U.S. 416, 433 (1920).

framers' intent for their general insights and specific revelations of the dominant values and purposes that the fourteenth amendment sought to achieve. Instead the court turned its sights to the specifics of equal protection doctrine recently generated by the United States Supreme Court in cases that presented materially different issues.

THE PROPER EQUAL PROTECTION TEST

Because of lack of success in the Supreme Court during its first seventy-five years the equal protection clause was not seriously relied upon by lawyers as a means for invalidating state laws; this provoked Justice Holmes to characterize the clause as "the usual last resort of consitutional arguments."[58] Two learned commentators later wrote that "nothing in the annals of our law better reflects the primacy of American concern with liberty over equality than the comparative careers of the due process and equal protection clauses of the Fourteenth Amendment."[59] Nevertheless, fortunes change, and during the last thirty years the equal protection clause has come into its own: it has recently been the subject of some of the most significant constitutional litigation,[60] and has generated the equal protection doctrine upon which the *Bakke* court focussed.[61]

When deciding whether a law violates the equal protection clause, the Supreme Court looks, in essence, to three things: (1) the character of the law's classification; (2) the valid individual interest affected by the law; and (3) the governmental interest advanced in support of the law's classification.[62] Over the years, the Court has evolved more than one test, or standard of review, for equal protection cases, depending upon its characterization of the interest affected, or the classification involved, or the classification's context. Thus, the first important question in *Bakke,* or in any equal protection case, is for a court to select the proper standard of review.

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58. Buck v. Bell, 274 U.S. 200, 208 (1927).

59. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

60. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954).

61. 18 Cal. 3d at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690. *See also* Dunn v. Blumstein, 405 U.S. 330 (1972); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

62. Dunn v. Blumstein, 405 U.S. 300, 335 (1972); Williams v. Rhodes, 393 U.S. 23, 30 (1968).

The Rational Basis Test

The traditional standard used by courts to review the constitutionality of legislation is the rational basis test. Its application requires only that the government show that there is a rational basis for the challenged classification. If the government can show that the classification under attack can reasonably be believed to further a legitimate state end, then the classification is upheld because it bears a rational relationship to some legitimate legislative objective.[63] The minimum judicial scrutiny of a law's classification under this traditional standard is exemplified by *McGowan v. Maryland:* "The constitutional safeguard is offered only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[64] The legislative body need not have conceived of the justifying set of facts; it is sufficient if a court can. Given the wide scope of legislative discretion afforded by the rational basis standard of judicial review, almost amounting to judicial abdication of review, it is not necessary to determine whether any feasible but less drastic alternatives to a state's classification exist.

The United States Supreme Court historically has invoked the rational basis test in equal protection cases when it has characterized legislation as presenting economic problems,[65] even though serious human issues[66] involving socio-economic inequalities are also involved.[67] The court has consistently found a rational basis for economic legislation. However, in several recent cases[68] not involving economic legislation, the Court has applied the rational basis test in a stricter fashion, with more "bite,"[69] and has found an absence of a reasonable

63. *See, e.g.,* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Goesart v. Cleary, 335 U.S. 464, 466 (1948). *Compare,* Frontiero v. Richardson, 411 U.S. 677, 682, 690 (1973), *with* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556, 564 (1947).

64. 366 U.S. 420, 425-26 (1961).

65. *See, e.g.,* cases cited in note 63 *supra.*

66. *E.g.,* Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

67. Geduldig v. Aiello, 417 U.S. 484, 495 (1974); Dandridge v. Williams, 397 U.S. 471, 485-86 (1970).

68. *E.g.,* Department of Agriculture v. Moreno, 413 U.S. 528 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

69. "Bite" comes from the proposed standard of review set forth in 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, 20 (1972).

relationship[70] between the legislation and the end it sought to achieve.

If, in *Bakke,* the California Supreme Court had applied this traditional standard (amounting to almost no judicial scrutiny) in either its traditional form or with "bite," there is no doubt that the medical school's preferential admission program would have been upheld. The classification utilized in that program clearly bears a reasonable, indeed, a substantially congruent relationship, to the legitimate state purposes of (1) helping to eradicate self-perpetuating underclasses; (2) making educational opportunity available to qualified members of the underclasses previously excluded; (3) integrating the medical school and the medical profession; (4) ameliorating stereotypes; and (5) providing successful role models for members of downtrodden underclasses, thereby raising youthful aspirations so that the underclass will not continue to be self-perpetuating.

The Strict Scrutiny Test

The Supreme Court began to develop a stricter standard of review during the forties.[71] This standard developed during the fifties and sixties[72] into what has become known as the strict scrutiny standard of equal protection review. The Court has indicated that strict scrutiny of a state's classification is appropriate, even though it bears a reasonable relationship to a legitimate state purpose, whenever the state's classification is based on "suspect" criteria[73] or burdens "fundamental" rights.[74] Since the Court has decided that there was no fundamental right to basic, public school education,[75] it is evident[76]

70. *See* cases cited in note 68 *supra.* In several recent cases the Court has used the due process "irrebuttable presumption" doctrine to rule unconstitutional classifications which would have been upheld if reviewed under the rational basis standard, and which would not invoke strict scrutiny review. *See, e.g.,* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973).

71. Skinner v. Oklahoma, 316 U.S. 535 (1942); *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

72. *See generally Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

73. *E.g.,* Korematsu v. United States, 323 U.S. 214 (1944). *See also* McLaughlin v. Florida, 379 U.S. 184 (1964); Rostow, *The Japanese American Cases—A Disaster,* 54 YALE L.J. 489 (1945).

74. *E.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to travel).

75. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

76. This conclusion is reinforced by court decisions affording universities and colleges wide ranges of discretion when admitting students. For discussion see Gellhorn

that the Court would even be less inclined to hold that a fundamental right exists to higher education in medicine.[77] Hence, if *Bakke* is properly to be subjected to strict scrutiny, it is because its preferential admissions program uses the suspect criterion of race. This conclusion applies not only to the special medical school admissions in *Bakke,* but generally, to all special admissions programs in higher education that are based on race.

Bakke differs from DeFunis. The Supreme Court has held that "classifications based *solely* on race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[78] The preferential admissions program of the University of Washington Law School litigated in *DeFunis* was based *exclusively and solely* upon race.[79] That fact, conjoined with the use of race as an exclusionary device, led the Washington Supreme Court to invoke the strict scrutiny standard of judicial review.[80] For the same reason Mr. Justice Douglas rejected the constitutional validity of awarding outright and blatant racial preferences,[81] while going to great lengths to approve the use of socio-economic, class and other nonracial criteria.[82]

Although the California Supreme Court failed to analyze the differences, *DeFunis* simply is not *Bakke.* The medical school's preferential admissions program in *Bakke* significantly differs from that in *DeFunis.* The *Bakke* program was not solely based on race as was that in *DeFunis. Bakke*'s program is based on two separate and distinct standards—socio-economic disadvantage and race. Because *DeFunis* rests solely and exclusively on exclusionary use of racial classification, it

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& Hornby, *Constitutional Limitations on Admissions Procedures and Standards—Beyond Affirmative Action,* 61 VA. L. REV. 975, 992-98 (1974).

77. Runyon v. McCrary, 96 S. Ct. 2586 (1976), may moot the constitutional question if its appliciation of 42 U.S.C. § 1981 (1970), prohibiting purposeful racial discrimination by a private school, is extended to the use of racial preferences in higher education admissions. I believe it would be error to do so since preferential admissions do not involve purposeful racial discrimination. *See* text accompanying notes 94-101 *infra.*

78. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (emphasis added).

79. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated and remanded per curiam as moot,* 416 U.S. 312 (1974).

80. *Id.* at 32, 507 P.2d at 1182.

81. DeFunis v. Odegaard, 416 U.S. 312, 340-44 (1974). *But cf.* Morton v. Mancari, 417 U.S. 535, 554 (1974) (upholding a hiring preference while euphemistically characterizing "American Indians" as a political and not as a racial classification).

82. DeFunis v. Odegaard, 416 U.S. at 331-32, 334-36, 340-41, 343.

may have been appropriate to apply the strict scrutiny test in that case. In order to receive a preference under the *DeFunis* program all that an academically qualified applicant needed to do was declare himself a member of one of the preferred minority groups. It did not matter, nor did the law school have information about, whether the preferred minority applicant was also disadvantaged or whether the applicant was also one of the favored few members of the law school's identified minority groups who had middle or upper class incomes and backgrounds affording all the privileges equal to similarly situated whites.[83]

That is, the University of Washington Law School awarded its admissions preference to some persons who were of the same race as a self-perpetuating racial underclass, but on racial grounds alone, with the result that some of the recipients of the law school's racial preference were not disadvantaged; thus, they fell outside of the scope of the "disadvantaged and self-perpetuating racial underclass" rationale used in *Bakke*. The point is that *Bakke* is simply not *DeFunis* all over again, and the California Supreme Court committed error by treating them and their constitutional questions as identical, both to be decided under the strict scrutiny test.

Bakke's preferential admissions program presents one criterion—the socio-economic criterion of disadvantage—that favors the application of the traditional rational basis standard of review.[84] However, the racial criterion argues in favor of the application of the strict standard of judicial review. *Bakke*'s program is not based solely on race, unlike that of *DeFunis*, and contrary to the view of the California Supreme Court, it does not automatically trigger either the strict scrutiny standard or the rational basis standard of review. This conclusion suggests that, perhaps, a third standard should be applied to *Bakke* and to similar affirmative action admissions programs in higher education.[85]

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83. It is not unreasonable for the law school to award preferences to the wealthy and well-educated who have "made it," so long as they are of the same race as America's self-perpetuating racial underclasses "if preferences are justifiable because they deal with problems resulting from the continuing social significance of race and ethnicity" because the "preference is granted for the same reason that preference is shown for exceptionally bright applicants—a judgment that the qualities of the individuals admitted are likely to make them more useful than those who are excluded." Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 691-92 (1975).

84. *See generally* Danridge v. Williams, 397 U.S. 471 (1970).

85. In *Bakke* the university argued that the rational basis test should apply and

"Invidious" discrimination. Racial discrimination by government is invidious in the constitutional sense whenever its purpose is to discriminate on racial grounds, usually in a stigmatizing way, against members of a racial group. However, statutes which are fair on their face do not constitute invidious racial discrimination merely because they have differing impacts on various racial groups.[86] Invidious racial discrimination[87] has been found where the government's purpose was to racially discriminate against *all* members of a certain racial group, by excluding all members from a benefit. For example,

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not the strict scrutiny standard because although the special admissions program excluded some white applicants, they are not stigmatized "in having cast about them an aura of inferiority." 18 Cal. 3d at 50, 553 P.2d at 1163, 132 Cal. Rptr. at 691. While that is true, it misses the important point that a racial classification can trigger strict scrutiny. Apparently the university also relied on John Ely's argument that "it is not 'suspect' in a constitutional sense for a majority, any majority, to discriminate against itself." Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974). But this argument is unconvincing and has been adequately answered. *See* Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 569-70 (1975); Lavinsky, *DeFunis v. Odegaard: The "Non-Decision" with a Message*, 75 COLUM. L. REV. 521, 527 (1975); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 693-703 (1975).

86. Washington v. Davis, 426 U.S. 299 (1976). The Court recently declared "that official action will not be held unconstitutional solely because it results in a racially discriminatory impact," that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," and that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v. Metro. Hous. Dev., 97 S. Ct. 555, 563 (1977).

87. The United States Supreme Court has yet to clarify its concept of "racially discriminatory intention or purpose." The constitutionality of affirmative action programs, like those found in *Bakke* and *DeFunis*, will turn on the Court's clarification of this concept. Assuming that a *group* can properly be said to have an intention or purpose, there are two ways in which "racially discriminatory purpose or intention" may be construed in the context of university admissions. First, the Court might hold that this concept involves a kind of "active" group desire to achieve racial discrimination. Under this construction a group responsible for university admissions, such as the Board of Regents or the law or medical faculty, would be found to have a "racially discriminatory purpose or intention" only if it desired to institute a racially conditioned preferential admissions system for no other reason than to discriminate racially. The effect of this "desire" construction would be to insulate preferential admissions systems from the finding that they were adopted with a "racially discriminatory intent or purpose." Second, the Court might reject "desire" as part of its concept of intentional racial discrimination, and substitute the requirement of an "expectation of a consequence." Discriminatory racial intent would exist when a group expected that its action would have racially discriminatory consequences. There is, then, the question whether the "expectation" must be by a mere probability or to a substantial certainty. If the "expectation" need only be one that is reasonable under the circumstances, cases like *DeFunis* and *Bakke* would result in a finding that there was a racially discriminatory purpose.

the Supreme Court has found invidious racial discrimination at the graduate school level when a state used a racial classification to exclude all blacks, whether of the same educational qualifications or not, from enjoying the same specific educational benefits enjoyed by white students.[88] As discussed below, affirmative action programs in higher education that use a racial classification differ radically from the prior cases in which invidious discrimination has been found. The common purpose of affirmative action programs is neither to segregate nor to deny higher educational benefits to *all* members of any racial group, thereby stigmatizing them. The purpose of such programs is to integrate and to provide higher educational benefits to qualified members of all racial groups, thereby helping to eradicate America's self-perpetuating racial underclasses.

The existence of a self-perpetuating racial underclass impales American society on the horns of an unpleasant dilemma. One horn is to do nothing and to ignore the plight of members of self-perpetuating racial underclasses. The glacial rate of ameliorating change in their social circumstances has led far too many American Indians, blacks, Chicanos and Asian American to believe that they and their children have been consigned by American society to permanent underclass status, without hope of ever "moving up," thereby fostering the perpetuation of the underclass status of these racial groups. The other horn of the dilemma is to do something, as exemplified by the defendant universities in *DeFunis* and *Bakke*. In order to ameliorate the conditions of members of downtrodden racial underclasses, government institutions can make an effective remedial but nonbenign use of racial classifications preferring qualified minority group members over nonminority group members with the sad result of excluding qualified persons like DeFunis and Bakke. This is a cruel dilemma.

The problem is one of choosing the lesser evil. It is unfortunate that any qualified applicant is excluded from education. But the exclusion of a few qualified whites does not exclude a racial group as a whole and is not as great an evil as that of continuing the permanent or semi-permanent existence of a self-perpetuating racial underclass to the peril of our society. The principle of choosing the lesser evil is one of long standing

88. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

in the law. American constitutional law and "the common law ha[ve] long recognized that in times of imminent peril—such as when fire threatened a whole community—the soverneign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved."[89] Moreover, the Court has "denied [recovery under the fifth amendment] to the owners of a factory which had been destroyed by American soldiers in the field in Cuba because it was thought that the structure housed the germs of a contagious disease."[90] The task of distributing burdens while seeking to achieve equal justice in an unequal world for members of self-perpetuating racial underclasses involves similar considerations and similar judicial choices. This approach applies equally to our universities and colleges, and clearly, this type of thinking is not alien to higher education. It is present, for example, whenever a public university terminates the employment of a group of professors either because of university reorganization or because of general faculty retrenchment due to a decided lack of general legislative funding.

Last term the United States Supreme Court took an important step toward resolving the dilemma presented by the conflicting interests of members of the majority and victims of past racial discrimination. In *Franks v. Bowman Transportation Company, Inc.*,[91] the Court held that under 703(g) of the Civil Rights Act of 1964, blacks who had been denied employment because of racially discriminatory hiring practices, were entitled to employment with the seniority status which they presumptively would have attained if their applications had been accepted. The Court held that the conferral of seniority status on these victims of racial discrimination was an appropriate remedy even though it had the effect of lowering the seniority ranking of those who had been hired after the plaintiff blacks had been refused employment. The Court stated that it was "untenable" that this remedy should be withheld merely because it would adversely affect the interests of other employees.[92] The other employees, like Bakke and DeFunis, could not be blamed for the existence of self-perpetuating racial under-

89. United States v. Caltex (Philippines), Inc., 344 U.S. 149, 154 (1952).

90. *Id., citing* Juraga Iron Co. v. United States, 212 U.S. 297 (1909).

91. 96 S. Ct. 1251 (1976). Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 412 (1976).

92. 96 S. Ct. at 1269.

classes. Nevertheless, they were required to bear part of the burden incurred in eliminating the effects of past discrimination.

The greater evil is to do nothing and to await coming of the social ruptures caused by riots and race war when the downtrodden racial underclasses finally lash out in anger and misery.[93] The use of racial preferences to eradicate self-perpetuating racial underclasses is ameliorating and self-liquidating as well as restorative of substantial social equilibrium to the body politic. It is to be preferred, to the altenative of doing nothing.

Realistically considered, affirmative action[94] programs in higher education admissions can be divided into two polar groups. In one of them, a university might use a racial classification in order to identify and to admit qualified minority group members whose admission would be in addition to all other applicants who normally would have been admitted. The result of this inclusionary use of a racial classification is that all of the students are within the educational system, and no one is excluded. The use of the racial classification has harmed no one and has furthered the goal of achieving equal educational opportunity. Its use, therefore, is "benign."[95] Because this use of the racial classification is inclusionary, nonharmful and "benign," the Court had indicated that the rational basis

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93. See the consequences predicted in REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Bantam ed. 1968).

94. Although much used, this term has no generally agreed upon decriptive content, causing much confesion and consternation. In a race or sex context, "affirmative action" can refer to any number of various types of programs designed to aid women and/or racial minorities, ranging from merely informing them of certain opportunities to awarding them a benefit such as a promotion or admission to higher education, solely because of their status as women and/or members of a racial minority. Thus, affirmative action programs can operate "inclusively" by merely admitting people previously excluded or "exclusively" by denying opportunities for admission to person who do not enjoy a favored status.

95. Kent Greenawalt identifies

> four kinds of racial classifications that are arguably "benign" use of race to integrate as when black pupils are bused to white schools; racial preferences, . . . denial of a benefit to some members of a minority race to encourage integration, as when some blacks are denied public housing so that a "tipping point" will not be reached causing whites to "flee"; segregation by minority wish, as when blacks request and are given a "black dormitory."

Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 570 n.74 (1975). I do not believe it can be shown that the use of a racial preference in the *DeFunis*-type situation is "benign" in the true meaning of that term, *i.e.*, "of mild character, manifesting kindness and gentleness—not harmful," especially viewed from DeFunis' point of view.

standard of judicial review would be the test most likely applied and that its constitutionality most likely would be upheld.[96] Thus, it is virtually certain that in these circumstances the Court would rule that a university can constitutionally employ an inclusionary racial classification within its admission criteria. However, as will be shown, it is not realistic to assume that this option is available.[97]

A second type of higher education affirmative action admissions program differs radically from the benign type, and is exemplified in two ways by *DeFunis*. This second, *DeFunis*-type program of special admissions is based *exclusively and solely* upon a racial classification, the use of which is necessarily exclusionary of a few members, but by no means of all the members of a racial group, and hence, this use of a racial classification definitely is not harmless and "benign."[98] Indeed, in this second and nonbenign type of admissions program, a racial classification is used to prefer and to admit certain favored minority group applicants to public, higher education in circumstances where the necessary consequence is that of excluding other, more academically qualified applicants who, simply put, are of the "wrong" race. That use, of course, can be characterized as "institutional"[99] (as measured by its consequences) but not "purposive" racial discrimination by the government. The *DeFunis*-type use of a racial classification is harmful to the excluded applicant, but not to the applicant's racial group as a whole; thus, although the intent of the program is remedial, the consequences of using the racial classification are not properly termed "mild" or "benign." Nevertheless, it is clear that the law school's intent in *DeFunis,* like the

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96. In this circumstance and in a public school context, so long as all the students are included within the educational system, the Court has approved this benign use of a racial classification, ruling that

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

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

97. *See* text accompanying notes 141-50 *infra*.

98. *See* note 94 *supra*.

99. For a discussion of institutional racialism see, R. O'NEIL, DISCRIMINATING AGAINST DISCRIMINATION 99-106 (1975); *Compare* Griggs v. Duke Power Co., 401 U.S. 424 (1971) *with* Washington v. Davis, 96 S. Ct. 2040, 2050 n.12 (1976).

medical school's in *Bakke,* was not purposefully to discriminate against anyone.

Although the use of a racial classification in the *DeFunis*-type situation cannot be considered "benign," it does not follow that the classification is "invidious." The *DeFunis*-type use lacks the ingredient of a racially discriminatory purpose which the United States Supreme Court has held to be constitutionally necessary for a finding of "invidious" discrimination. The Court recently ruled that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact" and "that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[100] The lack of "invidiousness" is even clearer in *Bakke* than in *Defunis* since *Bakke*'s special admissions program was based on the criteria of disadvantage as well as race. Yet, in neither *DeFunis* nor *Bakke* was any racial group or any particular person specifically identified and purposefully treated in a racially stigmatizing manner.[101]

The California Supreme Court, along with some commentators, failed to distinguish constitutional problems presented by an admissions program based on the criteria of disadvantage and race from those presented by an admissions program based solely on race in a *DeFunis*-type, nonbenign situation. The California Supreme Court also failed to distinguish between a racial classification which is used with a remedial intent and the segregative use of racial criteria with the forbidden racially discriminatory purpose which enables a court to find invidious discrimination.[102] The *Bakke* court used the strict scrutiny test to hold, in effect, that the university had engaged in invidious discrimination, but the court did not make the crucial finding that the university's special admissions pro-

100. Washington v. Davis, 96 S. Ct. 2040, 2047-48 (1976).

101. In Strauder v. West Virginia, 100 U.S. 303, 308 (1879), the Court held that the fourteenth amendment protected blacks from government discrimination "implying their inferiority in civil society" and practically branding them with a stamp of "inferiority." *See also* Peters v. Kiff, 407 U.S. 493, 499-500 (1972).

102. Moreover, the *Bakke* court erred in relying on a Title VII case when interpreting the Constitution. The United States Supreme Court has clearly held that the legal standards applicable to Title VII cases under the 1964 Civil Rights Act are different from, and cannot be applied to fourteenth amendment cases. Washington v. Davis, 96 S. Ct. 2040, 2047 (1976). Nevertheless, the *Bakke* court relied on McDonald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574 (1976), a Title VII case. 18 Cal. 3d at 51, 553 P.2d at 1164, 132 Cal. Rptr. at 692.

gram could be traced to a racially discriminatory purpose. It appears to have relied exclusively on the differential impact of the medical school's admissions program on members of the Caucasian race in order to find a violation of equal protection of the laws which, of course, is erroneous.[103] *Bakke* is an inappropriate case for the application of the strict scrutiny test of equal protection. That standard was advanced by the United States Supreme Court for application to cases where a state may actually have a segregative purpose in using a racial classification.[104] Such a segregative purpose will create an invidious use of racial classification unless it is necessary to achieve some legitimate state interest, the gravity of which is compelling.[105] The strict scrutiny test was not fashioned for cases like *Bakke* or *DeFunis* where, even though a few members of the majority are excluded, the state's purpose in using the racial classification is not segregative, but integrative and remedial.

Since *Bakke*'s special admissions program differs significantly from *DeFunis'* (although both are applied in nonbenign contexts), since in neither case can a racially discriminatory purpose ultimately be traced to the university, since in each case a remedial purpose can be traced to each university, and since the strict scrutiny test was created for cases where a racially discriminatory purpose can be traced to a state, it is most doubtful that the strict scrutiny test should be automatically invoked in *Bakke* simply because a racial classification is present in a state university's special admissions program.

The Substantial Interest Test

It would be improper to apply the rational basis test to *Bakke*'s special admissions program because it is not "benign" and because its use necessarily involves harm in that some more academically qualified applicants are denied admission,[106] even though that is not the purpose of racial classification. For the same reason, it would be equally improper automatically to invoke the strict scrutiny standard as did the California Supreme Court. Professor Kent Greenawalt has presented clear and convincing arguments, which will not be repeated here, for using a third standard of judicial review.[107] The

103. *See* authorities cited in note 86 *supra*.
104. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964).
105. Loving v. Virginia, 388 U.S. 1, 9-11 (1968).
106. *But see* Katzenbach v. Morgan, 384 U.S. 641, 651, 657-58 (1966).
107. Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School*

test is that of a substantial interest. It has recently been applied by the United States Supreme Court to classification based on sex.[108] As Professor Greenawalt argues, this test should be applied to higher education admissions programs like the type found in *Bakke* where the admissions preference is aimed at improving the lot of self-perpetuating racial underclasses and is not based solely on race.

This test has already been approved by New York's highest appellate court in the *Alevy*[109] case which involved a medical school admissions program almost identicial to that found in *Bakke:*

> We are of the view that in deciding an issue of whether reverse discrimination is present, the courts should make proper inquiry to determine whether the preferential treatment satisfies a substantial State interest. In determining whether a substantial State interest underlies a preferential treatment policy, courts should inquire whether the policy has a substantial basis in actuality, and is not merely conjectural. At a minimum, the State-sponsored scheme must further some legitimate, articulated governmental purpose. However, the interest need not be urgent, paramount or compelling. Thus, to satisfy the substantial interest requirement, it need be found that, on balance, the gain to be derived from the preferential policy outweighs its possible detrimental effects.
>
> If it be found that the substantial interest requirement is met, a further inquiry must be made as to whether the objectives being advanced by the policy could not be achieved by a less objectionable alternative; for example, by reducing the size of the preference, or by limiting the time span of the practice. Additionally, where preference policies are indulged, the indulgent must be prepared to defend them. Courts ought not be required to divine the diverse motives of legislators, administrators or, as here, educators.
>
> In sum, in proper circumstances, reverse discrimination is constitutional. However, to be so, it must be shown

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Admissions, 75 COLUM. L. REV. 559, 579-99 (1975); *see* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role,* 42 U. CHI. L. REV. 653 (1975).

108. "To withstand constitutional challenge . . . classification by gender must serve important governmental objectives and be substantially related to achievement of those objectives." Craig v. Boren, 97 S. Ct. 451 (1976).

109. Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

> that a substantial interest underlies the policy and practice and, further, that no nonracial, or objectionable racial, classification will serve the same purpose.[110]

Although *Alevy* was argued in *Bakke,* the California Supreme Court refused to adopt *Alevy*'s substantial state interest test, preferring the strict scrutiny standard of review, apparently on the mistaken belief that the issues presented in *DeFunis* and *Bakke* were identical[111] and on the mistaken assumption "arguendo, that with minor exceptions the University has demonstrated that the special admission program serves a compelling state interest, [therefore] conflict between the language of the New York court and this opinion is more apparent than real."[112] The court is simply in error on both counts, the first already having been discussed—*Bakke*'s special admissions program is not identical to that in *DeFunis.* Second, under the compelling interest standard of judicial review the court rigidly applies strict scrutiny to deterime whether any reasonable but less restrictive alternatives exist. Strict scrutiny review requires a court to search for alternatives in a much more rigid and intense way than the substantial interest test. The court is much more likely to find reasonable alternatives to existing legislation under the strict scrutiny test than under the substantial interest test. Under the latter test, the required interest need be only substantial. This carries with it a less intense judicial search for alternatives that may be substituted for the one actually chosen by the state.

BAKKE'S MISUSE OF THE "REASONABLE BUT LESS RESTRICTIVE ALTERNATIVES" TEST

The Supreme Court has indicated that the strict scrutiny standard of judicial review should be applied to state classifications that solely and decisively use suspect criteria in an exclusionary and stigmatizing way—*i.e.*, those based on race,[113] alienage[114] or national origin.[115] To pass the strict scrutiny test, a

110. *Id.* at 336, 348 N.E.2d at 545-46, 384 N.Y.S.2d at 90.

111. 18 Cal. 3d at 48 n.12, 51-52, 553 P.2d at 1162 n.12, 1163-64, 132 Cal. Rptr. at 690 n.12, 691-92.

112. *Id.* at 60 n.30, 553 P.2d at 1170 n.30, 132 Cal. Rptr. at 698 n.30.

113. Loving v. Virginia, 338 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

114. Graham v. Richardson, 403 U.S. 365, 372 (1971).

115. Oyama v. California, 332 U.S. 633, 644-46 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

state must carry the burden of showing: (1) that a state's racial classification is "necessary to the accomplishment of some permissible state objective"[116] and (2) that the state has a compelling and and overriding interest in its use of the racial classification.[117] In other words, the classification must be necessary to reach the state's ends, and those ends must be justified by compelling state interests. Thus, a court may strictly scrutinize the importance of a state achieving its desired end in light of the undesirability of its classification, or whether the state's end might equally be achieved by some feasible but less restrictive alternative—that is, whether the means used by the state are necessary to achieve its end.

The *Bakke* court did not decide whether any of the state interests as argued by the university were compelling as did the Washington Supreme Court in *DeFunis*.[118] Nevertheless, the California Supreme Court pronounced on the state's ends by *assuming*, arguendo, that several of the university's objectives served by its "special admission program meet the exacting standards required to uphold the validity of a racial classification insofar as they establish compelling governmental interests."[119] The ends proposed by the university and accepted by the court as compelling were: (1) "to integrate the medical school and the profession;"[120] (2) to "influence the student and the remainder of the profession so that they will become aware of the medical needs of the minority community and be encouraged to assist in meeting those demands;"[121] (3) to "provide role models [of minority doctors] for younger persons in the minority community,"[122] and to "increase the number of doctors willing to serve the minority community."[123] Because the purpose of the special admissions program was to help eradicate self-perpetuation of racial underclasses, each of the above compelling interests, accepted by the *Bakke* court, necessarily is racially conditioned or strongly oriented to racial considerations. By accepting these compelling interests, the court acknowledged the racial dimensions of the state's problem. It is strange

116. Loving v. Virginia, 388 U.S. 1, 10-11 (1967).

117. McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

118. DeFunis v. Odegaard, 82 Wash. 2d 11, ___, 507 P.2d 1169, 1182-84 (1973).

119. 18 Cal. 3d at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693.

120. *Id.* at 52, 553 P.2d at 1164, 132 Cal. Rptr. at 692.

121. *Id.*

122. *Id.*

123. *Id.*

that the court rejected two of the ends advanced by the university, since the court stated that it "assumed," rather than decided, the compelling nature of the others. The rejected ends failing to show a compelling state interest were "that minorities would have more rapport with doctors of their own race and that black doctors would have a greater interest in treating diseases prevalent among blacks."[124]

Under the strict scrutiny standard, legislative precison in seeking to achieve compelling ends is essential. A state's classification—its means—must demonstrate a vastly closer fit with the state's purpose than under either the rational basis test or substantial interest test. The requirement of necessity in the strict scrutiny standard has been equated by the Court to the "reasonable but less restrictive alternative" doctrine.[125] It was this doctrine that was the basis of the California Supreme Court's decision in *Bakke*.[126]

The reasonable but less restrictive alternative doctrine[127] dates from 1821.[128] It is applied in various kinds of litigation besides that under the equal protection clause.[129] The doctrine can be formulated in various ways,[130] but the basic idea is clear:

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124. *Id.* at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693.

125. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972).

126. 18 Cal. 3d at 56, 553 P.2d at 1167, 132 Cal. Rptr. at 695.

127. *See* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1109-11, 1137-51 (1972); Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1049-51, 1082-93 (1968); Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969); Note, *Legislative Inquiry into Political Activity: First Amendment Immunity from Committee Interrogation*, 65 YALE L.J. 1159, 1173-75 (1956).

128. *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821).

129. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 348, 351 (1973). The less restrictive alternative test can also apply to substantive due process cases like Griswold v. Connecticut, 381 U.S. 479, 485 (1965); to conclusive presumption cases like Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 647 (1974); to procedural due process cases like Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315-18 (1950); to commerce clause cases like Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951); and to first amendment cases like Shelton v. Tucker, 364 U.S. 479, 488 (1960).

130. Some of the expressions which have been used are: "less drastic means" in Shelton v. Tucker, 364 U.S. 479, 488 (1960); "the reasonable alternative" in Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); "the less intrusive alternative" in Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968); "the least intrusive or most effective means" in Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d at 56, 553 P.2d at 1167, 132 Cal. Rptr. at 695; "precision of regulation" in NAACP v. Button, 371 U.S. 415, 438 (1963); or simply "necessity" in Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

it admits the constitutional legitimacy of the substantive end that a state is seeking to achieve, but questions whether that admittedly legitimate end can be achieved through the use of some alternate means that is less restrictive of a valid individual interest.

This test has been applied in two ways. The most common and proper application is to inquire whether there are other equally efficacious legislative means of accomplishing the state's end which encroach less on the individual interest than the law under scrutiny. Recently another application has been undertaken by the courts: it is asked how well the state's end is served by the passage of legislation of the type under analysis. A court may conclude that legislation does not sufficiently promote the end or that other existing laws adequately promote the state's interest, and hold the legislation under scrutiny is unconstitutional.

This second application of the reasonable but less restrictive alternative test is subject to improper use when a court judges whether a state's means sufficiently promotes its ends. When doing this, a court may be tempted to substitute its judgment of the importance, or compelling nature, of the state's end for that of the legislature, rather than limiting its judgment to whether the classification substantially or rigorously achieves legitimate state objectives. If the court succumbs to the temptation of makin an ends-related judgment and if the ends are judged crucially important, then a legislative measure having a low probability of achieving them will not be judged to be "too attenuated" and will be upheld. But if the state's ends are deemed not very important by a court, then a court will be less inclined to uphold legislation which encroaches on valid individual interests. This type of decision properly should be made under the strict scrutiny test when a court judges whether a state's ends are compelling. It should not enter into a judgment of whether the state has selected a reasonable alternative for achieving admittedly legitimate or compelling state ends. There is no reason why a court, purporting to analyze the means-ends relationship of legislation, cannot judge whether the means rigorously and strictly achieves the state's ends.

The "Legislative" Sense of the Test

To be a reasonable alternative in this first and traditional sense, the less drastic alternative must be successful in maxim-

izing *all* the contested, underlying values. Thus, it must satisfy two criteria: first, it must actually achieve the admittedly valid end sought by the state; second, it must achieve the state's ends while being less restrictive of other valid interests than the legislation under scrutiny. A court's judgment that a less restrictive alternative exists that is more reasonable than the one actually chosen by the legislature obviously requires close judicial examination of the efficacy of the proferred alternative. Whenever a court concludes that a less drastic means equally achieves the state's legitimate end without creating as great an encroachment on some other constitutinally protected interest, then the proferred alternative is termed more "reasonable" in the legislative use of the doctrine, and the actual means previously chosen by the state is declared unconstitutional.[131]

The legislative body's subsequent adoption of the court's more reasonable alternative avoids unnecessary encroachment upon constitutionally protected interests while simultaneously allowing the state to achieve its admittedly legitimate end. In this legislative use, the reasonableness determination functions to identify a less drastic alternative that enables a state to achieve its ends, but limits the state's actual choice of means by eliminating overbreadth in order to accomodate other interests. The final result sought by the doctrine is the salutary one of allowing a greater maximization of all the underlying, valid interests—individual and state. In short, proper application of the doctrine involves a court in a careful search for more reasonable legislative alternatives while allowing legislative bodies their substantive policy decisions about proper legislative ends.

The "Contextual" Sense of the Test

In this second and less traditional sense, the use of the less restrictive alternative test does not trigger a search for more reasonable legislative alternatives. But rather, it triggers a strict judicial scrutiny of the contextual efficaciousness of the means actually chosen by the state. The question usually stated by the court is: Given the fact that the state's means encroach on a constitutionally protected interest, are the means actually chosen by the state *necessary* to achieve its admittedly legitimate ends? If the court decides that the

131. An excellent example is Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

means-ends relationship under consideration is "too attenuated," or if other existing laws of the state, apart from the one in question, are judged likely to achieve the state's legitimate ends, then the law in question unreasonably encroaches upon the valid individual interest. The means is then declared unnecessary and unconstitutional, not because a more reasonable but less drastic alternative exists, but because the court differs with the legislature on the substantive efficaciousness of the means actually chosen. An improper application of this test permits the court to substantively value the end to be achieved as being less important than did the legislature.

Dunn v. Blumstein[132] provides one of the very few examples of the contextual sense of the reasonable alternative test. In *Dunn,* the United States Supreme Court agreed that Tennessee had compelling state interests in eliminating fraud and in maintaining the purity of its ballot box. To achieve these ends, Tennessee law contained the usual variety of provisions governing voter registration and criminal fraud. The law that was the subject of constitutional attack was a durational residency requirement. Tennesse argued that its durational residency requirement was a proper means for achieving the state's compelling ends because it assured that the voters would be bona fide residents and that voters would be minimally knowledgeable about the issues and personalities involved in elections. But Tennessee's durational residency requirement clashed with the fundamental rights of recent immigrants—the rights to vote and to travel. *Dunn*'s conflict of a compelling state interest with an individual's fundamental rights presented the ingredients necessary for the Court to invoke the reasonable but less restrictive alternative doctrine in its contextual sense.

The Court ruled Tennessee's durational residency requirement unnecessary and unconstitutional because (1) many Tennesseans of long residency voted but were less informed about the issues and candidates than recent migrants;[133] (2) "the record is totally devoid of any evidence that durational residence requirements are in fact necessary to identify bona fide resi-

132. 405 U.S. 330 (1972). Craig v. Boren, 97 S. Ct. 451 (1976) provides a good, recent example of the Court employing the substantial interest test. It was held that a gender classification could not be substituted for more germane bases of classification because the relationship between the gender classification and the classifications for which it was substituted was "too attenuated." In other words, there was a lack of substantial congruence between gender and the more germane bases of classification that the gender classification purported to represent.

133. 405 U.S. at 358.

dents;"[134] (3) most importantly, Tennessee's criminal fraud and voter registration laws also achieved the state's end of ballot-box purity;[135] and (4) the durational residency requirement encroached on other valid individual interests (the fundamental rights to travel and to vote).[136] The Court ruled that there was "simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement"[137] of Tennessee's durational residency requirement. For this reason the Court was unable to conclude "that durational residence requirements are necessary to further a compelling state interest."[138] The Court's discussion focussed on the attentuation between the state's means and its achievement of the state's admittedly legitimate ends.[139] In *Dunn* the Court did not engage in a search for more reasonable legislative alternatives in the same way as it would have under the legislative use of the less restrictive alternative test.

Bakke and the Reasonable Alternative Test

The *Bakke* court relied on *Dunn* for the case-deciding proposition that the university must demonstrate "by rigid scrutiny that there are no reasonable ways to achieve the state's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification."[140] This reliance was misplaced because *Dunn* used the reasonable but less restrictive alternative test in its contextual sense, while the California Supreme Court purported to use the test in its legislative sense.[141]

When, by design or confusion, the California Supreme Court considered the reasonable but less restrictive alternative test in its legislative sense, it offered three nonracial alternatives that it approved as realistically feasible legislative substi-

134. *Id.* at 346.

135. "At least six separate sections of the Tennessee Code define offenses to deal with voter fraud." *Id.* at 353.

136. *Id.* at 336-42.

137. *Id.* at 360.

138. *Id.*

139. *Id.* at 356-60. The Court, in other circumstances, has looked to see whether a means-ends relationship is "too attenuated." In these circumstances, there need not be a fundamental right or suspect class present. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976); James v. Strange, 407 U.S. 128 (1972). *See also*, McLaughlin v. Florida, 379 U.S. 184 (1964).

140. 18 Cal. 3d at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690.

141. *Id.* at 53-57, 553 P.2d at 1165-67, 132 Cal. Rptr. at 693-95.

tutes for the university's special admissions program: (1) "to increase the number of places available in the medical schools, either by allowing additional students to enroll in existing schools or by expanding the schools;"[142] (2) to institute "aggressive programs to identify, recruit, and provide remedial schooling for disadvantaged students of all races;"[143] and (3) to use "flexible admission standards."[144] Although offered as a set of feasible, legislative alternatives equally capable of solving the university's problem that necessarily carried racial dimensions, the *Bakke* court ruled that "none of the foregoing measures can be related to race."[145]

The question is whether the court's proferred alternatives are valid legislative substitutes for the university's special admissions program. When deciding this question, the United States Supreme Court has held that the means chosen by the state are valid and permissible, despite competing constitutional claims, if the state's means are "reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways."[146] In short, the state cannot be required to use means to achieve its ends that are unrealistic or lacking in effectiveness equal to those actually chosen by the state.

Justice Tobriner correctly pointed out that the lack of reality in the first of the majority's proferred legislative alternatives discredited its feasibility and that, therefore, it could not be considered to be equally effective as the state's chosen means, nor as a reasonable but less restrictive legislative alternative:

> The majority's alternative suggestion that the integration of medical schools can be accomplished by increasing the size and number of medical schools is similarly unrealistic. The cost of medical educational facilities is enormous; absolutely nothing suggests that the necessary financial commitment for increased facilities will be forthcoming in the foreseeable future. It is a cruel hoax to deny minorities participation in the medical profession on the basis of such clearly fanciful speculation.[147]

142. *Id.* at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.
143. *Id.*
144. *Id.*
145. *Id.*
146. American Party of Tex. v. White, 415 U.S. 767, 781 (1974).
147. 18 Cal. 3d at 90, 553 P.2d at 1190, 132 Cal. Rptr. at 718.

The same criticism of a lack of reality is equally valid for the majority's alternative of increasing the number of medical students without increasing the size or number of medical schools. America's medical schools are currently filled to their capacities. Many excellently qualified applicants are denied admission each year, not because medical faculties are perverse or prefer to operate medical schools at less than their full capacities, but rather, because our medical schools are currently operating at their full student capacities. They simply cannot admit more students and still deliver the same educational quality.

The criticism of a lack of realistic effectiveness equally applies to a literal applicaton of the court's two remaining alternatives—flexible admissions standards and an aggressive program to identify, recruit and provide remedial schooling for disadvantaged students of all races. Neither is individually tailored specifically to achieve the state's end of attracting disadvantaged minority group applicants from self-perpetuating racial underclasses. If literally and honestly applied, these alternatives would most probably produce many times more disadvantaged white applicants than racial underclass applicants. While a much higher percentage of minority group members are economically disadvantaged and live below the poverty line, because there are vastly greater number of whites in this country, many more whites than minority group members fall below the poverty line. Thus, the great majority of those qualifying as "disadvantaged" under the *Bakke* court's alternatives would be white. The use of the court's alternatives most probably would produce many times more white medical students, a group already well represented, than the desired students from self-perpetuating racial underclasses. Thus, these two alternatives are not true legislative substitutes for the university's program because they neither recognize nor meet the racial dimension of the problem that the university was seeking to solve.

If disingenuosness and manipulation are ruled out, then no matter how flexible the medical school's admissions standards might become nor how aggressive its program to identify, recruit and provide remedial schooling for disadvantaged students of all races, the court's two remaining alternatives are unrealistic and not true legislative substitutes for the medical school's special admissions program. In addition, an important financial reason was set forth by Justice Tobriner in his dissent:

> Moreover, although the majority speculate that the broadening of the special admission program to disadvantaged applicants of all races will result in approximately the same amount of integration as the present program, that conclusion appears untenable on its face. Because all disadvantaged students need financial aid, the total number of such students a medical school can afford to admit is limited. As a consequence, inclusion of all disadvantaged students in the special admission program would inevitably decrease the number of minority students admitted under the program and thus curtail the achievement of all integration-related objectives.[148]

The California Supreme Court stated that it ruled as it did because it refused to engage in a "sacrifice of principle for the sake of dubious expediency."[149] But, as discussed above, it is difficult to locate a more principled use of legislative authority than the university's attempt to help eradicate a self-perpetuating racial underclass from American society. Moreover, if it had heeded its own exhortations about principle and adhered to the principle of consistency, the *Bakke* court would have admitted that its proferred legislative alternatives are not really alternatives at all because they address themselves solely to a problem quite different from that which was before the court. The court's alternatives go only to solving a university's admissions problem presented by academically qualified students who are disadvantaged, and the *Bakke* court meant economically, not racially, disadvantaged. It is most unrealistic to believe that the court's alternatives, designed to solve the problem of the economically disadvantaged, will in some unexplained and mysterious way stimultaneously solve the actual admissions problem presented to a university by academically qualified students who are both disadvantaged and members of a self-perpetuating racial underclass. Fundamentally, it was a racial problem problem of qualified but disadvantaged minorities found in self-perpetuating underclasses that the medical school sought to solve through its racially conditioned

148. *Id. See, e.g.*, Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 690-92 (1975). One federal court has already ruled it a violation of Title VI of the Civil Rights Acts of 1964 for a law school to administer its financial aid program in such a way as to accord an automatic preference to applicants from self-perpetuating racial underclasses. Flanagan v. President & Directors of Georgetown College, 45 U.S.L.W. 2067 (D.D.C. July 28, 1976).

149. 18 Cal. 3d at 62, 553 P.2d at 1171, 132 Cal. Rptr. at 699.

special admissions program, and not merely one presented by those applicants who are economically disadvantaged. By definition, the university's problem necessarily contains a racial dimension and likewise each and every effective alternative must address that dimension before it can be deemed an alternative capable of solving that problem. Thus, without manipulating them severely, the unrealistic and ineffective legislative substitutes offered by the *Bakke* majority cannot be accepted as reasonable but less restrictive legislative alternatives to the medical school's special admissions program.

In the course of rendering its decision, the *Bakke* court tacitly admitted that it ignored and was not even attempting to solve the same problem with its alternatives as the racially-conditioned one attacked by the medical school through its special admissions program. When delivering its summary appraisal of its proposed nonracial alternatives the court admitted that:

> Whether these [alternative] measures, taken together, will result in the enrollment of precisely the same number of minority students as under the current special admission program, no one can determine. It may be that in some years there would be fewer and in some years more minorities enrolled than under the present scheme.[150]

The court says nothing about eradicating self-perpetuating underclasses which, by definition, are racial in *Bakke*. The revealing point is that the court admitted that it does not know whether its proferred alternatives are really alternatives at all in the sense of actually achieving the state's admittedly compelling ends, but nevertheless, the court was sure that it substantively wanted to rule out racial preferences in medical school admissions. In doing so, the court brushed aside a careful application of the more traditional sense of the reasonable but less restrictive alternative test—as a search for legislative alternatives—while avowing that what it was applying was that test in its traditional legislative form. It also ignored the central purpose of the fourteenth amendment, as well as one of the more important strictures of the United States Supreme Court concerning the proper judicial application of the less restrictive alternative test—that "the Constitution does not require the state to choose ineffectual means to achieve its aims."[151]

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150. *Id.* at 55-56, 553 P.2d at 1167, 132 Cal. Rptr. at 695.

151. Storer v. Brown, 415 U.S. 724, 736 (1974).

Finally, by using the strict scrutiny standard of review and by assuming the state's ends to be compelling, the *Bakke* majority placed the burden of showing that no reasonable alternative existed to the medical school's use of a racial classification on the university and then held that the university failed to carry that burden, having not "established that the Special Admission program is the least intrusive or even the most effective means to achieve [its] goal."[152] In so ruling, the court deliberately ignored the record made in the trial court, as was pointed out by Justice Tobriner in dissent:

> Moreover, although the majority conclude that the medical school failed to demonstrate the unavailability of alternatives, the only evidence in the present record on this point is the admission committee chairman's statement that, "in the judgment of the faculty of the Davis Medical School, *the special admissions program is the only method* whereby the school can produce a diverse student body which will include qualified students from disadvantaged backgrounds. . . . [T]here would be few, if any black students and few Mexican-American, Indian or Orientals from disadvantaged backgrounds in the Davis Medical School or any other medical school, if the special admissions program and similar programs at other schools did not exist. . . ." (Italics added.) The majority simply reject this unimpeached statement out-of-hand, and, without any support from the record, suggest a number of alternatives which on their face are either disingenuous or impractical or both.[153]

Two conclusions stand above all others. First, when judging the adequacy of its quest for a "reasonable legislative alternative," the California Supreme Court is to be criticized because it proceeded by supposition, speculation, surmise and just plain guesswork, rather than by a carefully reasoned, probative and studied inquiry. Second, if one rules out disingenuous and candorless alternatives to the use of a racial preference, then the means suggested by the court must also be ruled out as alternatives.

The *Bakke* court also failed to correctly apply the reasonable alternative test in its second sense. The court's reliance on *Dunn* suggests that the court may have intended to apply the reasonable alternative test in the second sense. However,

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152. 18 Cal. 3d at 56, 553 P.2d at 1167, 132 Cal. Rptr. at 695.

153. *Id.* at 89, 553 P.2d at 1190, 132 Cal. Rptr. at 718.

Dunn is inapposite and the application by the *Bakke* court of the test used in *Dunn* is clearly erroneous.

It is significant that the *Bakke* majority expressly and solely relied on *Dunn* but that it nowhere identified *Bakke*'s use of racial classification as "too attenuated." The *Bakke* court had to ignore this decisive aspect of *Dunn* because the university had selected a means that was clearly directly related and congruent with the state's compelling ends. The critical concept in *Dunn* is that as state-chosen means move away from a congruent relationship with the state's end, a point is reached where it is proper for a court to hold the means "too attenuated" in a case where other state laws also achieve the state's ends. Obviously, this was not, and could not be, at issue in *Bakke.*

Neither can it be maintained that existing laws sufficiently promote the compelling ends so as to make the classification under scrutiny unnecessary. There is no alternative law existing in California that currently achieves the university's substantive end in *Bakke,* as the voter registration laws and and those prohibiting voter fraud alternatively achieved the state's end of ballot-box purity in *Dunn.*[154] This is obvious in light of the fact that the classification at issue in *Bakke* was designed to break down groups identified as self-perpetuating racial underclasses. Their very existence is testimony to the inadequacy of existing laws to accomplish the ends sought by the use of racially based preferential admissions standards.

It has been shown that the *Bakke* court did not use the reasonable but less restrictive test in either of its methods of application. The alternative means offered by the court will not achieve the same ends sought by the university. Furthermore, the court's reliance on *Dunn,* with the implicit suggestion that the court was using the test in its contextual sense, has been shown to be illusory. This indicates that the court's analysis was not restricted to scrutinizing the means which were adopted by the university. The conclusion is inescapable that the substantive end sought to be achieved by the university's special admissions program is simply ruled out by the *Bakke* court as one that the state is constitutionally prohibited from achieving.

The California Supreme Court's misuse of the reasonable

154. *See* note 134 *supra.*

but less restrictive alternative test conceals the fact that in its judgment the ends sought in *Bakke* are less than compelling. It is apparently the court's view that the interests of the few applicants who are denied admission because of the special admissions program at the university outweigh the state's interest in eliminating self-perpetuating racial underclasses. The *Bakke* court's conclusion is directly opposite to the holding of *DeFunis* but is cloaked in a misleading analysis of the requirement of necessity. This interpretation of *Bakke* is shared by Justice Tobriner, who states in dissent: "In the end the majority alternatively defend their holding on the ground that, while there are many laudable objectives served by the special admissions program 'there are more forceful *policy reasons* against preferential admissions based on race.' "[155]

Special Admissions Program After Bakke

The California Supreme Court repeatedly emphasized "that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission."[156] It expressly approved the use of "flexible admission standards"[157] and expressly ruled that "the University may properly as it in fact does, consider other factors [than grades and admission test scores] in evaluating an applicant, such as the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals."[158] In addition to the factors stated by the court, the university, in its regular and in its special admissions procedures, also considered an applicant's "extracurricular and community acitivities, a history of the applicants's work experience, and his personal comments."[159] For both the regular and the specially admitted students, the university then created

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155. 18 Cal. 3d at 90, 553 P.2d at 1190-91, 132 Cal. Rptr. at 718-19.

156. *Id.* at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

157. *Id.*

158. *Id.* at 54-55, 553 P.2d at 1166, 132 Cal. Rptr. at 694. The court's position is supported by a number of articles which point out that a cultural bias is implicit in traditional medical school admission criteria. *See, e.g.*, Marshall, *Minority Students for Medicine and the Hazards of High School*, 48 J. Med. Ed. 134 (1973); Nelson, *Expanding Educational Opportuunities in Medicine for Blacks and Other Minority Students*, 45 J. Med. Ed. 731 (1970); Whittico, *The Medical School Dilemma*, 61 A.M.A.J. 185 (1969).

159. 18 Cal. 3d at 40, 553 P.2d at 1156, 132 Cal. Rptr. at 684.

> a combined numerical rating . . . based upon an assessment of the applicant derived from information in his application, his letters of recommendation, the interview summary, test scores and grade point average, as well as a consideration of his motivation, character, imagination, and the type and locale of the practice he anticipates entering in the future.[160]

Except for the sole factor of the use of the racial classification, the California Supreme Court expressly ruled that "the standards for admission employed by the university are not constitutionally infirm"[161] and that the medical school "is entitled to consider . . . that low grades and test scores may not accurately reflect the abilities of some disadvantaged students" and "may reasonably conclude that . . . their potential for success in the school and the profession is equal to or greater than that of an applicant who has not been similarly handicapped."[162] Thus, it appears that the *Bakke* court would allow an affirmative action program of considerable scope for "disadvantaged" applicants, so long as it did not use a racial classification. It also appears that the court, without actually characterizing it as such, finally allowed for the creation of a valid, nonracial alternative which would permit the university to solve the real problem that it had originally attacked with its special admissions program. That judicially unacknowledged alternative is disingenuous and candorless, but can be effective.[163]

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160. *Id.* at 42, 553 P.2d at 1157, 132 Cal. Rptr. at 685. This appears proper because there appears to be a lack of correlation between academic performance, whether judged by undergraduate or medical school grade point, and later physican performances. *See* Price, *Measurement of Physician Performance*, 39 J. MED. ED. 203 (1964). *See generally* Haley & Lerner, *The Characteristics and Performance of Medical Students During Preclinical Training*, 47 J. MED. ED. 446 (1972); Rhoades, *Motivation, Medical School Admissions, and Student Performance*, 49 J. MED. ED. 1119 (1974); Turner, *Predictions of Clinical Performance*, 49 J. MED. ED. 338 (1974).

161. 18 Cal. 3d at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

162. *Id.* at 54, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

163. Writing a year before the *Bakke* decision, Professor Greenawalt presented the argument that racially preferential admissions program might be advantageously pursued if they were concealed behind broad racially neutral admissions criteria. This type of analysis might explain, at least in part, the *Bakke* majority's willingness to disallow the use of racially based criteria. Professor Greenawalt wrote:

> Thus far I have assumed that an open weighing of constitutional values is to be desired in this area, as in most others. That is at least debatable. Consider the following position: Preferences for blacks are badly needed to alleviate black alienation and to create genuine equality of opportunity. But upper middle class liberal whites who make the decisions about preference will suffer a crisis of conscience if they have to

In short, through the use of the loose and vague admissions criteria approved by the *Bakke* court, everything depends on what one specifically counts as a handicap and on the amount of points assigned to that handicap. This alternative can be manipulated into just about anything one wants. For example, if overcoming the handicap of having been raised in a core-city barrio or ghetto, or on a reservation, were deemed to reveal character, and/or motivation, and/or imagination and were also worth an additional 100 points, added to a medical applicant's combined numerical rating score, or if 100 points were added for an applicant's statement that he intended to practice medicine in a core-city barrio or ghetto, or on a reservation, and that statement were considered for its reliability of commitment against the background of an applicant's life experience, then clearly many disadvantaged Chicanos, blacks and American Indians could be produced under the court's approved admissions standards.[164] This disingenuous and candorless alternative obviously can be made into an expressly nonracial, legislative substitute for the university's special admissions program which will achieve the same ends as its racially-conditioned

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> admit they are favoring some racial groups at the expense of others and at the expense of criteria of individual merit. The poorer whites who have relatively few social opportunities will certainly resent such a policy very strongly. These effects can be partly avoided if an essentially racial preference is clothed in the polite language of "cultural disadvantage" and if the policy, whether explicitly racial or not, is based on the need for a "more sensitive assessment of qualifications" and a "diverse student body," politically the most noncontroversial justifications for preference. The broader harmful effects of announced and judicially approved racial preferences can be avoided if preference is accomplished under the cover of some apparently more open policy, or at least justified on the most noncontroversial grounds. There will be less encouragement to whites to think in racial terms; and blacks who enter law school may feel less that they are there because they happened to be black.

Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 601 (1975); *cf.* Morton v. Mancari, 417 U.S. 535 (1974) (upholding an employment preference for American Indians in the Bureau of Indian Affairs while characterizing American Indians as a "political," not a "racial," group).

164. The medical school need not worry that this would open the floodgates, producing a surfeit of disadvantaged students. Intangibles such as intensity of imagination, strength of motivation and reliability of character might be used as criteria and provide a basis for various rankings of disadvantaged applicants. Thus, while *Bakke* most likely precludes the medical school from using its quota of sixteen for disadvantaged applicants (18 Cal. 3d at 62-63, 553 P.2d at 171-72, 132 Cal. Rptr. at 699-70) by concealing its racially preferential admissions program behind vague racially neutral formuli, the medical school should be able to annually admit sixteen, or so, first-year medical students from self-perpetuating racial underclasses.

preferential admissions system for disadvantaged but qualified applicants.

It can be—everything depends upon what set of characteristics are counted as handicaps and the values assigned. But, even so, the transparency of the progress is patently obvious. By what objective criteria does one say what really should count as a nonracial handicap? Of course, no one truly knows how to weigh and quantify nonracial handicaps. For example, consider whether the following handicaps qualify as admissions standards and how much weight they should carry: having been raised in poverty in a barrio or city ghetto or reservation; having a home life where parents spoke broken or no Engish; not having sufficient money to go to a prestigious university and have to attend a local community college instead; having to work while attending a lower ranked college; having been raised by only one parent; having participated in intercollegiate athletics or student government rather than having studied those additional hours; having alcoholic but affluent upperclass parents; having been prohibited by wealthy parents from participating in intercollegiate sports, from working part time, from attending public schools or from having conversations with riff-raff. Obviously this alternative can collapse into a hopeless morass of arbitrariness; yet, apparently, it was approved in principle by the California Supreme Court.

The *Bakke* court clearly wanted to approve the admission of persons who are qualified but disadvantaged. But, it failed to give adequate guidance. The court has now shifted the locus of decision making to the university. It should feel free to adopt any careful and reasonable program worked out on educational grounds that is designed to admit disadvantaged applicants, so long as it does not use a racial classification, remembering, however, that when defining disadvantage one of the noblest elements of American tradition is the uplifting of downtrodden, self-perpetuating underclasses. In this light, it should be clearly understood that a careful study by the university of its own previously admitted applicants who are academically qualified but disadvantaged and come from the self-perpetuating racial underclasses that previously were favored in its special admissions program, should yield a set of nonracial criteria functionally equivalent to that expressed by its previous use of a racial classification, and be equally substitutable for it.

In using its new racially neutral admissions criteria, with

its disadvantaged aspects, the university will be using admissions standards that are racially neutral on their faces; thus, no suspect classification would be involved. Since most likely there is no fundamental constitutional right to higher education,[165] it would, therefore, be most difficult for a litigating plaintiff to induce a court to invoke either the strict scrutiny or the substantial interest standard of fourteenth amendment review. That leaves only the rational basis test as the standard of review, and no unversity burden of showing the absence of a reasonable alternative to its nonracial admissions program. Thus, in final and summary appraisal of *Bakke* with its implied approval of the unacknowledged, disingenuous, candorless but effective alternative, it can be said that "what the left hand giveth the right hand taketh away."

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165. *See* notes 72 & 73 and accompanying text *supra*.