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RACIAL PREFERENCE, REALITY AND THE CONSTITUTION: *BAKKE v. REGENTS OF THE UNIVERSITY OF CALIFORNIA*

Robert Allen Sedler*

George's son had done his work so thoroughly that he was considered too good a workman to live, and was in fact, taken and tragically shot at twelve o'clock that same day—another instance of the untoward fate which so often attends dogs and other philosophers who follow out a train of reasoning to its logical conclusion and attempt perfectly consistent conduct in a world made up so largely of compromise.¹

INTRODUCTION

The above passage from Hardy's *Far from the Madding Crowd*, is particularly appropriate to introduce a commentary on the recent decision of the California Supreme Court in *Bakke v. Regents of the University of California*.² *Bakke* "follow[ed] out a train of reasoning to its logical conclusion" without regard to the realities of American life. The California Supreme Court emphasized "consistency of principle" at the expense of one of the relatively few societal efforts to help bring about full equality for blacks and other racial-ethnic minorities³ who have been subject to extreme discrimination and victimization solely because of the color of their skin. In this article, I have attempted to explore and develop thoughts on the meaning of racial equality that go to the essence of the constitutional question presented in *Bakke*. I do not claim to have made a comprehensive study of all the dimensions of racially preferential admissions to law schools and medical schools;⁴

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1. T. HARDY, *FAR FROM THE MADDING CROWD* 42 (1902).

2. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 45 U.S.L.W. 3555 (U.S. Feb. 22, 1977) (No. 76-811).

3. I also consider Puerto Ricans, Chicanos and Native Americans to be racial minorities.

4. It is in these two professions, traditionally the "leading" professions, that the shortage of available places has given rise to the problem of racially preferential admissions.

such a study would probably be redundant in view of the abundance of academic commentary on the subject.⁵ I have borrowed freely from these works, and have relied greatly on the research of other commentators in formulating my own views.

My analysis, however, will be somewhat different from those advanced previously. I will be approaching the issue of racial equality with reference to the constitutional values indicated by the particular racial *discrimination* involved in *Bakke* (preference for blacks as a group resulting in discrimination against individual whites) rather than with reference to the validity of racial *classifications* under the compelling state interest test,⁶ the rational basis test,⁷ the substantial interest test,⁸ or any such formulation. There is a crucial difference, in my view, between approaching the problem in terms of racial classification and approaching it in terms of racial discrimination. A racial classification, as such, merely involves taking race into account. Assuming that this produces differential treatment or "disadvantage" on the basis of race, the court must decide whether this results in unconstitutional racial discrimination. In resolving that question the court must make an initial value judgment as to whether the differential treatment or "disadvantage" causes what may be called "racial injury." For example, court-ordered school desegregation requires the classification of students on the basis of race for purposes of assignment to particular schools. But this has never been considered by the Supreme Court to constitute racial discrimination, given the Court's value judgment (inherent in striking down state imposed segregation) that white children are not "injured" by attendance at school with black children. Racially preferential admissions programs, however, obviously cause "racial injury" to those white applicants who are excluded from

5. See, e.g., *DeFunis Symposium*, 75 COLUM. L. REV. 483 (1975); *DeFunis Symposium*, 60 VA. L. REV. 917 (1974); *Symposium*, 1970 U. TOL. L. REV. 277.

6. See *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974) [hereinafter cited as Karst & Horowitz]; O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974) [hereinafter cited as O'Neil].

7. See Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974) [hereinafter cited as Ely].

8. See *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975) [hereinafter cited as Sandalow].

admission to professional school because of these programs, and in that sense are racially discriminatory. A court, deciding on the constitutionality of these programs, must, therefore, make another value judgment. It must decide whether the Constitution prohibits *all* forms of racial discrimination, or if not, whether this particular form of racial discrimination is constitutionally proscribed. The fact that a racial classification is involved adds little, if anything, to this analysis, and focusing on the classification rather than on the resulting discrimination may merely serve to obscure the crucial value judgments that the court will necessarily be making.

Moreover, to analyze the validity of racially preferential admissions programs in terms of the classification being made necessitates application of the two-tier, frequently result-dispositive, approach to questions of equal protection and due process which the Supreme Court has found so troublesome in recent years.⁹ The Court's consideration of the constitutionality of racially preferential admissions programs in *Bakke*, will furnish it with the opportunity to abandon the two-tier approach once and for all, and to adopt a standard of review that will enable the courts to deal directly and explicitly with the hard value judgments and the ends and means questions that clearly influence their decisions in due process and equal protection cases.¹⁰

9. Under the two-tier approach, governmental action is tested by the "rational basis" standard unless it involves a "suspect classification" or infringes upon a "fundamental right," in which case, the strict scrutiny standard requires that a "compelling" state interest be established.

The Court's dissatisfaction in recent years with the two-tier approach is reflected in its unwillingness to recognize any new suspect classifications or fundamental rights requiring strict scrutiny. Cf. *Stanton v. Stanton*, 421 U.S. 7 (1975) (sex not recognized as a suspect classification); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education not recognized as a fundamental right); *Lindsey v. Normet*, 405 U.S. 56 (1972) (housing not recognized as a fundamental right). Moreover, some Justices have argued for constitutional analysis leading to a single standard of review or to a sliding scale of standards. See, e.g., *Vlandis v. Kline*, 412 U.S. 441, 456 (1973) (White, J. concurring); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 98-99 (Marshall, J. dissenting); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172-73 (1972). Even more significantly, the rational basis standard has begun to be used to invalidate governmental action. See generally Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

10. In *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973) for example, Justice Powell, writing for the majority, made it clear that if the Court had held that education was a fundamental right, and thus subject to the strict scrutiny test, local school district financing would have been invalidated because of the availability of less drastic alternative means. He went on to emphasize the value

I submit that the Constitution does not prevent the state from giving the type of limited racial preference to racial-ethnic minorities rejected in *Bakke*, and upheld in *DeFunis v. Odegaard*,¹¹ and *Alevy v. Downstate Medical Center*.¹² This is because, in my view, such a limited racial preference is fully consistent with the values embodied in the fourteenth amendment—its broader, organic purposes¹³—the primal one being minority equality and the full integration of racial minorities groups into the mainstream of American society.¹⁴ Moreover, such a preference does not discriminate against whites as a group, notwithstanding that its existence may result in the exclusion of some individual whites from medical school and law school.

Its constitutionality must be viewed with reference to the realities of present-day American society, the past history of victimization of racial minorities, and what has been called the constitutional right of black freedom, protected by the fourteenth amendment and the other Civil War Amendments.¹⁵ When so viewed, "in a world made up so largely of compromise," its constitutionality clearly can be sustained.

BAKKE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA

The medical school at the University of California at Davis, recognizing a need to increase minority representation in the medical profession, adopted a special admissions program exclusively for disadvantaged minorities.¹⁶ The univer-

of local autonomy and, in effect, to make the value judgment that local autonomy was more important than equalization of educational resources.

11. 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974).

12. 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976). The court stated that the racial preference advanced a substantial state interest and thus was presumptively constitutional. Such a presumption could be overcome if the court found the particular program was not sufficiently limited in size and duration, but since the assailant did not show that he would have been admitted even if the program had been invalidated, the New York court did not pass on the scope of the program. *Id.* at 338, 348 N.E.2d at 547, 384 N.Y.S.2d at 91.

13. As the Court noted in *Loving v. Virginia*, 388 U.S. 1, 9 (1967), the fourteenth amendment is not to be interpreted solely with reference to the intent of its framers, but is to be given a dynamic interpretation. Nevertheless, the historical objectives of the fourteenth amendment are relevant in determining its broader, organic purposes. See text accompanying notes 129-40 *infra*.

14. See text accompanying notes 129-40 *infra*.

15. The Civil War Amendments are the thirteenth, fourteenth and fifteenth amendments. See generally Kinoy, *The Constitutional Right of Negro Freedom*, 21 *RUTGERS L. REV.* 387 (1967) [hereinafter cited as Kinoy].

16. *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34, 41, 43, 553 P.2d 1152, 1157, 1159, 132 Cal. Rptr. 680, 685, 687 (1976).

sity set aside 16 places in a class of 100 to be filled by applicants considered under the special admissions program. All white applicants were considered in the regular admissions program, which automatically rejected anyone whose grade point average was below 2.5. The special admissions program, however, had no such automatic disqualification and, in fact, admitted minority applicants with grade point averages below 2.5. The court said "it is clear that the special admissions program classifies applicants by race"¹⁷ and concluded the program violated the constitutional rights of nonminority students.

The result is quite ironic. Historically, the equal protection clause was viewed as primarily protecting blacks and other racial minorities from state-imposed discrimination that would impede their achieving full equality in American society,¹⁸ but for a long time, it had been interpreted so restrictively that blacks received very little protection from it.¹⁹ In *Bakke*, the equal protection clause came full circle to invalidate a very limited preference for racial minorities that was designed to overcome the cumulative effects of societal discrimination against them. The effect of the decision is to protect the interests of individual whites over the interests of minorities as a group in achieving full equality in American society, insofar as such equality would be achieved by increasing the number of minority lawyers and doctors to a level in proportion to their numbers in the population as a whole.

Bakke's Standing

Initially, it should be pointed out that Bakke's standing to sue was questionable. The court reasoned that there would be no constitutional violation if the university gave preference to disadvantaged students of all races.²⁰ Since minority students

17. *Id.* at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 688.

18. See notes 42 and 129 and accompanying text *infra*. See also Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131, 132-42 [hereinafter cited as Frank & Munro].

19. See R. KLUGER, *SIMPLE JUSTICE*, chs. 1-4 (1975), for an interesting discussion of the United States Supreme Court's early interpretation of the fourteenth amendment with a view toward "black freedom." Only with the invalidation of the "separate but equal" doctrine of state imposed segregation in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and its progeny has the fourteenth amendment made a significant dent in the legal structure of societal racism.

20. According to the California Supreme Court:

In short, 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. Disadvantaged applicants of all races

who were not disadvantaged were not allowed in the special admissions program,²¹ the racial classification only discriminated against disadvantaged whites. However, Bakke did not claim to be disadvantaged. The racial preference, therefore, did not violate any of Bakke's rights, and no basis existed for allowing Bakke to assert the rights of disadvantaged whites.²² In effect, Bakke prevailed by asserting the rights of third parties in a case that was clearly not one for third party standing.

Even more importantly, perhaps, Bakke made no showing that he was in fact injured by the operation of the racially preferential admissions program, since he could not show that he would have been admitted if the program had not been in effect. The court treated this question as relevant only to the remedy, reasoning by analogy to other cases that since the university unconstitutionally discriminated against Bakke, it had the burden of showing he would not have been admitted if the program had not been in effect.²³ Under the federal concept of standing, however, invalidation of the challenged action must be likely to produce some direct benefit to the plaintiff.²⁴ Using that concept, Bakke would not have had standing to challenge the constitutionality of the university's racial preferential admissions program. Although I do not favor the use of standing as an independent limitation on judicial review,²⁵ the California Supreme Court does,²⁶ and while the court was

must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race.

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

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

22. In determining the propriety of *jus tertii* standing, the primary considerations are the relationship between the assailant and the person whose rights are being asserted and the practicability of assertion by the holders of the rights. *See, e.g.,* Singleton v. Wulff, 96 S. Ct. 2868 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972); Barrows v. Jackson, 346 U.S. 249 (1953). *See also* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 646-48 (1962).

23. In *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976), the New York Court of Appeals determined the excluded white applicant had standing to challenge the constitutionality of the program. However, because he failed to show that he would have been admitted if the program had not been in effect, he had not established a right to relief, and the court would not consider the reasonableness of the racial preference for minorities. *Id.* at 338, 348 N.E.2d at 547, 384 N.Y.S.2d at 91.

24. *Simon v. Eastern Ky. Welfare Rights Organization*, 96 S. Ct. 1917 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975).

25. *See* Sedler, *Standing, Justiciability and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972).

26. *See, e.g., In re Estate of Horman*, 5 Cal. 3d 62, 78, 485 P.2d 785, 796, 95 Cal.

not willing to sacrifice "consistency of principle" when it came to the merits, it is at least questionable whether it was equally faithful to its own principles of standing.

The Constitutional Analysis Applied in Bakke

In *Bakke*, the court noted that a classification based on race is "subject to strict scrutiny, at least where the classification results in detriment to a person because of his race."²⁷ By this standard, such a classification not only must satisfy a compelling state interest but must do so by means least intrusive on the constitutional rights of others. While assuming arguendo that the racial classification advanced compelling state interests, the court was unconvinced that these interests could not be achieved by means "less detrimental to the rights of the majority."²⁸ Specifically, the assumedly compelling *racial objectives*—increasing minority representation in the medical profession and achieving racial integration of the student body—did not satisfy the strict scrutiny test because the court concluded that those objectives could be achieved by *non-racial means*.

The court's invalidation of the classification under the compelling state interest test accords with the result generally reached whenever that test is applied and for the same reason. In nearly all cases it will be possible to find that alternative means would, to some extent, accomplish the desired objective, although perhaps not as effectively as the means that were chosen. Invoking the compelling state interest test then becomes result-dispositive. Once a court holds that the validity of a law or other governmental action must be tested against the "strict scrutiny" standard, the result will almost always be a declaration of unconstitutionality.²⁹ It may be precisely because the invocation of "strict scrutiny" produces this result that the Supreme Court has shied away from creating any new suspect classifications or fundamental rights, and appears to be moving away from the "two-tier" approach to equal protec-

Rptr. 433, 444 (1971), *cert. denied sub nom.*, *Gumen v. California*, 404 U.S. 1015 (1972).

27. 18 Cal. 3d at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690.

28. *Id.* at 52-53, 553 P.2d at 1164-65, 132 Cal. Rptr. at 692-93.

29. As Chief Justice Burger has observed with respect to the compelling state interest standard: "So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard." *Dunn v. Blumstein*, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

tion and due process questions.³⁰

Nevertheless, the special admissions program properly could have been sustained under the compelling state interest test. Since the assumedly compelling state interests were racial in nature, the court could have held that nonracial alternatives were irrelevant to their advancement. This was the conclusion of the Washington Supreme Court in *DeFunis v. Odegaard*,³¹ and of the New York Court of Appeals in *Alevy v. Downstate Medical Center*.³²

The real problem with the compelling state interest test or with any other effort to link the result with a differing standard of review is that it obscures the *value judgments* which are an integral part of defining broad constitutional concepts such as equal protection and due process, and which determine what standard applies in any particular situation. It is difficult to believe that the Supreme Court or any other court is not making a value judgment when it decides upon the appropriate standard of review in the context of a challenge to a particular law or governmental action.³³ It would be far better for the court to discuss explicitly those value judgments as they appear in the context of specific challenges—an action more likely to occur if a single standard of review were adopted.

The fundamental value question in these cases is whether a state is justified in giving racial preference to minorities as a group when this results in discrimination against individual whites. To say that since the racial objective is compelling, only racial means are relevant to the accomplishment of that objective, is to make the value judgment in favor of racial preference. By the same token, to hold that nonracial means must be considered, will necessarily skew the value judgment against racial preference since it is obvious that nonracial means can always be found. Under the "less drastic means" aspect of the compelling state interest test, it does not matter that the means chosen will accomplish the racial objective less effectively. The California Supreme Court clearly made a value judgment against racial preferences by applying the "strict scrutiny" standard of review and by holding that nonracial

30. See note 9 and accompanying text *supra*.

31. 82 Wash. 2d 11, 31-32, 507 P.2d 1169, 1184 (1973), *vacated as moot*, 416 U.S. 312 (1974).

32. 39 N.Y.2d 326, 336-37, 348 N.E.2d 537, 546, 384 N.Y.S.2d 82, 90 (1976).

33. This is particularly illustrated by decisions such as *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). See note 10 *supra*.

alternatives had to be considered.

The court's reliance in *Bakke* on the strict scrutiny standard of review is doubly ironic. At least in recent times, the compelling state interest test as applied to racial classifications, was formulated in the context of the Supreme Court's invalidation of discrimination against blacks as a group or discrimination against blacks and whites equally.³⁴ Furthermore, in those cases in which the standard developed, the racial discrimination invalidated did not advance even a legitimate, let alone compelling, state interest, and it was struck down for that reason rather than because "less drastic means" were not employed.³⁵ Thus, invoking strict scrutiny was completely unnecessary to the decision of those cases,³⁶ and in practice, strict scrutiny has been of no real utility to minorities in their legal struggles against societal racism. In *Bakke*, the strict scrutiny test invalidated one of the few instances where American society has given preference to racial minorities, because the preference had the effect of discriminating against individual whites, although not against whites as a group. The primary beneficiaries of this more restrictive standard of review in racial cases, therefore, have not been minorities, but individual whites, whose interests were preferred over the interests of minorities as a group and over the societal interest in bringing about full equality for racial minorities.

Equal Protection for the Individual or for the Group?

The court in *Bakke* was not concerned with the historical purpose of the fourteenth amendment or with full equality for racial minorities in American society. In its view, "[r]egardless of its historical origin, the equal protection clause by its literal terms applies to 'any person,' and its lofty purpose, to secure equality of treatment to all, is incompatible with the premise that some races may be afforded a higher protection against unequal treatment more than others."³⁷ But the preference involved in *Bakke* was not a preference for "some races." It was a preference for the racial-ethnic minority

34. See notes 227-33 and accompanying text *infra*. Those cases in which the compelling state interest test was supposedly applied were cited in *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 49, 553 P.2d 1152, 1162, 132 Cal. Rptr. 680, 690 (1976).

35. See notes 152-65 and accompanying text *infra*.

36. See notes 166-69 and accompanying text *infra*.

37. 18 Cal. 3d at 51, 553 P.2d at 1163, 132 Cal. Rptr. at 691.

groups in American society who have been victimized and discriminated against because of their color. To say that the lofty purpose of the fourteenth amendment is to "secure equality of treatment to all," begs the question of how equality of treatment can be secured for racial minorities in American society, given the realities of our society and the cumulative effects of over 300 years of discrimination against them. Although the law may say that all people are equal, realistically in American society white people as a group have always been "more equal" than black people. To invalidate a preference for racial minorities as a group because it results in discrimination against individual whites is to "follow a train of reasoning to its logical conclusion" without taking account of the origin of that train of reasoning and without considering the consequences of "seeking perfect consistency in a world so largely made up of compromise." Those consequences, as I shall explain, may spell an end to efforts to increase minority representation in the legal and medical professions.

The court stated its concern for consistency of principle when it wrote:

To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality. The safest course, the one most consistent with the fundamental interests of all races and with the design of the Constitution is to hold, as we do, that the special admission program is unconstitutional because it violates the rights guaranteed to the majority by the equal protection clause of the Fourteenth Amendment of the United States Constitution.³⁸

It is this proposition with which I would most strongly disagree.

The "principle" that the fourteenth amendment prohibits all differential treatment between racial minorities and whites,³⁹ even when that differential treatment is for the bene-

38. *Id.* at 62-63, 553 P.2d at 1171-72, 132 Cal. Rptr. at 699-700.

39. The principal of racial neutrality has been put forth as follows: "[T]he proper constitutional principle is not, no 'invidious' racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits or burdens." Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25. "Both as a matter of constitu-

fit of minorities as a group and does not discriminate against whites as a group, is neither "required by history, nor can it be derived from a more general principle of constitutional law."⁴⁰ On the contrary, it is inconsistent with the broader organic purpose of the fourteenth amendment's guarantee of racial equality and with the constitutional right of black freedom that the Civil War Amendments, taken as a whole, were designed to implement. There is nothing in the design of the Constitution that prohibits the states from taking affirmative action of the kind involved in *Bakke* to assure full equality for blacks and other racial-ethnic minorities in American society. Indeed, in view of the realities of American society today, it is only by the taking of such action that the design of the Civil War Amendments—true freedom for the emancipated blacks and their full integration into American society—will ever be realized.

A proper constitutional analysis, giving due regard to all of the values embodied in the fourteenth amendment and other Civil War Amendments, requires a court to distinguish between the following categories of racial discrimination:

tional law, and of social decency expressed in state and federal legislation, we have come to view all forms of discrimination based on race as not merely suspect, and at least presumptively intolerable." Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. Tol. L. Rev. 377, 379.

For at least a generation the lesson of the great decisions of this Court and the lesson of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are now to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.

Brief for B'nai B'rith Anti-Defamation League as Amicus Curiae at 16-17, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (authored by Professors Alexander Bickel and Phillip Kurland), quoted in Lavinsky, *DeFunis v. Odegaard: The "Non-Decision" with a Message*, 75 COLUM. L. REV. 520, 521-22 (1975) [hereinafter cited as Lavinsky]. Similar views were expressed by Justice Douglas in his dissent in *DeFunis v. Odegaard*, 416 U.S. 312, 340-41 (1974), although he argued that in order to admit all applicants in a racially neutral way, the university was required to be "color-conscious" in considering the possible basis of objective indicators such as the LSAT and the impact of racial discrimination on particular applicants.

40. Sandalow, *supra* note 8, at 681. In commenting on Professor Posner's statement, quoted in note 39 *supra*, Professor Sandalow observed: "A constitutional principle that government may not distribute burdens or benefits on racial or ethnic grounds is required neither by the 'intentions of the framers' nor by a more general principle of constitutional law." *Id.* at 675. See generally *id.* at 675-81.

- 1) discrimination against blacks as a group; *i.e.*, discrimination against all individual blacks because of their group membership;
- 2) discrimination against blacks as a group and against whites as a group; *i.e.*, blacks and whites are discriminated against mutually because of their respective group membership;
- 3) discrimination in favor of blacks as a group, which results in discrimination against whites as a group; *i.e.*, benefits are given only to blacks because of their group membership and denied entirely to whites because of their group membership;
- 4) discrimination in favor of blacks as a group which results in discrimination against individual whites, but not against whites as a group; *i.e.*, benefits are given to blacks because of their group membership and denied to individual whites because of their group membership, but those benefits are not denied substantially to whites as a group.

Racially preferential admissions cases, such as *Bakke*, involve the fourth category of discrimination. I will endeavor to show that the first three categories of racial discrimination clearly violate the fourteenth amendment. It is my contention, however, that, considering the values of the fourteenth amendment, the need to accommodate conflicting values and the reasonableness of the means employed to do so, in light of the present societal condition of blacks, the fourth category of discrimination does not offend the Constitution.

The protections of the fourteenth amendment quite properly are not limited to blacks, and extend to individuals as well as groups.⁴¹ Admittedly, one of the values embodied in the fourteenth amendment is the value of racial neutrality and, in the broader sense, of racial equality, which does render "suspect" distinctions drawn on the basis of race.

But there is another value embodied in the fourteenth amendment and the other Civil War Amendments—the value of black freedom.⁴² This value seeks to insure full equality for blacks in American society, to eliminate all the badges and incidents of servitude, to overcome the consequences of societal racism, and to bring about the full integration of blacks into American society as free and equal human beings. When courts consider racial discrimination against blacks, these two values

41. *Shelley v. Kramer*, 334 U.S. 1, 22 (1948).

42. See notes 133-34 and accompanying text *infra*.

operate in tandem. But when courts consider racial preferences in favor of blacks which operate to produce racial discrimination against whites, these values may conflict, requiring a determination as to which value shall be paramount in the particular circumstances presented. The purpose of the particular racial discrimination or racial preference, the context in which it occurs, its impact on the individual or group against which it is directed and the reasonableness of the means employed are all part of the constitutional equation. Every effort must be made to *accommodate* these conflicting values.

In *Bakke*, the California Supreme Court did not try to make any accommodation. It focused entirely on the value of racial neutrality between blacks and whites, ignoring completely the value of black freedom and of true equality for blacks in American society. The court made a value judgment in favor of racial neutrality and against the long-range societal benefits sought to be achieved by the racial preference.⁴³ The court recognized the persuasiveness of arguing for the need for racial preference in order to advance equality of opportunity for blacks. But in the context of a multi-racial society, the court concluded that the detrimental effects of racial preference outweighed the benefits.⁴⁴ Yet, the court was not compelled to reach such a value judgment. Its value judgment contrasts sharply with that of the New York Court of Appeals. In *Alevy v. Downstate Medical Center*, that court stated in an unanimous opinion: "It would indeed be ironic and, of course, would cut against the very grain of the amendment, were the equal protection clause used to strike down measures designed to achieve real equality for persons whom it was intended to aid."⁴⁵

If the Constitution prohibits the kind of limited racial preference for minorities invalidated in *Bakke*, it should be because it is contrary to the values reflected in the fourteenth amendment's guarantee of equal protection of the laws. However, it is completely incongruous to say, as the court did in *Bakke*, that while the uncompromising principle of equal protection is racial neutrality between blacks and whites, racial classifications can be sustained if they satisfy the compelling

43. 18 Cal. 3d at 61-63, 553 P.2d at 1170-72, 132 Cal. Rptr. at 698-700.

44. Compare *id.* at 61-62, 553 P.2d at 1171, 132 Cal. Rptr. at 699 with *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 335-36, 348 N.E.2d 537, 545, 384 N.Y.S.2d 82, 89-90 (1976).

45. 39 N.Y.2d 326, 334-35, 348 N.E.2d 537, 544-45, 384 N.Y.S.2d 82, 89 (1976).

state interest test. It is equally incongruous to assume on the one hand, as the court did in *Bakke*, that the state's interest in increasing black representation in the professions is compelling, but to hold on the other hand, that it cannot advance that interest by the giving of a racial preference, because nonracial alternatives could advance that interest, although not as effectively, "by means less detrimental to the rights of the majority."⁴⁶ It is time to decide, clearly and forthrightly, whether, in light of the values contained in the fourteenth amendment, the state may or may not give blacks as a group, the kind of limited preference that was involved in *Bakke*.

The Effect of Bakke—Real or Imagined?

The court in *Bakke* listed nonracial alternatives the university could have adopted to achieve its racial objective, making it clear that the university could admit students on virtually any basis it chose so long as it did not explicitly take race into account.⁴⁷ The court emphasized that the university was not required to use only the highest academic credentials. Such an admissions criterion, it noted, may not "accurately reflect the abilities of some disadvantaged students."⁴⁸ Similarly, the university could take into account factors relating to "the needs of the profession and society, such as an applicant's professional goals."⁴⁹ And, it could also give preference to disadvantaged students of all races, even to the point of establishing a disadvantaged quota, since the Constitution does not prohibit discrimination in favor of less advantaged students over more advantaged ones.⁵⁰

Subterfuge: I seriously doubt that the California Supreme Court intended to eliminate efforts to increase the number of minority medical and law students.⁵¹ All it has really done, as Justice Tobriner noted in his dissent, is to require that the medical schools and the law schools desiring to continue preferential racial admissions be more disingenuous about it and

46. 18 Cal. 3d at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693.

47. *Id.* at 54-55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

48. *Id.*

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

50. *Id.* at 54-55, 553 P.2d at 1166-67, 132 Cal. Rptr. at 694-95.

51. Most opponents of racially preferential admissions appear to be in favor of increased black enrollment in law schools and medical schools so long as it is accomplished by means other than racial preference. See, e.g., Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 3 BLACK L.J. 232, 233-234 (1973); Lavin-sky, *supra* note 39, at 533.

engage in a manipulation of labels so that the racial preference will be concealed by subterfuge."⁵² Since a university may use "flexible admissions standards,"⁵³ it would not be surprising that a university strongly committed to preferential racial admissions would just "happen" to admit substantially the same number of minority applicants under these standards as it did when race was an admissions criteria. However, to avoid an open refusal to follow *Bakke*, a university will have to give every application special consideration, which many schools, faced by burgeoning admissions demands, may be unwilling to do. If they do not give such special consideration, they will again be found to have been practicing racial discrimination once another *Bakke* is again excluded and discovers that minorities have been admitted under the flexible admissions standards in substantially the same proportion as before.

If a school does not want to depart from its heavy reliance on objective academic criteria, but still wants to increase its number of black students, it may establish a preferential admissions program for "disadvantaged students of all races."⁵⁴ Of course, if it uses the "disadvantaged" criterion, it must exclude from the preferential admissions program advantaged minority students who might not compete well against advantaged whites, yet who are more likely to perform better academically than disadvantaged students of either race. It would also have to include disadvantaged whites, whose inclusion, regardless of whether it might be justified on nonracial grounds,⁵⁵ will not serve the racial objective that was assumed in *Bakke* to be compelling. Moreover, while proportionately there is a substantially higher incidence of disadvantaged individuals among blacks as a group than among whites as a group, in strict number terms, there are more disadvantaged whites than there are disadvantaged blacks.⁵⁶ Assuming that disad-

52. 18 Cal. 3d at 89-90, 553 P.2d at 1190, 132 Cal. Rptr. at 718. (Tobriner, J., dissenting).

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

54. *Id.* The preference for disadvantaged students may in practice be a subterfuge to increase the number of blacks and other racial-ethnic minorities, and thus amount to a "de facto racial classification rather than a de jure preference." O'Neil, *supra* note 6, at 951. See also Karst & Horowitz, *supra* note 6, at 971.

55. See notes 103-07 and accompanying text *infra*.

56. In 1974 there were 6.2 million white children (under 18 years old) in families below low income level compared to 4.0 million "black and other race" children. But only 11.2% of white children were in families below low income level, compared with and 38.4% "black and other race" children. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1975, at 399, table 652

vantaged blacks and disadvantaged whites are more or less equally qualified,⁵⁷ to obtain substantially the same number of blacks under the "disadvantaged" criterion as it did under straight racial preference, a university would have to admit at least an equal number of disadvantaged whites.⁵⁸ To do so will reduce the available space and exclude an even larger number of advantaged whites than previously. Bakke's victory could turn out to be very pyrrhic indeed. On the other hand, a university may conclude that such a result would cause a greater erosion in academic quality than it is willing to accept. Thus it will keep the same quota of special admittees, but cut the number of minority students. While this will open up preferential admissions for disadvantaged whites, it will be counterproductive for the racial objectives that were assumed in *Bakke* to be compelling.

Legitimizes lack of social concern. The real danger posed by *Bakke* is that many schools will decide they are unwilling to make any burdensome effort to increase minority enrollment. Although preferential admissions programs are apparently widespread,⁵⁹ within every institution there are likely to be those who object to the continuation of such programs. Such individuals might honestly believe that racial considerations

[hereinafter cited as 1975 ABSTRACT]. The excess of disadvantaged whites over disadvantaged blacks is also reflected in law school applications. LSDAS statistics that I have seen indicate that in the applications for the nationwide entering class of 1977, using the lower cut-off point of a 2.5 GPA and a 500 LSAT score, over 1000 white applicants characterized their socio-economic status as "low." The total number of black, Chicano and Puerto Rican applicants in that range, without regard to socio-economic status, was approximately 350. The number of minority students who characterized their socio-economic status as "low" was 130 (although not all students indicated their status).

57. This is an unlikely assumption since the majority of black students now applying to medical school and law school are likely to have received all or part of their primary and secondary education in racially segregated schools, a factor in the cause of academic inferiority among blacks in particular. See notes 84-98 and accompanying text *infra*.

58. *But see* *Bakke v. Regents of the Univ. of California*, 18 Cal. 3d at 54 n.22, 553 P.2d at 1166 n.22, 132 Cal. Rptr. at 694 n.22 (criticizing the view that the percentage of disadvantaged students accepted for admission would have to be increased in order to achieve racial integration).

59. In its amicus curiae brief to the Supreme Court in *DeFunis*, the Association of American Law Schools stated: "Law schools differ greatly in their admission policies. Almost all law schools seek to have a reasonable representation of minority students. The University of Washington Law School thought 37 students out of 145 was reasonable. The result in other law schools ranges between about five or ten percent of their students." Brief for the Association of American Law Schools as Amicus Curiae at 15-16, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

have an undesirable effect on both whites and blacks,⁶⁰ or they might be concerned about the dilution of academic standards. *Bakke* constitutionalizes the objections to racial preference, and the burden that the decision imposes on institutions in order to continue admitting minorities may persuade many that they have done enough. Any pangs of conscience at barring the doors of the professions to minorities can be salved by remembering, "The court made us do it." It may turn out then that the price for "consistency of principle" will be paid, as it so often is, by the minorities.⁶¹ Although I do not think that that was the intent of the California Supreme Court in *Bakke*, the practical effect of the decision may be to deal a crippling blow to efforts to increase minority representation in the legal and medical professions.⁶²

SPECIAL ADMISSIONS BASED UPON RACE: A HARD LOOK AT THE REALITIES

An integral part of a value analysis of the constitutionality of racially preferential admissions is the necessity and justification for the preference. To properly develop the justification for preferential admission based upon race, it is first necessary to consider the realities of American life and the impact that racism has had on American society.⁶³

The Reality of Admissions Without Regard to Race

More than ever before, medical and law schools are experiencing a shortage of openings for admissions, and the number

60. It is argued that these programs "stigmatize" black students by branding them with a "stamp of inferiority." See *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). On the other hand, as has been observed: "Indeed, if the stigmatizing effect of preferential programs were as great as that of segregated schools, one would expect to find blacks avoiding such programs, black organizations opposing them, and black leaders denouncing them. In practice, however, one finds nothing of the sort and indeed finds the opposite." Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534, 554-55 (1975) [hereinafter cited as Nickel]. And, of course, if the choice is between being "stigmatized" and not being admitted at all, blacks, like other students would probably prefer to be "stigmatized." See also O'Neil, *supra* note 6, at 941.

61. For example, where equality of treatment is supposedly afforded to blacks and whites, in reality blacks may be disadvantaged by adherence to the equality. See, e.g., *Palmer v. Thompson*, 403 U.S. 217 (1971).

62. See Brief for the Deans of California Law Schools as Amicus Curiae at 29-31, *Bakke v. Regents of Univ. of Cal.*, No. 76-811 (U.S. filed Dec. 14, 1976).

63. In my discussion of the realities of American society, I have focused exclusively on the conditions of blacks. To the extent other racial minorities confront similar conditions, the need and value of a special admissions program also apply to them.

of applicants who are minimally qualified⁶⁴ vastly exceeds the number of available places.⁶⁵ The approach generally taken by the schools has been to determine who among the minimally qualified applicants are the "most qualified" in relation to each other. Since the probability of academic success is the objective of the selection process, it is not surprising that the criteria of selection relate to predictors of academic performance, such as prior academic performance and performance on standardized aptitude tests such as the Law School Admissions Test (LSAT) and the Medical College Aptitude Test (MCAT). In response to increasing admissions, more and more emphasis is placed on these objective indicators, with correspondingly less opportunity for evaluation of individual factors such as motivation, personality and the like.⁶⁶ Unfortunately, as will be

64. Minimally qualified applicants refer to those for whom there is a reasonable probability they will successfully complete the course of study and graduate, based on objective factors of academic qualification used by law and medical schools. Such factors are not designed to predict professional success. At least in law school, there is little correlation between academic performance and professional success, primarily because law schools teach only some of the skills necessary for professional success. As Dean Griswold has stated:

To equate law school success with success in practice is also a dangerous proposition, for law school education, as it now exists, is best geared to training in the analytical and research skills required of practitioners. It does not train effectively in the skills of advocacy, counselling, drafting, negotiation, client relations, fact investigation and preparation, which are also of prime importance in practice; and it may well be that law schools should not attempt such training. Nor do these skills involve the same aspects of intellectual capacity as the analytical skills.

Griswold, *Some Observations on the DeFunis Case*, 75 COLUM. L. REV. 512, 515 (1975) [hereinafter cited as Griswold]. For an "official" admission in this regard, see Brief for the Association of American Law Schools as Amicus Curiae at 5-6, *DeFunis v. Odegaard*, 416 U.S. 312 (1974); Brief for the Law School Admission Council as Amicus Curiae at 10-11, *id.*

65. In *Bakke*, there were 3737 applicants for 100 available places in the medical school's 1974 entering class. 18 Cal. 3d at 38, 553 P.2d at 1155, 132 Cal. Rptr. at 683. In *Alevy*, the medical school had 6300 applications for 216 positions. 39 N.Y.2d at 329, 348 N.E.2d at 540, 384 N.Y.S.2d at 85. In *DeFunis*, the University of Washington law school had 1601 applications for 150 positions. 416 U.S. at 314. The ten to one ratio of applicants for available places holds true for a number of law schools with which I am familiar. Overall, despite the very large number of law schools in this country (including those of dubious academic quality which are limited to accreditation within a single state), it was estimated in 1973 that there were two "minimally qualified" applicants for every available law school place. See Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 U.C.L.A. L. REV. 343, 361 & n.85 (1974) [hereinafter cited as Redish].

66. Individual interviews appear to be a regular part of the medical school admission process, although the primary basis of selection for individual interviews is generally the objective indicators. In the law school process, interviews are not generally used, the selection being almost entirely based on objective indicators.

discussed below, blacks as a group have relatively poor records of academic performance compared with whites as a group and perform relatively poorly on standardized aptitude tests. Because the white population is close to eight times greater than the black population,⁶⁷ and whites as a group are more academically qualified than blacks as a group, the normal working of the admission process will produce few if any black students. The only way most black applicants can compete for admission is if there is an exception to the normal admissions process when considering black academic qualifications while maintaining standards sufficiently high so as to accept only those black applicants likely to complete medical or law school.

Unless some type of affirmative action is taken, the inability of blacks to compete successfully with whites for a limited number of places in medical schools and law schools will perpetuate the existence of woefully inadequate numbers of black doctors and lawyers.⁶⁸ Although the population is over eleven percent black,⁶⁹ less than three percent of all doctors and less than two percent of all lawyers are black.⁷⁰ While preferential

67. As of July 1, 1974, the white population totaled approximately 184,000,000, the black population approximately 24,000,000 and "other" approximately 3,000,000. 1975 ABSTRACT, *supra* note 56, table 26.

68. "The total number of blacks, Mexican-Americans, American Indians, and mainland Puerto Ricans enrolled in medical schools between 1969 and 1974 was only 8 percent." *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. The *Bakke* court noted the significantly increased enrollment of minority students after the university instituted the special admissions program. But the court also noted there was no evidence of what standards of admissions had been previously used, "and it may well be that virtually determinative weight was accorded to test scores and grades." *Id.* at 54, 553 P.2d at 1165, 132 Cal. Rptr. at 693. The court in *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 330, 348 N.E.2d 537, 541, 384 N.Y.S.2d 82, 86 (1976), also noted a significant increase in the enrollment of minority students after initiating a racially preferential admissions program.

69. 1975 ABSTRACT, *supra* note 56.

70. In *Alevy*, the court cited 1970 figures indicating that 2.2% of all doctors in the United States were black. 39 N.Y.2d at 330, 348 N.E.2d at 541, 384 N.Y.S.2d at 86. As of 1974, there was one doctor for every 750 persons in the general population, but only one black doctor for every 3500 blacks. At that time there were apparently only 250 Chicano and 56 Native American doctors in the entire country. O'Neil, *supra* note 6, at 943-44. O'Neil points out that since 1971-72, the enrollment of black law students has exceeded the numbers of black lawyers in practice. While as of 1970 there was one lawyer for every 637 persons, there was one black lawyer for every 7000 blacks, and at that time less than 4000 of the 300,000 lawyers in the country were black. Redish, *supra* note 65, at 389 & nn.194 & 195.

As to the shortage of Chicano lawyers, see Reynoso, *La Raza, The Law and the Law Schools*, 1970 U. Tol. L. Rev. 809, 814-16. In California, as of 1967, the ratio of white lawyers to whites was one for every 530; for Spanish-surnamed lawyers to Spanish-surnamed citizens, it was one for every 9482. As to the shortage of Puerto

admissions programs have increased somewhat the numbers of black lawyers and doctors, society is a long way from having a reasonable, let alone proportionate, number of black doctors and lawyers in relation to the black population as a whole.⁷¹

As a society then, we are faced with gross underrepresentation of blacks in the legal and medical professions at a time when the normal admissions process will admit very few black students. The choices for the law schools and medical schools in regard to black applicants are clear: 1) retain the present objective admissions standards for all applicants, seeking the most academically qualified applicants and admit few or no black students; 2) make an individual determination of the intrinsic capability of each applicant, giving little consideration to objective standards; 3) reserve a reasonable number of places, by either a fixed or fluctuating quota, for the most qualified black applicants to obtain a reasonable number of black students without abandoning primary reliance on objective criteria. To their credit, most law schools and medical schools have not closed their eyes to the effect of the normal admissions process on blacks and the resulting professional underrepresentation. However, they have been unwilling to abandon their primary reliance on objective criteria, realistically doubting their ability, in light of mounting applications, to make an across-the-board determination of the intrinsic ability of each applicant. Although I have not verified this, I am reasonably sure that practically all law schools and medical schools which have increased the size of their black student body above token numbers in recent years have opted for the racially preferential quota, either fixed or fluctuating. However, because quota has been discredited, they may not so describe their admissions program. I am also reasonably sure that the size of the quota in practically all places is not large, and will rarely exceed the proportionate black population of the state or region.

Rican lawyers, see Carbranes, *Careers in Law for Minorities: A Puerto Rican's Perspective on Recent Developments in Legal Education*, 25 J. LEGAL EDUC. 447, 450-51 (1973). In New York, with a population of more than one million Puerto Ricans, as of 1973 there were less than 70 Puerto Rican lawyers. In New Jersey, with a Spanish-speaking population of over 300,000, there were three Puerto Rican lawyers. As to the shortage of Native American lawyers, see the discussion in Strickland, *Redeeming Centuries of Dishonor: Legal Education and the American Indian*, 1970 U. TOL. L. REV. 847, 861-66.

71. See the discussion in Redish, *supra* note 65, at 393.

The Admissions Failure of Black Applicants: Academic Inferiority

To understand the need specifically for a racially oriented admissions program, one must consider why objective indicators of academic success are lower for blacks than for whites. Some legal scholars contend that standardized aptitude tests are "culturally biased," thus blacks as a group will necessarily perform poorly on them.⁷² Yet if the LSAT, for example, is culturally biased, so is the entire law school program and the practice of law.⁷³ The LSAT has at least the same predictive validity for blacks as it does for whites,⁷⁴ and I would imagine that the same is true for the MCAT as well. The primary utility of standardized aptitude tests is to predict academic performance at the upper and lower levels: students who score very high on these tests are likely to perform at a relatively high level in law school and medical school, and students who score low on these tests are likely to perform relatively poorly.⁷⁵ This is no less true for blacks than it is for whites.⁷⁶ Similarly, the college grade point averages of blacks are culturally biased only to the extent that college education is itself culturally biased.⁷⁷

72. Cf. Griswold, *supra* note 64, at 515 (criticism of the LSAT as culturally biased).

73. Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 587 (1975) [hereinafter cited as Greenawalt].

74. See Consalus, *The Law School Admission Test and the Minority Student*, 1970 U. TOL. L. REV. 501, 509 [hereinafter cited as Consalus]; Greenawalt, *supra* note 73, at 586-87; Redish, *supra* note 65, at 377 & n.144.

75. The predictive validity of these tests probably assures their constitutionality. Cf. *Washington v. Davis*, 96 S. Ct. 2040 (1976) (racially disproportionate impact of racially neutral aptitude test, used to screen police applicants, does not alone indicate a constitutional violation). For a pre-*Washington v. Davis* argument to the contrary, see Zimmer, *Beyond DeFunis: Disproportionate Impact Analysis and Mandated "Preferences" in Law School Admissions*, 54 N.C.L. REV. 317, 371-85 (1976) [hereinafter cited as Zimmer].

76. See Consalus, *supra* note 74, at 515. For a general discussion of the theory and operation of the LSAT, see generally *id.* at 508-16. Since these tests cannot measure motivation and similar factors, there will always be exceptions, of course, but that fact in no way undermines the general predictive validity of the tests.

77. It is not questioned that college education, as does almost everything else in the society, operates within a framework of "whiteness," but a black student, if he or she is to succeed in that society, must learn how to operate within that framework. Where cultural bias is significant is where a test purports to measure *intelligence* but, in reality, and with a heavy cultural bias, measures acquired knowledge instead. The use of such culturally biased tests to determine school assignment, ability grouping and the like are improper, precisely because they do not measure what they purport to measure and thus discriminate against persons who have not grown up in the "white culture." See *Hobson v. Hansen*, 269 F. Supp. 401, 478, 484-85 (D.D.C. 1967), *appeal on this issue dismissed for lack of standing sub nom.*, *Smuck v. Hobson*, 408 F.2d 175,

Perhaps it is time to stop taking refuge in the supposed "cultural bias" of everything to explain the poor academic performance of blacks as a group. It is clear from experience that blacks (and any other students) who are admitted on the basis of special standards are likely to perform poorly as a group in comparison with the students who were admitted under the regular standards. Regardless of whether there is any strong correlation between academic performance and performance in the practice of the profession,⁷⁸ there is clearly a correlation between objective standards and academic performance in professional schools. Objective admission criteria are not "culturally biased" to any significant degree in their predictive value and it is time that we stop pretending that they are.

Our obsessive concern with the "cultural bias" of standardized aptitude tests and of academic programs merely serves to mask the real problem. We do not want to say that blacks as a group are *academically inferior* in comparison to whites as a group. But in truth they are, which is the reason why reliance on objective standards of academic qualification will necessarily result in the virtual exclusion of blacks from the limited number of places available in law schools and medical schools today.⁷⁹

To properly understand the need for special admissions based on race, one must understand why blacks as a group are academically inferior to whites as a group. For one willing to face the realities of American life and the condition of blacks in American society, the answer is painfully obvious. Blacks as a group are academically inferior to whites as a group because they receive substantially less benefit from primary and secondary education in this country than do whites as a group. The reasons they receive substantially less benefit than do whites relate both to the conditions of life for blacks in American society and to the historically segregated nature of public education in this country.

Economic condition. In terms of conditions of life, the primary consequences for blacks as a group after years of societal

190 (D. C.C. Cir. 1969); cf. *Moses v. Washington Parish School Bd.*, 330 F. Supp. 1340, 1345 (E.D. La. 1971) (disallowing use of tests to group students in recently desegregated schools), *aff'd per curiam*, 456 F.2d 1285 (3rd Cir. 1972).

78. See note 64 *supra*.

79. Of course in the past, racial discrimination was also a reason why blacks were excluded from law and medical schools. See Blumrosen, *Legal Education for Black Students: A Remedy for Class Discrimination*, 1970 U. Tol. L. Rev. 799, 800-01; O'Neil, *supra* note 6, at 947-48.

racism has been *black poverty*. Of course the impact of this poverty is felt most strikingly by the children who grow up in it.⁸⁰ It is not necessary to set out at length the now all too familiar statistics showing the substantial income gap between blacks and whites in this country and the substantially higher incidence of real poverty among blacks.⁸¹ Suffice it to say that a much larger proportion of black children than white children grow up in poverty, making it far more likely a black child will be economically disadvantaged in comparison to a white child.

There is a direct correlation between economic condition and academic performance. That is, the economically disadvantaged child is likely to be educationally disadvantaged also. The child from an advantaged home is more likely to have had pre-school training than the child from a disadvantaged home. Such a child also receives many intangible benefits relating to learning and academic ability not available to the disadvantaged child.⁸² The evidence is indisputable that children from advantaged homes, as a group, have a much higher level of academic performance than do children from disadvantaged homes, as a group. As has been observed, "[W]hatever the average innate abilities of members of different races, social conditions in this country are the main determinant of differences in the average intellectual performances of blacks and whites."⁸³ Because the proportion of economically disadvantaged children is higher among blacks than among whites, the conclusion that whites as a group will be academically superior is foreordained before the children start school.

Segregated educational experience. The "built-in" handi-

80. As to the impact of black poverty on the children who grew up in it, see generally Rainwater, *Crucible of Identity, The Negro Lower-Class Family*, in *THE NEGRO AMERICAN* 160 (T. Parsons & K. Clark eds. 1966).

81. Black family income was approximately 60% of white family income as of 1974, a figure that has remained fairly constant over the last decade. 1975 ABSTRACT, *supra* note 56, table 634. Approximately 30% of all black families, compared with 11% of all white families, have incomes under \$5,000. Below the \$10,000 income level, the comparison is 59% of the black families to 33% of the white families. *Id.*, table 632. Over 40% of all black children grow up in families with income below low income level compared with 11% of white children. *Id.*, table 652.

82. See generally J. COLEMAN, *et al.*, *EQUALITY OF EDUCATIONAL OPPORTUNITY* 298-302 (1966) [hereinafter cited as COLEMAN REPORT]. As Professor Kaplan has observed, "The first and most obvious relation between social class and the educational process is that, in general, the higher the student's social class, the better he will do in school." Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U. L. REV. 157, 196 & n.105 (1963) (footnote omitted) [hereinafter cited as Kaplan].

83. Greenawalt, *supra* note 73, at 584.

cap that disadvantaged black children have could be reduced if they were allowed to attend schools predominated by advantaged children. It appears clear that the most significant factor affecting academic achievement of children as a group is the social class composition of the school. Where disadvantaged children are attending predominantly advantaged schools they will do better on the whole than if they were attending predominantly disadvantaged schools⁸⁴ although, in the absence of special compensatory programs, they will not do as well as the children coming from advantaged backgrounds.⁸⁵ On the other hand, children coming from advantaged backgrounds, but attending predominantly disadvantaged schools, will do less well as a group than they would if they were attending predominantly advantaged schools.⁸⁶ Although, whether racial segregation *per se* is an academic handicap to black students is essentially a moot question,⁸⁷ at least some evidence indicates that it is a handicap regardless of the socio-economic composition of a school.⁸⁸ But the question is largely irrelevant, since given

84. However, this will not be true if students are internally segregated by separate classrooms, ability grouping or other criteria. Strictly speaking, it is the social class composition of the classroom that affects the achievement of the lower class child.

85. See generally COLEMAN REPORT, *supra* note 105. The conclusions are effectively summarized in Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 400-03 (1972). Again quoting Professor Kaplan: "[T]he social class composition of a given school has a powerful effect upon the education of all the children in it." Kaplan, *supra* note 82, at 197 & n.107.

86. In a predominantly advantaged school, the academic performance of advantaged children will not suffer by the presence of a minority of disadvantaged students. See generally Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 L. & CONTEMP. PROB. 243, 268-69 (1975).

87. For a discussion of the various studies which lead to different conclusions on the academic handicap of racial segregation, see *id.* at 244-68.

88. The thrust of the COLEMAN REPORT, *supra* note 82, is that the socio-economic composition of the student body, rather than its racial composition, explains the educational benefit for black children arising from attendance at predominantly white schools.

In 1967, the United States Commission on Civil Rights issued a report which, while endorsing the major findings of the Coleman Report, contends that the racial characteristics of fellow students does have an independent effect on the performance of black children at the classroom level. See 1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 81-82, 84-86, 89-91 (1967) [hereinafter cited as RACIAL ISOLATION]. This is illustrated by the fact that the average academic performance of disadvantaged blacks improved by two grade levels when disadvantaged blacks were in a class with advantaged whites and by one full grade level even when disadvantaged blacks were in a class with similarly disadvantaged whites. *Id.* at 91. See also Pettigrew, *The Consequences of Racial Isolation in the Public Schools: Another Look*, in H. HOROWITZ & K. KARST, LAW, LAWYERS AND SOCIAL CHANGE 404-13 (1969).

the class composition of the black population, predominantly black schools will almost invariably be predominantly lower-class schools.

The overwhelming majority of black children, until very recently, have been educated in racially segregated schools. Because racially segregated (predominantly black) schools are almost invariably predominantly lower class schools, the overwhelming majority of black children have attended schools which did not maximize their educational potential. Widespread segregation in education thus has increased the handicap which disadvantaged black children already have and has diminished the educational opportunities for black children as a group.

Almost all black students who are in college today and who thus will be applying for admission to law school and medical school over the next few years have received all or the substantial part of their primary and secondary education in predominantly black, lower class schools.⁸⁹ In the South, where approximately half the blacks live today,⁹⁰ very little desegregated education occurred until the Supreme Court invalidated so-called "freedom of choice" plans in 1968.⁹¹ Significant desegregation of the urban school systems in the South did not result until the *Swann* decision in 1971.⁹² Today, there is substantial desegregation in the south, except in certain urban systems where the white flight to surrounding suburbs has made actual desegregation of the system a practical impossibility.⁹³ Using 1969 as the starting date of substantial school desegregation in

89. Redish noted the practical effect on blacks of their segregated educational experience: "The most obvious reason for the traditionally small number of minority students in law school is the generally inferior level of secondary education which many of them received in de jure or de facto segregated schools." Redish, *supra* note 65, at 385.

90. As of 1973, 52% of the black population lived in the South, 40% in the North and 8% in the West. 1975 ABSTRACT, *supra* note 56, table 31.

91. *Green v. County School*, 391 U.S. 430, 441 (1968) (such plans are "unacceptable" when speedier and more effective alternatives are reasonably available to convert to a unitary, nonracial school system). As of 1967 relatively few black children in the southern and border states were attending schools where any substantial number of whites were also in attendance. Cf. RACIAL ISOLATION, *supra* note 88, at 59, 66-70 (only limited desegregation has been achieved).

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

93. For an example of how the white flight has hampered desegregation of southern urban systems, see *Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975) (affirming a finding that the Atlanta school system, with an 85% black enrollment, was a unitary system notwithstanding that 92 out of its 148 schools had student bodies that were over 90% black).

the South (1972 would probably be more realistic), at least until 1985 a black student from the South applying to a professional school will be likely to have attended segregated schools during his full educational experience.

Outside of the South, desegregation is even less advanced; a clear majority of black students still attend racially segregated schools. Fully sixty percent of all blacks reside in the central cities,⁹⁴ where adherence to the "neighborhood school" method of student assignment has generally produced a condition of racial segregation in the public schools.⁹⁵ In recent years, more and more courts have found that racial segregation in the cities outside of the South is due to deliberate racial policies pursued by governing school boards, thus requiring desegregation of the school systems.⁹⁶ Yet, because of the white move-

94. 1975 ABSTRACT, *supra* note 56, table 31. The balance of the black population resides as follows: sixteen percent in metropolitan areas outside the central cities; twenty-four percent in nonmetropolitan areas (largely in the South). *Id.*

95. In part this is due to the maintenance of separate urban and suburban school districts in metropolitan areas, the urban districts being predominantly black and the suburban districts substantially white. For example, in 1972 the percentage of black students in the following urban school districts was: Chicago, 57.1%; Gary, 69.9%; Baltimore, 69.3%; Detroit, 67.6%; Kansas City (Mo.), 54.4%; Newark, 72.3%; Cleveland, 57.6%; and Philadelphia, 61.4%. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, DIRECTORY OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS IN SELECTED DISTRICTS 311, 394, 551, 627, 760, 854, 1039, 1212 (1972). In a number of cities the percentage was approaching the 50% mark, and generally increasing. *See generally id.*; SENATE SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, TOWARD EQUAL EDUCATIONAL OPPORTUNITY, S. REP. NO. 92-000, 92d Cong., 2d Sess. 102 (1972). Regardless of the black population in a school district, black students generally attend racially segregated schools. As of 1970, in the eleven northern and western states having the largest black populations, 65% of the black children attended schools at least 50% black, and 40% attended schools at least 90% black. For the largest school districts within the following cities, the percentage of black students attending schools, at least 50% and 90% black respectively was (using 1971 statistics for 50% schools and 1970 statistics for 90% schools): 97.4% & 86.4% in Newark; 90.8% & 79.2% in Baltimore; 96.2% & 85.7% in Gary; 93.7% & 73.9% in Detroit; 92.6% & 70% in Philadelphia (1970 data); 93.7% & 58.6% in Oakland; 95.4% & 89.2% in Cleveland; 97.8% & 89.7% in Chicago; 90.3% & 74.8% in Kansas City, Mo. A similar situation prevails where blacks compose a minority of the students within the school district. For the following cities, the percentage of blacks who attended a school at least 50% and 90% black was respectively: Buffalo (40% black) 72.6% & 56.1%; New York City (34.3% black) 83.9% & 57.9%; Los Angeles (25% black) 93.2% & 83.3%; Omaha (18% black) 70.7% & 48%; Denver (less than 16% black) 54.7% & 37.5% (using 1971 statistics for 50% schools and 1970 statistics for 90% schools). *Id.*, table 7-16.

96. The Supreme Court has made proof of a policy of segregation fairly easy to establish by holding that a finding of *de jure* segregation as to a meaningful portion of a school system raises a rebuttable presumption that other segregated schools within the system were also the result of intentionally segregative actions. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973). *See Sedler, Metropolitan Desegregation in the Wake of Milliken—On Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U.L.Q. 535, 546-47 [hereinafter cited as Sedler]. For a

ment to surrounding suburbs, many urban areas are now predominantly black.⁹⁷ Desegregation limited to such urban school districts will be increasingly less meaningful as more affluent people move away.⁹⁸ As a result, it could be a very long time, if ever, before the majority of black applicants to law school and medical school will have received most or all of their primary and secondary education in schools not predominantly composed of black lower class students.

Naturally there will be some exceptions to the group picture. Advantaged blacks who did not attend predominantly black and lower class schools have not been educationally handicapped. Presumably some will turn out to be among those chosen by the regular admissions process for law school and medical school. But the number of blacks who fall into this category is exceedingly small and cannot hope to raise the representation of black lawyers and doctors in the United States. The same is true of the number of exceptional black children who can surmount the handicaps of poverty and segregation and compete equally with advantaged whites. To remedy the current underrepresentation, an exception for minimally qualified blacks must be allowed.

The Justification for Racial Preference in School Admissions

It should be evident by now that the primary justification that I see for racially preferential admissions programs is the need to increase the gross underrepresentation of blacks in the medical and legal professions. This justification is related to the constitutional right of black freedom, which is embodied in the fourteenth amendment, and in the Civil War Amendments, taken as a whole. This justification is a utilitarian one, related to the interest of blacks as a group, and to the societal interest in insuring full equality for blacks in American society, insofar as that interest is advanced by appropriate black representation in the professions. It is this justification that I shall rely

partial listing of cases that have found non-southern school boards to be practicing de jure segregation, see *id.* at 545 & nn.41-42. There have been a number of additional cases since 1975, and it will be fairly rare today that a school district with a high incidence of racial segregation will not be found to have been practicing de jure segregation.

97. See Sedler, *supra* note 96, at 538-43.

98. Although made more difficult by *Milliken v. Bradley*, 418 U.S. 717 (1974), I believe it possible, in many situations, to obtain a desegregation decree that cuts across school district lines. For a general discussion and review of the post-*Milliken* cases, see Sedler, *supra* note 96, at 576-619.

upon to support the constitutionality of the racial preference involved in *Bakke*.

Analysis of the constitutional validity of special admissions programs based upon race can be obscured by the overlapping and sometimes inconsistent justifications, relative to the means, which have been advanced in support of such programs.⁹⁹ Confusion as to what is the real justification—the end sought—distorts the proper constitutional analysis of the means employed.¹⁰⁰ The difficulty of analysis is compounded by the fact that within a given institution different decision-makers may see different justifications and the particular admissions program adopted may represent the result of a combi-

99. In *Hupart v. Board of Higher Educ.*, 420 F. Supp. 1087 (S.D.N.Y. 1976), the special admissions program was declared unconstitutional because it was supported by inconsistent justifications. In that case, the university had recognized an objective to increase the number of physicians in the urban community and to increase the number of minorities and women in the medical profession. Although the admissions committee rejected adopting a specific quota for minority students, about half the students admitted were from minority groups. In practice, the admissions committee rejected white applicants who had been slated for acceptance and admitted minority applicants in their stead. However, when the constitutionality of the admissions program was challenged, the university argued that it did not discriminate on the basis of race and that racial discrimination was contrary to the university's policy.

The district court concluded that there was racial discrimination. Significantly, however, the court observed the equal protection clause was violated because "the State cannot justify making distinctions on the basis of race without having first made a deliberate choice to do so." *Id.* at 1106. Moreover, due process requires that the university adhere to its own regulations. *Id.* at 1107. As the court stated:

While perhaps not every classification by race is "odious," every distinction made on a racial basis is at least suspect and must be justified. It cannot be accomplished thoughtlessly or covertly, then justified after the fact. The defendants cannot sustain their burden of justification by coming to court with an array of hypothetical and *post-facto* justifications for discrimination that has occurred either without their approval or without their conscious and formal choice to discriminate as a matter of official policy. It is not for the court to supply a rational or compelling basis (or something in between) to sustain the questioned state action. That task must be done by appropriate state officials *before* they take any action. As the record now stands, the State, as represented by these defendants, rejects race as a proper admission criterion, even in a program with objectives that might arguably justify its use. There is, then, no basis for the distinctions that were made by the State's agents on the basis of race.

Id. at 1106 (citations omitted).

100. The importance of having a clearly articulated justification was underscored by the New York Court of Appeals when it wrote: "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." *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 336, 348 N.E.2d 537, 546, 384 N.Y.S.2d 82, 90 (1976).

nation of different justifications.¹⁰¹

Cultural bias. A frequently advanced justification for preferential admissions is the supposed cultural bias of standardized admissions tests and of other standardized objective evaluations of academic performance or potential.¹⁰² This has led to the argument that black students may be intrinsically more qualified than current standard evaluation methods indicate. However, if the cultural bias of the existing admissions criteria were the real justification, there would be no rational basis for imposing a racial quota or for continually admitting a reasonable number of black students. The objective of an admissions program based on this justification would still be to choose those applicants, from among the group minimally qualified, who are most qualified, not merely to increase minority representation. The cultural bias status of a disadvantaged applicant would be relevant only insofar as it enhanced the predictive quality of the objective indicators. Thus, a black student might be considered more likely to succeed in school than a white student who had slightly higher college grades or a slightly better score on the LSAT or MCAT when allowance is made for the cultural bias of the objective indicators. Cultural bias then would be simply another factor in the regular admissions process which all students would pass through.

I seriously doubt that such an approach, if it is truly administered without regard to racial preference, would result in many additional blacks being accepted for law school and medical school over those now accepted by the regular admissions process. On the other hand if it is administered on the basis of race, the justification fails because of an ends-means inconsistency: there is no rational relationship between the existence of cultural bias and the use of racial quotas to overcome that bias.

Compensatory justice. Another justification for special admissions might be compensatory justice. One could argue that preference should be given to persons who have suffered societal disadvantage in order to compensate for that disadvantage.¹⁰³ As with cultural bias, this justification has nothing to do with the admission of black students, since race is logically

101. As to the variety of possible justifications for a racially preferential admissions program see Henkin, *DeFunis: An Introduction*, 75 COLUM. L. REV. 483, 489-91 (1975) [hereinafter cited as Henkin]; Nickel, *supra* note 60, at 536.

102. See notes 72-78 and accompanying text *supra*.

103. For a discussion of the compensatory justice rationale, see Nickel, *supra* note 60, at 537-39.

and functionally irrelevant when compensating one for having suffered social or economic disadvantage.¹⁰⁴ Disadvantaged whites are as deserving of special consideration as disadvantaged blacks,¹⁰⁵ since they start out with the same "built-in" educational handicaps due to their economic condition as disadvantaged blacks. Therefore, regardless of whether administering compensatory justice is a compelling social objective, it is not achieved by a program which classifies one on the basis of race. As with cultural bias, there is an end-means inconsistency that causes compensatory justice to fail as a justification.

Nor do I see any difference if the justification for the preference is compensatory justice for blacks as a group. Apart from questions of who is entitled to claim compensatory justice on behalf of the group,¹⁰⁶ disadvantaged whites as a group would also seem to have a claim to compensatory justice, notwithstanding that they suffered injury because of the class structure in the United States rather than because of societal racism. Moreover, they are the ones who are least likely to have benefited from societal racism. If the justification is compensatory justice, the preference should be for all disadvantaged persons, regardless of race.

Increase minority representation. Only when the social objective is racial in nature can one justify a means which involves a preference based upon race. Two racial justifications were advanced in *Bakke*, which the court assumed *arguendo* to be compelling.¹⁰⁷ First, the admission of blacks will serve to integrate the student body, thereby enhancing the educational experience for all students. Second, the admission of blacks will increase the number of blacks in the professions, thereby reducing their underrepresentation¹⁰⁸ and more effectively serv-

104. Although the *Bakke* court did not speak in terms of compensatory justice, it did observe that one's disadvantaged background could be considered in deciding who to admit. However, "[d]isadvantaged applicants of all races must be eligible for sympathetic consideration None of the foregoing measures (to increase minority enrollment) can be related to race, but they will provide for consideration and assistance to individual applicants who have suffered previous disabilities, regardless of their surname or color." 18 Cal. 3d at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

105. As to the problem of determining who is entitled to "compensatory justice," see Nickel, *supra* note 60, at 537, 555-58.

106. See *id.* As to compensation to the group itself, see *id.* at 538-39.

107. 18 Cal. 3d at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693.

108. Increasing minority representation was not in itself assumed to be compelling. Rather, the court stated "[t]he two major aims of the University are to integrate the student body and to improve medical care for minorities." *Id.* "[T]he second major objective of the [University's] program [is] the need for more doctors to serve the minority community." *Id.* at 56, 553 P.2d at 1167, 132 Cal. Rptr. at 695. See text

ing the needs of black communities.

Although legal commentators have supported the utility of the integration objective,¹⁰⁹ the argument is flawed. That objective implies that blacks are admitted, not because of the need for black lawyers and doctors, but because the presence of black students will advance the educational goals of the institution. In terms of value, the objective raises the question whether such an objective is of sufficient importance to society to justify the resulting racial discrimination.¹¹⁰ In any event, the objective of increasing the number of blacks in the professions will necessarily achieve the integration objective, so as to avoid the necessity for independent justification.

The second objective advanced in *Bakke* is, in my view, the strongest justification for racial preference. The Civil War Amendments were designed, not simply to set blacks free, but to raise them from the status of inferior beings,¹¹¹ and to enable them to participate equally in society—a goal that has yet to be fully realized.¹¹² Surely an aspect of black freedom is the right to have blacks represented in the professions in some reasonable proportion to their numbers in the society as a whole,¹¹³ and this objective is most effectively advanced by racially preferential admissions programs.

Regardless of the differing justifications for special admissions programs, it is clear that their *primary* purpose and effect is to increase black representation in the legal and medical professions. Since this is so, the criteria for admission should be expressed in racial terms. The justification is not compensatory but utilitarian. Racially preferential admissions programs exist to achieve a racial purpose and must be justified on this

following note 111 *infra*. However, this recognizes the need for greater representation if one considers that the medical and legal needs of blacks will most effectively be administered by black doctors and lawyers. On this point, see Griswold, *supra* note 64, at 517; Nickel, *supra* note 60, at 541-42; Sandalow, *supra* note 8, at 686-90.

109. For a discussion of the integration objective, see Greenwalt, *supra* note 95, at 590-92; O'Neil, *supra* note 7, at 949; Sandalow, *supra* note 9, at 684-96.

110. As to the "affirmative duty of educational institutions toward blacks to provide some real chance for participation in majority-dominated social institutions," see Zimmer, *supra* note 75, at 346-53, 368-71.

111. See text accompanying note 133 *infra*.

112. See notes 68-71 and accompanying text *supra*.

113. The *Bakke* court recognized the argument that "minorities still labor under severe handicaps. To achieve the American goal of true equality of opportunity among all races, more is required than merely removing the shackles of past formal restrictions" 18 Cal.3d at 61, 553 P.2d at 1170, 132 Cal. Rptr. at 698. Nevertheless, the court concluded that equality could be achieved by means less intrusive on the constitutional rights of white applicants. *Id.* at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693.

basis. By this justification, the means is consistent with the end.

Let me review the assumptions on which a racially preferential admissions program, with this as its justification, would be based. First, there is the recognition that the normal workings of the admissions process, based on objective academic criteria (which we will assume are not "culturally-biased"), will produce few, if any blacks, because blacks as a group are less academically qualified than whites as a group. Second, the objective is to bring about true racial equality, both in terms of increasing the representation of blacks in the professions, and enabling the needs of black communities for professional services to be met effectively. This justification is utilitarian rather than compensatory. It proceeds on the belief that blacks as a group are more likely than whites as a group to meet the needs of black communities for legal and medical services, and it is certainly within "the legislative competence" of the institution to make such a determination. The program reserves a minimum quota for blacks, usually corresponding more or less, to the black population of the state.¹¹⁴ The normal admissions process, relying on objective criteria, will likely continue to be employed to allocate the remaining places among the applicants.

Because the justification is utilitarian, the emphasis is on the present needs of blacks for adequate legal and medical services; the preference is not designed to compensate blacks as a group for past wrongs inflicted upon them. In fact, compensatory justice has nothing to do with the program, and there is no desire to improve opportunities for disadvantaged persons or to increase the number of lawyers coming from disadvantaged backgrounds. Since the objective is to increase black

114. For constitutional purposes, any reasonable number should be proper even if it exceeds the proportion of blacks in the population, since the dangers normally associated with quotas, such as oppression, would be absent. As Professor Ely notes, when the white majority is giving a preference to blacks over whites, it is not "likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally extended to Blacks." Ely, *supra* note 7, at 735. It has been argued, however, that this assumption should not apply when the decision to discriminate is made by university faculties, who are "less constrained than legislatures by the need to obtain public consent for their actions, creating a danger that the choices they make will depart too widely from the values of the larger society." Sandalow, *supra* note 8, at 696. Nevertheless, Professor Sandalow concludes that the fact that these programs were adopted by universities rather than by legislatures does not make them invalid. *Id.* at 701-03.

representation in the professions, the sole criterion for inclusion in the preference is blackness, and there is no concern with whether those who are admitted are advantaged or disadvantaged, or with whether they have been demonstrably injured by past discrimination. As a practical matter, the program will likely favor advantaged blacks since they are apt to be more academically qualified than disadvantaged blacks.

Who are injured as a result of the operation of the program and the racial discrimination in favor of blacks as a group? The effect of the program is to reduce the number of the places available for the most qualified applicants from, let us say, 100 to 90. Assuming that the 10 places now reserved for blacks would otherwise have been filled by white applicants, those 10 applicants have suffered direct injury as a result of the special admissions program. The program itself has caused no injury to any other white applicants. Other white applicants might argue that they were discriminated against on the basis of race, since, if they were black and had academic qualifications equal or superior to those of the black applicants admitted under the preference, they would have been admitted. Nevertheless, they would not have been admitted if the program had not been in effect, and therefore the existence of the program has caused no injury to them. It should also be noted the discrimination effected by the program is not directed against whites as a group, as would be the case, for example, if all of the places had been reserved for blacks. The racial discrimination here affects individual whites, but does not result in substantial exclusion of whites from medical school or law school.

RACIAL DISCRIMINATION AND CONSTITUTIONAL VALUES

We may begin our analysis of the constitutionality of the racial discrimination in question by making some observations that will help focus on the precise issues and the value problems presented. The sole basis for the claim of violation of the constitutional rights of white applicants by a special admissions program for blacks is that race is a criterion for admission to the limited space set aside for applicants admitted through the special program. In *Bakke*, for example, if the school arbitrarily reduced the number of applicants accepted from 100 to 84, and eliminated the special admissions program, there would be no conceivable constitutional objection. Similarly, if it had established a preference for minimally qualified students

who were returning veterans,¹¹⁵ or who had demonstrated a "bona fide intention" to practice in an area where there was a shortage of doctors or lawyers,¹¹⁶ or who could be classified as "disadvantaged,"¹¹⁷ there would be no constitutional objection either. By comparison, since there is no constitutional right to governmental employment or educational benefits solely on the basis of "objective merit," presumably the school could establish a preferential admissions quota on virtually any rational basis except race.¹¹⁸ The fact that the excluded white applicants could have been excluded for a host of nonracial reasons despite their presumed greater merit should at least raise a question as to the seriousness of the injury they sustained when they were excluded as a result of the state's effort to increase the number of black lawyers and doctors.¹¹⁹

Yet, as the *Bakke* court observed, it would be improper to label discrimination against individual whites as "benign," simply because the majority has discriminated against itself.¹²⁰ Discrimination in favor of blacks against whites will not be perceived as "benign" by those whites affected,¹²¹ and it would be inconsistent with the values reflected in the fourteenth amendment, of which racial neutrality is clearly one, to sustain racial discrimination simply because it was in favor of blacks and against whites. Preferential admissions result in the denial

115. Statutes giving limited preference in civil service employment to former veterans, although in opposition to the "objective merit" criterion of such employment, have survived equal protection attacks. See, e.g., *Branch v. DuBois*, 418 F. Supp. 1128, 1130 (N.D. Ill. 1976); *Feinerman v. Jones*, 356 F. Supp. 252, 260 (M.D. Pa. 1973); *Koelfgen v. Jackson*, 355 F. Supp. 243, 251-52, 254 (D. Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973). But cf. *Anthony v. Massachusetts*, 415 F. Supp. 485, 499 (D. Mass. 1976) (absolute job preference, as opposed to rating preference, coupled with restrictive Armed Forces recruitment practices, unconstitutionally discriminates against females).

116. "[T]he University may properly as it in fact does, consider other factors in evaluating an applicant, such as . . . matters relating to the needs of the profession and society, such as an applicant's professional goals." 18 Cal. 3d at 54-55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

117. *Id.*

118. As the court stated in *Bakke*: "We reiterate . . . that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission." *Id.* "[T]he standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner." *Id.*

119. See Greenwalt, *supra* note 73, at 585.

120. 18 Cal. 3d at 48 n.12, 553 P.2d at 1162 n.12, 132 Cal. Rptr. at 690 n.12. *Contra*, *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 348, N.E.2d 537, 545, 384 N.Y.S.2d 82, 89 (1976) ("We reject, therefore, the strict scrutiny test for benign discriminations . . .").

121. See, e.g., Lavinsky, *supra* note 39, at 526-27.

of a very tangible benefit to the excluded whites. At a minimum, they are denied attendance at a chosen institution and possibly entrance into the profession. Unlike a white property owner compelled to convey property to a black under an open housing law, for example, or a white child who is bussed out of his neighborhood for purposes of school desegregation,¹²² the excluded white applicant suffers racial injury of a demonstrably substantive nature, and may properly claim a "right" to be free from such discrimination.¹²³ Therefore, although the constitution is not colorblind, the analysis appropriate in such desegregation cases is not appropriate in analyzing the particular racial discrimination presented by racially preferential admissions programs.

Finally, the constitutionality of discrimination in favor of blacks and against whites should not depend on whether the discrimination was effected voluntarily by the institution, or was undertaken to remedy the effects of past discrimination against blacks by the institution or by the state. Courts have sustained racial preferences in favor of blacks over whites where this was considered necessary to remedy the effects of past discrimination against blacks, even though the preferred blacks were not themselves shown to be the victims of the past discrimination.¹²⁴ The *Bakke* court considered those cases inapplicable because the university was not shown to have previously discriminated against blacks.¹²⁵ In rejecting the argu-

122. "Classification by race has been upheld in a number of cases in which the purpose of the classification was to benefit rather than to disable minority groups." *Bakke v. Regents of the Univ. of Cal.*, 18 Cal.3d 34, 46, 553 P.2d 1152, 1160, 132 Cal. Rptr. 680, 688 (1976). Cf. *Lau v. Nichols*, 414 U.S. 563 (1974) (classification to provide instruction in English to students of Chinese ancestry); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (classification to achieve integration in public schools).

123. According to the court in *Bakke*:

These cases [of school desegregation] differ from the special admissions program in at least one critical respect, however. In none of them did the extension of a right or benefit to a minority have the effect of depriving persons who were not members of a minority group of benefits which they would otherwise have enjoyed. . . . The disadvantages suffered by a child who must attend school some distance from his home or is transferred to a school not of his qualitative choice cannot be equated with the absolute denial of a professional education as occurred in the present case.

18 Cal. 3d at 46-47, 553 P.2d at 1160-61, 132 Cal. Rptr. at 688-89.

124. *E.g.*, *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *modified en banc*, 452 F.2d 327, 330-31, *cert. denied*, 406 U.S. 950 (1972) (racial quota for hiring new employees based on past discrimination).

125. 18 Cal. 3d at 57, 553 P.2d at 1168-69, 132 Cal. Rptr. at 696-97.

ment that the university's program was constitutional because it was undertaken voluntarily rather than imposed by court order, the *Bakke* court stated: "To the victim of racial discrimination the result is not different under either circumstance."¹²⁶ But the same can be said when racial discrimination is allowed as a remedy for past discrimination. The impact of the preference in favor of blacks is felt by individual whites, not by the employer or by the government;¹²⁷ and the white worker, for example, who is denied employment opportunities so that blacks may be preferred, in all probability did not benefit from the past discrimination.

As will be seen, in these cases the courts have tried to *accommodate* the conflicting interests of black workers and white workers, and to deal with the consequences of the prior discrimination against blacks as a group without *unreasonably* discriminating against individual whites. Their approach in these cases, in my view, has great utility in determining the constitutionality of racially preferential admissions programs absent a showing of prior discrimination. In these cases it is the prior discrimination that furnishes the justification for giving racial preference to blacks. But, as previously indicated, the state is also justified in allowing racially preferential admissions for blacks in light of the gross underrepresentation of blacks in the legal and medical professions and the inability of blacks as a group to obtain admission in reasonable numbers without racial preference. The point to be emphasized is that regardless of the justification for the racial preference for blacks, the impact is not noticeably different. The fundamental question still is whether the Constitution prohibits the state from discriminating in favor of blacks as a group in seeking to achieve what it considers to be valid societal objectives.

If such discrimination is necessarily unconstitutional, it is because the fourteenth amendment prohibits *all* racial discrim-

126. *Id.* at 58, 553 P.2d at 1169, 132 Cal. Rptr. at 697.

127. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). The Court noted that "a sharing of the burden of the past discrimination is presumptively necessary [between the employer and innocent employees]. *Id.* at 777. The impact on white workers could be lessened by placing the burden entirely on the employer or the government, such as by requiring the immediate hiring of a certain number of *additional* workers, who would be black, and directing the employer to maintain such an increased work force. Similarly, blacks could be given back seniority and the employer could be precluded from laying off white workers who would have less seniority as a result. *Cf. id.* at 777 n.38 (noting possible remedial actions to shift to the employer the burden of past discrimination).

ination: once the action of the state is held to amount to racial discrimination, it is per se unconstitutional.¹²⁸ In *Bakke*, the court stated:

[W]e do not hesitate to reject the notion that racial discrimination may be more easily justified against one race than another

Regardless of its historical origin, the equal protection clause by its literal terms applies to "any person," and its lofty purpose, to secure equality of treatment to all, is incompatible with the premise that some races may be afforded a higher degree of protection against unequal treatment than others.¹²⁹

But while it is indeed true that one lofty purpose of the fourteenth amendment is to "secure equality of treatment for all," there are other values and purposes embodied in it. The fourteenth amendment, and the Civil War Amendments as a whole, also embody the value of black freedom, and the implementation of that value may, in certain circumstances, justify racial preference for blacks.

A Constitutional Value of Equal Protection: Black Freedom

As the Supreme Court stated in the *Slaughter-House Cases*, the primary historical purpose of the fourteenth amendment was "the freedom of the slave-race, [and its protection] . . . from the oppressions of those who had formerly exercised unlimited dominion over him."¹³⁰ While the Court in the *Slaughter-House Cases* indicated the equal protection clause was not limited to blacks, it did state:

[I]f other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was sup-

128. See note 39 *supra*.

129. 18 Cal. 3d at 51, 553 P.2d at 1163, 132 Cal. Rptr. at 691.

130. 83 U.S. (16 Wall) 36, 71 (1873). See generally Frank & Munro, *supra* note 20, at 132-42.

posed to be accomplished, as far as constitutional law can accomplish it.¹³¹

Clearly then, "the amendment cannot be applied without a sense of its historical meaning and function."¹³²

Considering the Civil War Amendments as a whole, Professor Kinoy has argued they were designed to create a *constitutional right of black freedom*,¹³³ to overturn forever the premise that blacks were an inferior or subordinate class. As Kinoy stated:

[T]he main thrust of the Thirteenth, Fourteenth and Fifteenth Amendments was the construction of a penumbra of legal commands which were designed to raise the race of freedmen from the status of inferior beings—a status imposed by the system of chattel slavery—to that of free men and women, equal participants in the hitherto white political community consisting of the "people of the United States". The constitutional right of the black race to this status of freedom was the simple and central objective of the Reconstruction Amendments.¹³⁴

The significance of this constitutional right of black freedom was recognized by the Supreme Court in *Jones v. Alfred H. Mayer Co.*, where it held that Congress had the power, under the implementing clause of the thirteenth amendment, to prohibit all racial discrimination by private persons in the sale and rental of property.¹³⁵ The Court based its holding on the premise that under the amendment, Congress had the power to eliminate the restraints upon fundamental rights which are the essence of civil freedom.¹³⁶ The Court wrote:

And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

. . . . At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least

131. 83 U.S. (16 Wall) at 72.

132. Ely, *supra* note 7, at 728.

133. Kinoy, *supra* note 15.

134. *Id.* at 388 (emphasis added).

135. 392 U.S. 409, 438-39 (1968).

136. *Id.* at 440-41.

this much, then the Thirteenth Amendment made a promise the Nation cannot keep.¹³⁷

The primary value of the fourteenth amendment, then, was *black freedom* and while the value of racial neutrality—developed by the Court later¹³⁸—is also a value, one cannot contend that it was intended to supplant the value of black freedom. Certainly discrimination in favor of blacks cannot be considered a relic of slavery. Nor can the cause of black freedom be advanced by barring a program which specifically favors blacks at a time when black freedom has not yet been achieved in American society. Considering the purpose of the fourteenth amendment, one must be startled that it would be interpreted to render unconstitutional affirmative state efforts to make black freedom a reality.

The Wartime Amendments reflected a promise made to the newly freed blacks of full equality in American society: a place in society for blacks as a group equal to that enjoyed by whites as a group.¹³⁹ Once full equality between blacks and whites is achieved, the constitutional right of black freedom will have served its purpose, and the sole value of the fourteenth amendment can then be equality for all. At that time, the Constitution truly can be "color blind."

Unfortunately, that time has not yet arrived. In America today we have the tragedy of "two societies, black and white, separate and unequal."¹⁴⁰ As part of the consequences of being "separate and unequal," blacks as a group have disproportionately fewer doctors and lawyers, and the academic qualifications of black applicants to law school and medical school, as a group, are inferior to those of white applicants as a group. To implement the constitutional right of black freedom, a state university should be able to give limited preference to blacks in admission to its medical schools and law schools. As the New York Court of Appeals observed in *Alevy*, "It would indeed be ironic and, of course, would cut against the very grain of the amendment, were the equal protection clause used to strike down measures designed to achieve real equality for persons

137. *Id.* at 442-43.

138. See Sandalow, *supra* note 8, at 664.

139. See also Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 VAND. L. REV. 475 (1969).

140. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (Bantam ed. 1968).

whom it was intended to aid."¹⁴¹ Although the majority too is protected from some racial discrimination by the fourteenth amendment, it is submitted that they are not protected against the type of discrimination which is designed to provide benefits for blacks as a group, and which does not discriminate against whites as a group. And, as discussed below, in the cases coming before the Court, the discrimination in question was found to be "invidious," and thus unconstitutional because it could not conceivably advance any valid state interest and was simply "discrimination for discrimination's sake."

The Appropriate Constitutional Test for Racially Preferential Admissions Programs

Strict scrutiny. When the California Supreme Court considered *Bakke*, it saw a racial classification which triggered the result-oriented strict scrutiny test and raised the question of whether the classification furthered a compelling state interest in a manner least intrusive to majority rights. But applying this test obscures the crucial value judgment which must be made in order to determine whether the *particular* racial discrimination involved is unconstitutional.¹⁴² More significantly, the Supreme Court has clearly developed a doctrine, totally apart from the compelling state interest test, by which the constitutionality of racial discrimination can be evaluated. It is that doctrine which has been effectively applied in the past to deal with claims of racial discrimination rather than the compelling state interest test.

The compelling state interest/strict scrutiny test apparently originated¹⁴³ in the Japanese relocation cases of *Hirabayashi v. United States*¹⁴⁴ and *Korematsu v. United*

141. 39 N.Y.2d 326, 334-35, 348 N.E.2d 537, 544-45, 384 N.Y.S.2d 82, 89 (1976); cf. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1968) (urban renewal agency must take affirmative steps to overcome rampant discrimination in community housing market in meeting its duty to relocate persons displaced by its projects):

What we have said may require classification by race. That is something the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.

142. See text accompanying note 33 *supra*.

143. Cf. O'Neil, *supra* note 6, at 934-35 (asserting that the United States Supreme Court has never defined "compelling state interest").

144. 320 U.S. 81 (1943).

States.¹⁴⁵ The Court there upheld the government's right to remove persons of Japanese ancestry from the West Coast. Only in those cases¹⁴⁶ has the Court ever "sustained an explicitly racial classification detrimental to a minority group."¹⁴⁷ Strictly speaking, in *Hirabayashi* and *Korematsu*, the discrimination was on the basis of ancestry. But as the Court in *Hirabayashi* recognized, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded on equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."¹⁴⁸ Focusing on the *particular* racial discrimination, rather than simply recognizing the existence of a racial classification, the Court set forth the important principle that "racial discriminations are in most circumstances irrelevant and therefore prohibited."¹⁴⁹ Nevertheless, it upheld the constitutionality of the particular racial discrimination because of the exigencies of wartime. In *Korematsu*, the Court attempted to minimize the racial nature of the discrimination by emphasizing it was based only on Japanese ancestry and instituted because the United States was at war with Japan.¹⁵⁰ However, the Court's decisions in these cases has not stood the test of time;¹⁵¹ there is no doubt that it most seriously undermined the value of racial neutrality and of individual freedom in American society.

Clearly in these cases the Court made a value judgment upholding the *racial discrimination* in question. In neither case did the Court purport to be determining the validity of a *racial classification* under the strict scrutiny test. If it had, however, it doubtless would have concluded that the interest of military security was "compelling," and could not be advanced by means "less drastic" than forcibly relocating the Japanese population from the West Coast. In any event, these cases furnish

145. 323 U.S. 214 (1944).

146. Referring to *Hirabayashi* and *Korematsu*, the *Bakke* court observed: "It has been more than three decades since any decision of the United States Supreme Court upheld a classification which resulted in detriment solely on the basis of race" 18 Cal. 3d at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690.

147. O'Neil, *supra* note 6, at 934.

148. 320 U.S. at 100.

149. *Id.*

150. 323 U.S. at 223-24.

151. For a severe criticism of the Court's position, see, e.g., Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

no authority for requiring that the constitutionality of racial discrimination be determined by reference to a compelling state interest which cannot be achieved by "less drastic means."

In more recent times, the Supreme Court supposedly adopted the compelling state interest test in *McLaughlin v. Florida*¹⁵² and *Loving v. Virginia*,¹⁵³ to determine the constitutionality of racial discrimination. In neither case, however, did the Court distinguish between "compelling" and "legitimate" state objectives nor did the Court consider whether the ends could be achieved by less drastic means.

In *McLaughlin* the Court considered a Florida statute which prohibited an unmarried interracial couple from occupying the same room at night. Such conduct was not barred when engaged in by persons of the same race. The type of racial discrimination being considered was directed equally against blacks as a group and against whites as a group.¹⁵⁴ In invalidating the discrimination, the Court noted that the central purpose of the equal protection clause was to "eliminate racial discrimination emanating from official sources," and concluded that "[t]his strong policy renders racial classifications 'constitutionally suspect,' . . . and subject to 'the most rigid scrutiny,' . . . and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose"¹⁵⁵ The Court further maintained that a law infringing on one's freedom from invidious discrimination would be upheld "only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy."¹⁵⁶ The state was unable to suggest any constitutionally acceptable legislative purpose conceivably advanced by the racial discrimination effected by the statute. Without such justification, the discrimination "is reduced to an invidious discrimination forbidden by the Equal Protection Clause."¹⁵⁷ The key then, as *McLaughlin* makes clear, is not that there is or is not a compelling state interest, but whether there is *invidious* discrimination based on race.¹⁵⁸

152. 379 U.S. 184 (1964).

153. 388 U.S. 1 (1967).

154. This type of racial discrimination falls within category 2 of the four categories of discrimination set out in the text following note 40 *supra*.

155. 379 U.S. at 192 (citing *Hirabayashi*).

156. *Id.* at 196.

157. *Id.* at 192-93.

158. *But cf.* *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 50-51, 553 P.2d

In *Loving*, the Court invalidated Virginia's anti-miscegenation law and further clarified the meaning of invidious racial discrimination. As in *McLaughlin*, the Court noted that the "clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of *invidious* racial discrimination in the States."¹⁵⁹ It pointed out that the fourteenth amendment had traditionally required a very heavy burden of justification for statutes drawn according to race.¹⁶⁰ If a racial classification were ever to be upheld, it "must be shown to be necessary to the accomplishment of some *permissible* state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."¹⁶¹ Thus, the discrimination must be designed to serve what the Court finds to be a proper purpose—a purpose other than discrimination itself. There was no such purpose in the Virginia law. Because the law only prohibited whites from entering into an interracial marriage, its purpose was to maintain white supremacy,¹⁶² a clearly impermissible and invalid purpose.

In neither *McLaughlin* nor *Loving* were the states able to present any reasonable objective, let alone a compelling one, other than the racial discrimination itself. As the *Loving* Court concluded: "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."¹⁶³ Thus, although the Court spoke in terms of requiring a heavy burden of justification to sustain the discrimination, the less rigid test of reasonable relationship would have been sufficient to invalidate the governmental action in question. This is also illustrated by *Bolling v. Sharpe*,¹⁶⁴ where the Court invalidated school segregation in the District of Columbia. Applying the traditional rational basis test, the Court, without extensive discussion, concluded that no legitimate

1152, 1163, 132 Cal. Rptr. 680, 691 (1976) (rejecting the view that the "compelling interest" measure is applicable only to invidious discrimination, defined as discrimination against minorities).

159. 338 U.S. at 10 (emphasis added).

160. *Id.* at 9.

161. *Id.* at 11 (emphasis added).

162. *Id.* Although the Court found that the statute burdened the "fundamental right" of marriage, thus engaging the compelling state interest standard to test its validity, the statute would not have survived a challenge under the less rigid rational basis test.

163. *Id.*

164. 347 U.S. 497 (1954) (applying fifth amendment due process to segregated schools in Washington, D.C.).

purpose was served by school segregation.¹⁶⁵ Similarly, in *Anderson v. Martin*,¹⁶⁶ the Court invalidated a Louisiana voting statute which required designation of the candidate's race on the ballot. According to the Court, there was simply "no relevance in the State's pointing up the race of the candidate as bearing upon his qualifications for office,"¹⁶⁷ apart from encouraging the voter to make the choice on a racial basis. Not having a justification independent of the discrimination, the statute was patently unconstitutional.

What the Constitution prohibits, therefore, is racial discrimination for the sake of discrimination—racial discrimination which is invidious because it has no purpose apart from discrimination itself. The only relevant value to consider when analyzing invidious discrimination is the value of racial neutrality, the lack of which necessarily renders the discrimination unconstitutional. Under this analysis, the rational basis test would have been sufficient to bar the racial discrimination in these cases.¹⁶⁸ The compelling state interest test thus has been of no utility in enabling the Supreme Court to deal with the constitutionality of racial discrimination, and is not in practice the frame of reference with which the Court has approached this question.

The essence of invidiousness, as we have seen, is the absence of a valid governmental purpose. Its essence is not discrimination against blacks, and the opposite of invidious, for constitutional purposes, is not benign discrimination.¹⁶⁹ The Constitution prohibits purposeless discrimination against whites just as it does against blacks. The crucial question, however, is whether the Constitution necessarily prohibits racial discrimination that *does serve a valid governmental purpose*, and it is that question to which we will now turn.

Balancing conflicting values. Whether racial discrimination is constitutional depends on the particular type of discrim-

165. *Id.* at 498. Although observing that the equal protection and due process clauses are not interchangeable, the Court appeared to use a rational basis test. Because segregation is not reasonably related to a proper governmental objective, the Court wrote, it violates the due process clause.

166. 375 U.S. 399 (1964).

167. *Id.* at 403.

168. According to Professor Greenawalt, "[i]f the only purpose underlying a classification is itself constitutionally forbidden, say the denial of opportunity for minority groups, or the classification bears no reasonable relation to a legitimate purpose that supposedly underlies it, then the classification is unconstitutional." Greenawalt, *supra* note 73, at 561.

169. See notes 120-21 and accompanying text *supra*.

ination involved. We have previously referred to four different types of discrimination: (1) discrimination against blacks as a group; (2) discrimination against both blacks as a group and whites as a group; (3) discrimination in favor of blacks as a group, which results in discrimination against whites as a group; and (4) discrimination in favor of blacks as a group, which results in discrimination against individual whites, but not against whites as a group.

As to the first and second categories of discrimination, the values of racial neutrality and black freedom operate in tandem, and it is difficult to conceive of any valid governmental purpose that could be achieved by such discrimination. A possible exception might be where there has been discrimination against individual blacks and individual whites for the purpose of bringing about racial integration in public housing by imposing black and white quotas for each project, or where a state court was asked to enforce racial quotas in a racially planned community.¹⁷⁰ The purpose of achieving racial integration would be relied upon to justify the racial quota and the resulting racial discrimination. In deciding whether that is a valid purpose a court would make a value judgment of whether the purpose of achieving racial integration is of sufficient societal importance to justify the resulting discrimination against individual blacks and/or individual whites.¹⁷¹ While I do not propose to suggest the resolution of that value judgment, I would emphasize that it is the resolution of that value judgment on which the constitutionality of the discrimination in question would depend.

The Supreme Court has not yet considered the constitutionality of the third and fourth categories of discrimination. I would submit, however, that racial discrimination in favor of blacks can be sustained as valid in certain circumstances if it can be shown to be related to the value of *black freedom*. If it is not related to this value, however, it is clearly unconstitu-

170. On the possible constitutional implications, see generally Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962).

171. In such a situation, reliance on the compelling state interest test, because it is result oriented, will likely obscure this value judgment. *But cf.* *Otero v. New York Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973) (recognizing a constitutional and statutory duty to integrate a housing project, even to the extent of denying displaced minority tenants a priority for the new housing they would otherwise be entitled to; the defendant satisfied its "heavy burden" of justification for racial considerations used to achieve its integration objective).

tional. Suppose, for example, that in a predominantly black city, an ordinance is passed reserving all public facilities for the exclusive use of blacks. That ordinance would be patently unconstitutional because it serves no valid governmental purpose "independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."¹⁷² It flies in the face of the fourteenth amendment's value of racial neutrality, and the fourteenth amendment's value of black freedom is not advanced by the subjugation of whites to blacks. The fourteenth amendment, then, prohibits denial of access of public facilities on the basis of race, whether it be blacks or whites who are excluded.

A very different question is presented when the state discriminates in favor of blacks as a group in order to advance an interest related to the constitutional right of black freedom, as when a state establishes a racially preferential quota for admission to law school or medical school. Although the discrimination is not purposeless, the Court still must make a value judgment as to whether its purpose is a valid one. This value judgment brings into play a conflict between the fourteenth amendment values of racial neutrality and black freedom, values which operate in tandem whenever there is discrimination against blacks as a group or mutual discrimination against blacks and whites equally. The resolution of that conflict may require a *balancing*,¹⁷³ a reasonable accommodation between the interests of blacks as a group in full integration into American society, and the interests of whites as a group in racial neutrality and freedom from discrimination.

To illustrate the balancing, suppose the highly unlikely event that a state embarked on a crash program to increase the number of black lawyers and doctors and decided that for the next five years only blacks would be admitted to the state's medical schools and law schools.¹⁷⁴ Although this would advance the value of black freedom, it would do so at the cost of completely destroying the value of racial neutrality. To effec-

172. *Loving v. Virginia*, 338 U.S. 1, 11 (1967).

173. Professor Henkin has posited the balancing question as follows:

[A]ssuming the practices attacked in *DeFunis* are not impermissible in principle, might the different possible purposes of such programs weigh differently in a balance against the interests of those disadvantaged by them, so that some "sacrifices" in some measure may be imposed on the majority for some of the suggested purposes though not for others? And if the cost to the majority is not ipso facto a barrier, is a state required to justify the actual number of applicants admitted on a preferred basis in relation to the societal purposes to be achieved?

Henkin, *supra* note 101, at 492-93.

174. See note 157 *supra*.

tuate the purpose of the equal protection clause, the state is constitutionally required to balance the values that it embodies. Any preference given to blacks as a group must be *reasonable* in its impact on whites as a group, and the state, therefore, cannot constitutionally deny admission to *all* whites. The state is constitutionally required to balance the conflicting values and group interests and must adopt a means of achieving its objective that does not *unreasonably discriminate* against whites. The total exclusion of whites as a group then, in the unlikely event that it should ever occur, would be unconstitutional, because the means chosen by the state to achieve its objective do not strike a fair balance between the conflicting fourteenth amendment values and the corresponding group interests.

The requirement of balancing and making a reasonable accommodation was recognized by the New York Court of Appeals in *Alevy v. Downstate Medical Center*, when it held that the state could grant a reasonable preference to blacks and Puerto Ricans in admission to medical school.¹⁷⁵ The court took the position that racial discrimination in favor of minorities as a group should not be tested by the same standard as discrimination against minorities.¹⁷⁶ Since such discrimination is within the purpose of the fourteenth amendment, it would be upheld if it advances a "substantial state interest." Such an interest exists, said the court, if "on balance, the gain to be derived from the preferential policy outweighs its possible detrimental effects."¹⁷⁷ Although the court did not say what specifically would affect the balance, it did suggest that the discrimination must be limited in time and extent.

Further guidance on the matter of balancing conflicting values associated with minority preference can be found in decisions of the lower federal courts upholding racial hiring quotas designed to eliminate the effects of past discrimination

175. Since Alevy could not show he would have been admitted to medical school, but for the racial preference given to minorities, the court did not decide whether the racial preference was reasonable. 39 N.Y.2d 326, 337-38, 348 N.E.2d 537, 547, 384 N.Y.S.2d 82, 91 (1976).

176. The court observed that the United States Supreme Court was moving away from the "two-tiered" test. *Id.* at 333, 348 N.E.2d at 543-44, 384 N.Y.S.2d at 88. Further, "[i]t would indeed be ironic and, of course, would cut against the very grain of the amendment, were the equal protection clause used to strike down measures designed to achieve real equality for persons whom it was intended to aid." *Id.* at 334-35, 348 N.E.2d at 544-45, 384 N.Y.S.2d at 89.

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

against blacks.¹⁷⁸ When past discrimination has been shown, the employer can be compelled to hire a minimum quota of blacks.¹⁷⁹ The black hired, however, may not have suffered the past discrimination and the white not hired may not have benefited from such discrimination.¹⁸⁰ Nevertheless, advancing the group interests of blacks—and in this sense implementing the value of black freedom—in such cases has been held, on balance, to outweigh considerations of racial neutrality, provided that racial neutrality is not disregarded completely. For example, if in order to remedy past discrimination, all future job openings were reserved for blacks until a quota was reached, there would be discrimination against white workers as a group. This is improper, since the group interests of whites must be accommodated within the preferential treatment given to blacks. A *reasonable* accommodation would give preference to blacks as a group but still allow some whites to be hired during the period of attaining a minimum quota of blacks, so that whites as a group would not be excluded entirely.

The leading case in this regard is *Carter v. Gallagher*.¹⁸¹ There, the city had a black population of almost seven percent, but maintained a virtually all-white fire department. The district court found the all-white nature of the fire department was the result of racial discrimination and enjoined discrimina-

178. The University of California pointed to those cases in support of its racially preferential admissions program. The court rejected its argument by limiting those cases to situations where past discrimination by the employer is established. "Absent a finding of past discrimination . . . the federal courts, with one exception, have held that the preferential treatment of minorities in employment is invalid . . ." *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d at 57, 553 P.2d at 1168, 132 Cal. Rptr. at 696.

179. *Carter v. Gallagher*, 452 F.2d 327, 331 (8th Cir. 1972), *en banc* modifying, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). The court did not consider its order to hire twenty blacks "a 'quota' system because as soon as the trial court's order is fully implemented, all hiring will be on a racially nondiscriminatory basis." *Id.* at 330.

180. *Id.*; *cf.* *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1976) (adverse effect on the interests of apparently innocent employees will not bar an award of retroactive seniority status to victims of prior racial discrimination). Significantly different from the lower court position in *Carter*, the Supreme Court in *Franks* recognized that at such time as individual class members seek positions as truck drivers, "evidence that particular individuals were not in fact victims of racial discrimination will be material." *Id.* at 772. If the defendant establishes that an individual was not a victim of past discrimination, retroactive seniority may be denied to the individual. *Id.* at 773.

181. 452 F.2d 315 (8th Cir. 1971), *modified en banc*, 452 F.2d 327 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).

tion against blacks in future hiring. Further, it directed that the next twenty vacancies be filled exclusively by blacks, American Indians and other minority applicants who otherwise qualify.¹⁸² The Eighth Circuit held that this absolute preference for minorities was impermissible, directing instead that one of every three new firefighters be a minority until twenty minority persons had been hired. The court stated:

The absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another. Yet we acknowledge the legitimacy of erasing the effects of past racially discriminatory practices. . . . *To accommodate these conflicting considerations*, we think some reasonable ratio for hiring minority persons who can qualify under the revised qualification standards is in order for a limited period of time, or until there is a fair approximation of minority representation consistent with the population mix in the area.¹⁸³

The same result has been reached in all of the other federal circuits that have passed on the question: racially preferential hiring quotas are constitutionally permissible so long as they are reasonable and whites as a group are not excluded from future employment opportunities.¹⁸⁴ While the Constitution permits racial preference in order to advance a valid state interest, whether it be the interest in eliminating the present effects of past discrimination, or the interest in alleviating the gross underrepresentation of blacks in the legal and medical professions, it only permits a *reasonable* racial preference, because only by a reasonable racial preference can conflicting constitutional interests be accommodated.

Conversely, imposing a promotion quota has been rejected as unconstitutional where few promotions would exist and

182. *Id.* at 318, 323.

183. *Id.* at 330 (on rehearing) (emphasis added).

184. In regard to public employment *see, e.g.*, *Erie Human Relations Comm'n v. Tullio*, 493 F.2d 371 (3d Cir. 1974); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974); *Vulcan Soc'y v. Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973); *Bridgeport Guardians v. Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973); *Castro v. Beccher*, 459 F.2d 725 (1st Cir. 1972). In regard to private employment, *see, e.g.*, *Patterson v. Newspaper & Mail Deliverers Union*, 514 F.2d 767 (2d Cir. 1975); *Rios v. Steam Fitters Local 638*, 501 F.2d 622 (2d Cir. 1974).

would be limited to present employees.¹⁸⁵ In such a situation, individual blacks, in effect, would be preferred over individual whites. The reasonableness of racial preference has also been involved in affirmative efforts to increase the number of black supervisory personnel in school systems. In one case, where the court upheld racially influenced promotions to principal and vice principal, the proposal was that thirty five whites and twenty blacks be advanced.¹⁸⁶ But in another case, an integration program by which the vacant school administrative positions could be filled only by blacks was held to be impermissible.¹⁸⁷

Where blacks are preferred then, the key factor is the reasonableness of the preference. Whether the preference is designed to eliminate the effects of past discrimination, or is contained in an affirmative action program voluntarily undertaken, the objective of advancing the interests of blacks as a group cannot be achieved by means that unreasonably discriminate against whites. The state must balance the conflicting interests and constitutional values, and seek a reasonable accommodation between them. When it does, its action, which advances the fourteenth amendment value of black freedom without unreasonably impinging on the fourteenth amendment value of racial neutrality, is not unconstitutional, although it results in discrimination against individual whites.

Under this analysis, the racially preferential admissions program involved in *Bakke* would be clearly constitutional. That program reserves only a limited number of places for racial minorities, in relation to minority representation in the general population, while all other places are filled without regard to race. While this does result in discrimination against those individual whites who would have been admitted in the absence of the racially preferential admissions program, their position is no different from that of the white employee who would have obtained a job if it had not been for the black hiring quota. Surely, the Constitution does not require a different

185. *Kirkland v. New York State Dep't of Correctional Servs.*, 520 F.2d 420, 429 (2d Cir. 1975).

186. *Porcelli v. Titus*, 431 F.2d 1254 at 1256 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).

187. *Anderson v. San Francisco United School Dist.*, 357 F. Supp. 248 (N.D. Cal. 1972). *But see Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 58 n.27, 553 P.2d 1152, 1168 n.27, 132 Cal. Rptr. 680, 696 n.27 (1976) (stating that the racial preference in *Anderson* was barred not because of excessive preference, but because of the absence of "a finding that the defendant had been guilty of prior discriminatory conduct").

result where the basis for the exclusion is advancement of the state's interest in alleviating the gross underrepresentation of racial minorities in the legal and medical professions.¹⁸⁸

Let me summarize then the constitutional argument that I believe should sustain the kind of limited racial preference involved in *Bakke*. Putting aside the matter of "racial classification" and the compelling state interest test, which merely obscure the value judgments that a court will necessarily be making when it decides whether or not any particular racial discrimination is unconstitutional, and which is not the test that the Supreme Court has applied in practice to determine the constitutionality of racial discrimination, we must look to the purpose and effect of the racial discrimination in question. The fourteenth amendment embodies the value of racial neutrality and the value of black freedom. Generally, racial discrimination will not advance a valid state interest, and in such a case it is invidious and constitutionally forbidden. However, increasing the representation of racial minorities in the medical and legal professions clearly does advance a valid state interest, being directly related to the implementation of the fourteenth amendment value of black freedom. Because of the shortage of available places and the academic inferiority of blacks as a group in comparison to whites as a group, the state may make a legislative judgment that increasing black representation in the professions will be achieved effectively only by the imposition of a racial admissions quota. Since the discrimi-

188. NAACP v. Allen, 493 F.2d 614, 619 (5th Cir. 1974) affirmed a racial hiring quota for the Alabama state police. The court stated:

In the absence of an invidious purpose, a determination of unconstitutionality here would be clearly unwarranted. . . . [T]he affirmative hiring relief instituted *sub judice* fails to transgress either the letter or the spirit of the Fourteenth Amendment. . . . No one is denied any right conferred by the Constitution. It is the collective interest, governmental as well as social, in effectively ending unconstitutional racial discrimination, that justifies temporary, carefully circumscribed resort to racial criteria, whenever the chancellor determines that it represents the only rational, nonarbitrary means of eradicating past evils.

The same "collective interest, governmental as well as social," in alleviating the gross underrepresentation of blacks in the medical and legal profession justifies the limited racial preferences for blacks in admissions to medical school and law school.

One should note that while the United States Supreme Court has invalidated discrimination against women (see, e.g., *Stanton v. Stanton*, 421 U.S. 7 (1975); *Reed v. Reed*, 404 U.S. 71 (1971)), it appears to have sustained discrimination favoring women in order to compensate for the effects of past discrimination. See, e.g., *Kahn v. Shevin*, 416 U.S. 351 (1974).

nation does advance a valid state interest, it is not invidious and thus not per se unconstitutional. But since the discrimination also creates a conflict between the fourteenth amendment value of racial neutrality and the fourteenth amendment value of black freedom, the amendment requires a balancing of the conflicting values and an effort to accommodate the conflicting interest. This balance is achieved if the discrimination effected by the program is *reasonable* and does not discriminate against whites as a group. While this constitutional analysis will permit discrimination on the basis of race against individual white applicants, it is well settled that individuals may be required to make sacrifices for the public good. Moreover, the fairness of this approach is heightened by the fact that excluded whites could have been excluded for a host of nonracial reasons. Thus, the racially preferential admissions program does not violate their constitutional rights.

CONCLUSION

In this writing I have attempted to set forth a justification for racially preferential admissions that accords both with the realities of American life and with the values embodied in the fourteenth amendment and in the Wartime Amendments, taken as a whole. I have sought to show why, without the racially preferential admissions quotas adopted by law schools and medical schools, very few members of minority groups will be admitted. In that circumstance, the gross underrepresentation of blacks in these two very important professions will continue. I submit that a limited racial preference for minorities, of the type involved in *Bakke*, is fully consistent with the fourteenth amendment.

In *Bakke*, the California Supreme Court, in the context of invalidating that preference by its application of the compelling state interest test, in effect made the value judgment that the Constitution prohibits the state from giving preference to racial minorities because it results in racial discrimination against individual whites. In so doing it placed its interpretation of "consistency of principle" above the interests of minorities as a group in achieving true equality, and paid little attention to the realities of American life and the consequences of societal racism. It focused only on the constitutional value of racial neutrality and ignored the equally important constitutional value of black freedom. While all it may have intended to do was to force universities to be more disingenuous or to pay

a higher price in their efforts to increase black representation in the professions, if the universities are unwilling to do so, the result of the decision may be to deal a crippling blow to this aspect of black freedom.

I respectfully submit that the court made the wrong decision, that it failed to consider all the constitutional values involved, and thus improperly skewed the value judgment that it made. If the state cannot take affirmative action to alleviate the gross underrepresentation of blacks in the medical and legal professions, if it cannot give blacks the kind of limited racial preference involved in *Bakke*, if it cannot try to make meaningful the constitutional right of black freedom, then truly, the Constitution has "made a promise the Nation cannot keep."¹⁸⁹

Addendum

After this article was at the printer, the Supreme Court decided *United Jewish Organizations v. Carey*, 45 U.S.L.W. 4221 (1977). In that case, the Court upheld New York's use of racial criteria in drawing legislative district lines to secure the Attorney General's approval of the redistricting under section 5 of the Voting Rights Act. (42 U.S.C. § 1973c.) Justice White announced the judgment of the Court and took the position that the redistricting plan was constitutional both on the grounds that it was adopted in an effort to comply with the Voting Rights Act and that independent of the Act white voters were not unconstitutionally discriminated against.

Only Justice Stevens fully concurred in the opinion. Justices Brennan and Blackmun concurred solely on the ground that the plan was constitutional because it was adopted in an effort to comply with the Act. Justice Rehnquist concurred because the redistricting resulted in a fair allocation of political power between whites and nonwhites. Justices Stewart and Powell took the position that the redistricting plan was not shown to have been adopted to advance a racially discriminatory purpose. Chief Justice Burger dissented and Justice Marshall did not participate.

Kings County, New York, became subject to section 5 of the Voting Rights Act and the state was therefore required to

189. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

submit its 1972 reapportionment statute affecting legislative districts in Kings County to the Attorney General of the United States. The statute was rejected because the state had not met its burden of establishing that the redistricting "had neither the purpose or effect of abridging the right to vote by reason of race or color." (45 U.S.L.W. at 4222.) Rather than challenge this determination, the state made an effort to comply with the Act so that the 1974 primary and general elections could go forward under the 1972 statute. The revised plan did not change the number of assembly and senate districts with non-white (black and Puerto Rican) majorities, but changed the size of the majorities so that all affected districts would be at least 65% nonwhite. To achieve that majority, part of the Hasidic Jewish community of Williamsburgh, previously located entirely in one assembly and one senate district, had to be reassigned to another assembly and senate district. United Jewish Organizations, Inc., sued on behalf of the Jewish community, alleging that the value of their franchise was being diluted solely for the purpose of achieving a racial quota in violation of the fourteenth amendment, and that they were assigned to voting districts solely on the basis of race in violation of the fifteenth amendment. The district court dismissed the complaint and a divided Second Circuit affirmed.

The Supreme Court upheld the constitutionality of the redistricting plan. Justices White, Stevens, Brennan and Blackmun took the position that the plan was constitutional because it represented a proper effort to comply with section 5 of the Voting Rights Act. *Beer v. United States*, 425 U.S. 130 (1976), established the section 5 test that redistricting could not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." (45 U.S.L.W. at 4225.) In order to comply with that test, the state could increase the percentage of nonwhite voters in a particular district until they would constitute a clear majority of the voters. (*Id.*) Speaking for the Court, Justice White stated, "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment," nor is the use of racial criteria "confined to eliminating the effects of past discriminatory districting or apportionment." (*Id.* at 4226.) Finally, his opinion recognizes that a state can use a specific quota to establish nonwhite majority districts and the percentage of nonwhites in a district could be set at such a level as to ensure a

majority of nonwhite voters.

Apart from an effort to comply with the Act, Justices White, Stevens, and Rehnquist took the position that the state could take race into account in order to "achieve a fair allocation of political power between white and nonwhite voters" in the county. (*Id.* at 4227.) Justice White noted that the plan did not "fence out" the white population from participation in the political processes of the county or unfairly cancel out white voting strength. The total number of districts with white majorities remained roughly equal to their size in the population of the county. In effect, he concluded that it was permissible for the state to "alleviate the consequences of racial voting at the polls" by insuring that nonwhites would have a majority in at least some districts, in the same manner as it was permissible for the state to change from multimember districts to single member districts for the purpose of increasing minority representation. (*Id.*)

United Jewish clearly appears to be limited to a constitutional analysis of racial discrimination involving the elective franchise. Nonetheless, the case may have significant overtones when the Court considers the issues presented in *Bakke*.

Significantly, only Chief Justice Burger appeared to take the position that racial preference—reflected in racial quotas—was necessarily unconstitutional. Justices White, Stevens, Brennan, Blackmun and Rehnquist agreed that preference for racial minorities through the use of quotas was constitutionally permissible in some circumstances. Justice White's opinion for the Court and Justice Brennan's concurring opinion emphasize what may be termed "reasonable accommodation" and "reality recognition" requiring that race be taken into account if true equality is ever to be achieved in American society.

Different value choices were involved in *United Jewish* than are involved in *Bakke*. In the former, the effect of the racial preference was to dilute the voting power of a particular group of whites, while in the latter, the effect was to exclude individual whites from a particular school and possibly from the profession itself. However, the voting power of whites in the county was not impaired in *United Jewish* nor were whites as a group excluded from medical school in *Bakke*. The five Justices voting to sustain the racial preference in *United Jewish* recognized the group interest of blacks. A similar recognition of the group interest of blacks lies at the core of *Bakke*.

The real significance of *United Jewish* may lie in the fact that the Court did not exalt the value of racial neutrality over the value of black freedom and true equality for blacks in American society. If the state may consider race when redistricting in order to avoid dilution of black political power, then the Court may also be willing to hold that the state can give a limited preference to blacks and other racial-ethnic minorities in order to alleviate the gross underrepresentation of minorities in the legal and medical professions. *United Jewish* recognizes that achieving full equality for blacks is a valid state interest, and that is the premise on which I have relied to justify the constitutionality of racially preferential admissions programs.