Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext

AFFIRMATIVE ACTION AND THE HARVARD COLLEGE DIVERSITY-DISCRETION MODEL: PARADIGM OR PRETEXT?

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INTRODUCTION

The Supreme Court's long-awaited decision in *Regents of the University of California v. Bakke* [1] has spawned an endless stream of commentary, criticism, and analysis, as college administrators, lawyers, and legislators attempt to decipher its 150 pages of studied ambiguity.[2]

The quest for the definitive interpretation of this effort by nine men to confront a set of perplexing social, moral, legal, and political issues within the narrow confines of a contrived judicial case and controversy is a futile one.[3] It would be a tragedy if the important debate over the role of race-specific affirmative action programs were to be deflected into such a quest.

This article does not attempt a systematic interpretation of the Justices' opinions, either individually or collectively. Nor does it purport to answer the fundamental constitutional question left open by the court: To what extent and under what circumstances may a state consider race *qua* race in the allocation of benefits among its citizens? Its purpose is to raise questions about some of the implications of *Bakke* and more specifically about Mr. Justice Powell's selection of the Harvard College admissions process as a model of fairness and constitutionality.

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

[2] Since *Bakke* was decided, in June 1978, there have been many law review commentaries analyzing the opinion. Among the more notable are several symposia of articles on issues raised by the *Bakke* decision. *E.g.*, *A Symposium*: Regents of the University of California v. Bakke, 67 CALIF. L. REV. 1 (1979); Bakke *Symposium: Civil Rights Perspectives*, 14 HARV. C.R.-C.L. L. REV. 1 (1979); *Symposium: Equality in America: A Color-Blind Constitution?* 21 HOW. L.J. 481 (1978).

[3] *See* Brief of Amici Curiae for the National Urban League et al., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), arguing in opposition to grant of certiorari that petitioners attempted to stipulate to jurisdiction, *id.* at 13-19, and claiming that "the University's primary aim was to 'set the stage' for a judicial determination," *id.* at 16 n.10, and including correspondence between Bakke and Peter Storandt, Assistant to the Dean of Student Affairs/Admissions at the University of California at Davis, suggesting that Bakke apply a second time and that he consider legal action if not accepted, *id.* at app. A.

Sometimes Supreme Court decisions are far more important for what they could have done, but did not do, than for what they actually did. *Bakke* is such a case. Numerous briefs urged the Justices to legitimate racial quotas.[4] Other briefs urged them to strike down all affirmative action programs.[5] The Court collectively—though not all of the Justices individually—steered a middle course: it did not legitimate explicit racial quotas that disqualify certain individuals—on the basis of their race, religion, or ethnicity—from competing for a reserved number of places in a university class. Nor did it strike down affirmative action programs in which the minority racial status of a candidate is given some positive weight in the selection process.[6]

The delphic words of the Justices' opinions—though they may not contain any more wisdom than the millions of other words written about affirmative action[7]—stand as the only authoritative judicial

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[4] Of the more than 50 briefs submitted amicus curiae in *Bakke*, those urging the legitimation of quotas, or as they are more innocuously termed, "targets," included the briefs of: Cleveland State University Chapter of the Black American Law Students Association; The Society of American Law Teachers; Asian American Bar Association of the Greater Bay Area; Fair Employment Practice Commission of the State of California; NAACP Legal Defense and Educational Fund; National Association of Minority Contractors et al.; National Fund for Minority Engineering Students; Black Law Students Union of Yale University Law School; Lawyers Committee for Civil Rights Under Law; NAACP; National Association of Churches of Christ et al.; Council on Legal Education Opportunity; Antioch School of Law; Legal Services Corporation; Native American Law Students of the University of California at Davis et al.; Mexican American Legal Defense and Educational Fund et al.; and the American Association of University Professors.

[5] Among the groups submitting briefs opposing all special programs for designated minorities were: Queens Jewish Community Council et al.; Order of Sons of Italy in America; Young Americans for Freedom; Anti-Defamation League of B'nai B'rith; Pacific Legal Foundation; Fraternal Order of Police et al.; Committee on Academic Nondiscrimination and Integrity et al.

[6] The Supreme Court, moreover, is not obliged to decide each of the sticky and divisive issues generated by its plethora of ambiguous phrases and footnotes. Among the most important powers possessed by the Supreme Court is the power to decide not to decide. This doctrine is most clearly articulated in Ashwander v. TVA, 297 U.S. 288, 346-49 (1936) (Brandeis, J., concurring). *See also* A. BICKEL, THE LEAST DANGEROUS BRANCH 69-72, 111-98 (1962). By the exercise of its discretion to review or not to review the decision of lower courts, the Supreme Court can allow these lower courts—both state and federal—to muddle through with inconsistent decisions until the Justices deem the occasion ripe for yet another foray into the admissions thicket. *See id.* at 126-27.

[7] *See, e.g.*, 438 U.S. at 288 n.25, 315 n.50 (citing Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro*, 61 NW. U.L. REV. 363 (1966); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); O'Neil *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974); Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 U.C.L.A. L. REV. 343 (1974);

guideline available to university officials and will inevitably have a significant impact on the course of university admissions for the foreseeable future.[8] These words will be all the more important if other guidance is not forthcoming from the Court.[9]

Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Sedler, *Racial Preference, Reality and the Constitution:* Bakke v. Regents of the University of California, 17 SANTA CLARA L. REV. 329 (1977); Seeburger, *A Heuristic Argument Against Preferential Admissions*, 39 U. PITT. L. REV. 285 (1977)).

[8] Although various guidelines and interpretations of the *Bakke* decision have appeared since June 1978, the task of admissions officers has not been notably clarified. The Office for Civil Rights of the Department of Health, Education and Welfare, for instance, recently published its own guideline for university officials. HEW, Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Policy Interpretation, 44 Fed. Reg. 58,509 (1979) [hereinafter cited as Policy Interpretation]. This guideline, which was sent to the presidents of 3000 colleges, outlines permissible techniques that institutions of higher education may use to comply with the *Bakke* decision while continuing and expanding affirmative action programs under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4 (1974). The policy interpretation may, however, exacerbate the confusion. For example, while it notes quite correctly that "*Bakke* prohibits an institution from setting aside a fixed number of places for minority students," Policy Interpretation, *supra*, at 58,510, the interpretation nevertheless allows an educational institution to "[e]stablish and pursue numerical goals to achieve the racial and ethnic composition of the student body it seeks," *id.* at 58,511. The interpretation does not indicate how such numerical goals are to be actively pursued without producing, in practice, precisely the kind of racial set-aside that was declared unconstitutional in *Bakke*, 438 U.S. at 315-20. *See H.E.W. Offers Guide on Bakke Decision*, N.Y. Times, Oct. 11, 1979, at A15, col. 6.

Similarly, the HEW guidelines approve the use of goals and affirmative programs based on race "to overcome the effects of conditions that have resulted in limited participation by persons of a particular race." Policy Interpretation, *supra*, at 58,511. In *Bakke*, Justice Powell explicitly found that *neither* the goal of increasing the numbers of traditionally disfavored minorities in medical schools *nor* the goal of countering the effects of societal discrimination was compelling enough to justify the use of race-based admissions. 438 U.S. at 305-10.

A recent study by the Anti-Defamation League of B'nai B'rith provides further evidence that the *Bakke* mandate may be widely misunderstood and misinterpreted. Answers received by June 1979 from 272 professional schools to a questionnaire about admissions policy and practice revealed that:

> Sixteen schools maintain facially discriminatory admissions procedures based on ethnic/racial classifications clearly in violation of *Bakke*. Another twenty schools maintain admissions procedures that are visibly suspect with respect to the ethnic/racial classifications made illegal by *Bakke*. These procedures range from fixed quotas and goals (or their numerical equivalents) to a stated special consideration or special preference policy for minority groups.

A Study of Post-Bakke Admissions Policies in Medical, Dental & Law Schools Throughout the United States, RIGHTS, Summer 1979, at 1 (*Rights* is a periodic report of the Anti-Defamation League of B'nai B'rith, 823 United Nations Plaza, New York, N.Y. 10017) [hereinafter cited as ADL Study].

One conclusion to be drawn from these reports is that the impact of the *Bakke* decision on admissions practice may be less than anticipated. Universities may either ignore it entirely, or, with the encouragement of HEW, ignore part of its substance by pursuing "numerical goals" and other race-based admissions procedures.

[9] Last term, in United Steelworkers v. Weber, 99 S. Ct. 2721 (1979), the Supreme Court interpreted the legislative history and context of § 703(a) and (d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(d) (1974), to permit a voluntary affirmative action plan that was collectively bargained by an employer and a union to reserve for black employees 50% of

Perceived through a morass of rhetoric, citations, footnotes, and dicta, the bottom line seems to be that a five-man majority of the Supreme Court has held—for a variety of irreconcilable reasons—that the type of admissions program used by Davis Medical School of the University of California does not pass constitutional and/or statutory muster, while the type used by Harvard College does. Justice Powell—whose opinion contained the judgment of the Court—expressly singled out the Harvard College admissions system for approval.[10] He quoted extensively from the description of the Harvard program contained in the amici curiae brief submitted by Harvard, Columbia, Stanford, and Pennsylvania Universities[11] and concluded:

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. . . . In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.[12]

Thus, instead of attempting to define the factors that would satisfy the constitutional and statutory standards, Justice Powell apparently found it easier to refer to an existing system.[13]

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the openings in an in-plant training program. In its opinion the Court emphasized the differences between Title VII (relating to employment and passed under commerce clause powers) and Title VI, at issue in *Bakke* (relating to education and passed as part of the government's power to regulate the use of federal funds) noting that the two "cannot be read *in pari materia*," 99 S. Ct. at 2729 n.6. The *Weber* decision was thus explicitly narrow in scope and its application restricted to the employment context. As such, it is substantially irrelevant to the issues of educational policy and statutory interpretation in *Bakke*.

[10] Section V-A of Powell's opinion focuses on the "illuminating example" of Harvard College. 438 U.S. at 315-19.

[11] *Id.* at 316-17 (quoting Brief of Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae [hereinafter cited as Universities Amici Curiae Brief]. A four-page description of the Harvard College admissions process was included as an appendix to both the Powell opinion, 438 U.S. at 321 app., and the amici curiae brief submitted by the four universities, Universities Amici Curiae Brief, *supra*, at app.

[12] 438 U.S. at 317 (footnote omitted).

[13] The Harvard diversity model rejects the notion of quotas in favor of a selection process that evaluates each applicant individually on the basis of his or her unique qualities. One would expect the percentage of specified minority enrollees produced by such a system to vacillate widely from year to year, reflecting changes in each year's applicant pool.

It is questionable, however, whether Harvard University follows *in practice* the dictates of its own "diversity-discretion model." An article in the undergraduate newspaper reported these percentages for black students:

It is the thesis of this article that Justice Powell erred seriously in selecting the Harvard College admissions system as the guidepost of constitutionality. To begin with, there are three technical reasons why Justice Powell blundered in selecting Harvard College as a model for other colleges and professional schools. First, an admissions system developed in the context of Harvard's unique abundance of wealth and enormous pool of applicants will necessarily have only limited applicability at institutions with lesser resources.[14] Second, an *undergraduate* admissions system is hardly the appropriate model for

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Class	Percentage of Black Students
1963	1
1969	3
1972	3
1973	7
1974	7
1975	7
1976	7
1977	7
1978	7
1979	7
1980	8
1981	7

Melnick, *Minority Recruitment at Harvard: Still a Ways to Go*, Harvard Crimson, Jan. 23, 1978, at 2, col. 1, at 3, cols. 1-4.

The inference is inescapable that a decision to increase the number of black students was made in the late sixties (the class of 1973 started college in 1969). Since that time, the percentage of black students—with the single exception of the class of '80—has not varied even one percentage point in either direction.

In the face of such stubbornly constant percentages, it is difficult to avoid the inference that some sort of implicit racial "target" or "quota" may be operating in the admissions process.

[14] Over the last sixty years, Harvard has developed and refined an admissions model that capitalizes on its advantages. *See* P. Feldman, Recruiting an Elite: Admission to Harvard College (1975) (unpublished Ph.D. dissertation in Harvard archives). Because almost all of Harvard's thousands of applicants present uniformly high academic credentials, discrimination among applicants can be made on some basis other than a straightforward selection of the most academically qualified. And because Harvard is the wealthiest school in the world, it need not accept most of its financially able applicants in order to assure the university's economic stability. Free of qualitative and economic constraints that are essential elsewhere, Harvard has the luxury of developing an admissions philosophy that emphasizes less essential criteria such as diversity, personal talents, and character traits.

Institutions with severely limited financial resources and inadequate numbers of applicants will continue to make their decisions with proportionately less selectivity, and such schools will not find much of practical value in Harvard's approach. Although every admissions office in the country will now paraphrase and purport to follow the *Bakke* mandate, most admissions decisions will continue to be made on the basis of the same limited spectrum of factors that have informed them in the past. *See* ADL Study, *supra* note 8 (documenting universities' unresponsiveness to *Bakke*).

professional or graduate schools.[15] Third, Harvard University is a private institution whose legal obligation not to discriminate derives from statutes such as Title VI of the 1964 Civil Rights Act;[16] the

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[15] Justice Powell's Harvard analogy is flawed because the diversity-discretion system described at length by Powell is simply not a description of the selection process at Harvard Medical School, Harvard Law School, or, in fact, at any of Harvard's graduate programs. Instead, it describes the admissions model used to admit freshmen to Harvard College and ignores completely the enormous and crucially relevant differences between the admissions policies of elite professional schools and those of elite undergraduate colleges.

Some colleges purport to seek diversity among the musical and athletic talents, subject matter interests, backgrounds, and genealogies of their students (though the motive behind this quest for diversity is by no means "without controvery"). Universities Amici Curiae Brief, *supra* note 11, at 12. Law schools and medical schools have traditionally paid far less attention to such diversifying considerations, with the possible exception of geography. Indeed, the Harvard Law School in particular has prided itself over the years—and has been praised—for its almost single-minded commitment to a meritocratic admissions policy.

Although Justice Powell may not be expected to be familiar with the ins and outs of university admissions, the same excuse cannot be made for the attorneys who wrote the amici brief on behalf of Harvard, Columbia, Pennsylvania and Stanford Universities, from which Powell quotes so extensively. *See* note 11 *supra* & accompanying text. These attorneys included the deans of the *law* schools at each of these universities, acting in their "individual" capacities as lawyers. *See* Universities Amici Curiae Brief, *supra* note 11, at 2 n.1.

In Section I of the brief, which argues that "the Inclusion of Qualified Minority Group Members in a Student Body Serves Important Educational Objectives," *id.* at 11-14, the general discussion of factors which contribute to student diversity is followed by the conclusion that "[a]cademic ability has not, therefore, been the sole criterion for selecting students at our institutions." *Id.* at 12. This conclusory statement seems to imply that the principle of diversity is actively applied in professional school admissions as well as in freshman admissions. Yet the appendix describing Harvard College admissions, relied on in the body of the brief as the source for all conclusions about Harvard's successful diversity-seeking program, describes only freshman admissions. *Id.* at app. Also, the seemingly inclusive footnote to the text pointing out that the Harvard description "applies generally to the selection of undergraduates at the other three amici institutions," *id.* at 12 n.5, actually serves the purpose of excluding all graduate and professional schools from the ambit of the Harvard description. Another footnote observes with apparently studied vagueness that "some of our professional schools give great weight to predicted academic performance and hence relatively less weight than our undergraduate and other professional schools to the other factors mentioned here." *Id.* at 12 n.4. In fact, a close reading of the brief discloses that the actual factors relied on at Harvard in the medical school admissions process, presumably at issue in the *Bakke* case, are never described specifically at all.

Thus, although the Universities Amici Curiae Brief contained the technically necessary caveats disclosing that there are differences between professional and undergraduate admissions policies, *id.* at 11-12, these differences were made to seem like mere matters of degree when—in fact—they are plainly matters of kind.

It is fair to ask why law school professors and deans, undoubtedly familiar with the critical differences between graduate and undergraduate admissions, nevertheless chose to highlight the admissions policy of an undergraduate college in cases involving law school and medical school admissions programs. The most probable answer, in light of the obvious differences between the two, is that the policies of their own professional schools were not described because they would probably not have supported the diversity argument the brief-writers were seeking to make.

[16] 42 U.S.C. §§ 2000d to 2000d-4 (1974).

Davis Medical School, on the other hand, is a state institution governed directly by the United States Constitution.[17] But Mr. Justice Powell's focus on the Harvard College admissions process was worse than a simple blunder. By approving the Harvard College system—the paradigm of the "diversity-discretion model" of admissions—Mr. Justice Powell legitimated an admissions process that is *inherently capable* of gross abuse and that, as we will demonstrate, *has in fact been deliberately* manipulated for the specific purpose of perpetuating religious and ethnic discrimination in college admissions.

Indeed, the historical evidence points inexorably to the conclusion that the current Harvard College admissions system was *born* out of one of the most shameful episodes in the history of American higher education in general, and of Harvard College in particular. We will attempt to demonstrate that, aside from the origins and past abuses of the Harvard College admissions model, its present use—for the ostensible purpose of enhancing the educational diversity of the student body—serves largely as a pretext for the commendable, but legally questionable and politically controversial, goal of simply increasing the number of minority persons in the universities and in the professions that these universities feed. We will argue that Harvard's current claim to be seeking diversity as a means of improving

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[17] This public/private distinction means that the University of California, as an arm of the state, must obey the 5th and 14th amendments of the Constitution by not violating due process and by not denying equal protection to any student, faculty member, or administrator, and it must also obey statutes which proscribe discriminatory behavior "under color of state law." The policies and acts of a private university such as Harvard, however, have been held not to be "state action" and not subject to constitutional scrutiny. *See, e.g.*, Krohn v. Harvard Law School, 552 F.2d 21, 25 (1st Cir. 1977) (holding Harvard Law School admissions policies not "state action" for purposes of an attack under the Civil Rights Act of Apr. 20, 1871, 42 U.S.C. § 1983 (1974)).

This distinction may, however, mean less in the *Bakke* context than would appear at first blush. Because Harvard, like most private universities, accepts federal funds for educational purposes, it is subject to the nondiscrimination requirement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4 (1974). Justice Powell, at the outset of his opinion in *Bakke* found that the legislative history of the Act showed that Title VI incorporated a constitutional standard, and that it "must be held to proscribe only those racial classifications that would violate the Equal Protection Clause [of the fourteenth amendment] or the Fifth Amendment." 438 U.S. at 287. The opinion goes on to find that the University of California's system violates the 14th amendment, 438 U.S. at 320, while a student processed by a system of "individual consideration" such as Harvard's "would have no basis to complain of unequal treatment under the Fourteenth Amendment," 438 U.S. at 318.

Whether the equal protection standard is applied to the state university as part of a straightforward 14th amendment analysis, or whether it is applied to a private university by incorporation into Title VI, the result appears to be the same: the University of California at Davis program is not permissible, but the Harvard program is. Thus the *Bakke* mandate would appear to apply equally to all schools that either are state-run or accept federal funds.

the educational experience of its students obscures the real issue in the debate over race-specific affirmative action admissions policies, and further that the Court's acceptance of that claim as a sufficient justification for considering race *qua* race in an admissions process creates an unnecessary and dangerous constitutional precedent. We will conclude that the Court should have approached the issues in a more explicit and direct manner by deciding whether the admirable goal of increasing the number of minority persons in the universities and professions could be achieved by less race-specific alternatives than the consideration of race as such in the admissions process.

Part I of this article will document the origins and history of the current Harvard College admissions system;[18] Part II will demonstrate that the "diversity-discretion" model is still being employed to mask its true purposes;[19] Part III will argue that Justice Powell, by accepting the claim for diversity as a sufficiently compelling ground for considering race, has trivialized the real issues and created a dangerous precedent;[20] and Part IV will suggest some alternative approaches that could have been—and in our view, should have been—explored by the Court before it legitimated the consideration of race as a factor in the admissions decision.[21]

I. The Unsavory Origin of the Harvard College "Diversity-Discretion" Model of Admissions

An understanding of the unsavory origin of the twin concepts—diversity and discretion—is essential to an evaluation of the admissions process legitimated by Justice Powell's opinion in *Bakke*.

Before the mid-1920's, admission to Harvard College was open to anyone who met the relatively stringent academic requirements and who, with the exception of a few scholarship students, could afford to pay the tuition.[22]

Between 1890 and 1920, admissions requirements began to be standardized and made more academically rigorous.[23] This movement, which was designed in part to enable boys from public high schools around the country to apply to Harvard, produced the so-

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[18] *See* text accompanying notes 22-68 *infra*.

[19] *See* text accompanying notes 69-87 *infra*.

[20] *See* text accompanying notes 88-103 *infra*.

[21] *See* text accompanying notes 104-32 *infra*.

[22] P. Feldman, *supra* note 14, at 1, 7. *See also* S. Steinberg, The Academic Melting Pot 20 (1974).

[23] F. Rudolph, The American College and University 436-38 (1962).

called "New Plan" in 1911; this plan allowed an applicant to present a satisfactory high school transcript plus passing results in four standardized Harvard examinations.[24]

The literature of the period contains little discussion of the subjective factors—personality, values, outside interests—that would come to be hallmarks of the diversity-discretion admissions system adopted in the 1920's.[25] Instead, one reads that "[a]dmission to Harvard College is by examinations . . . [that] are administered with the purpose of keeping only the candidates who have shown distinct intellectual capacity"[26] and that:

> there are two questions which a college wishes to ask with regard to every candidate for admissions; first, whether he has pursued successfully, for a sufficient length of time, studies fundamental to a sound education; secondly, what is his intellectual caliber, his capacity at the end of his period of study.[27]

Harvard's commitment to an admissions system that purported to ask only intellectual and academic questions weakened gradually and finally dissolved under the administration of President A. Lawrence Lowell, which began in 1909. Lowell and others in the university administration became increasingly dissatisfied with an admissions system that was accepting a growing number of "undesirables"—particularly, though not exclusively, immigrant Jews.

Jewish students began arriving at Harvard in substantial numbers around the turn of the 20th century: "There were enough of them in 1906 to form the Menorah Society, and in another fifteen years Harvard had her 'Jewish problem.'"[28] Although Harvard, like the other elite universities, did not attempt to confront its "Jewish problem" directly until the 1920's, the roots of anti-Jewish prejudice within Harvard and other universities ran deep. In 1907, Dean B.S. Hurlbut (in charge of financial aid to incoming students) articulated a prevalent attitude toward Jewish applicants and struck a cautionary note about the kind of diversity that their admission would foster when he expressed a preference for:

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[24] J. GARDINER, HARVARD 128-29 (1914).

[25] *See id.* at 125-29; C. KINGSLEY, COLLEGE ENTRANCE REQUIREMENTS (1939); Moore, *A New Plan of Admissions to Harvard College*, EDUCATIONAL REVIEW, June 1911, at 71; A. Potter, *The Changes at Harvard in Twenty-five Years (1889-1914)*, in 25TH ANNIVERSARY REPORT OF THE CLASS OF 1889, at 161, 168-71 (1914).

[26] J. GARDINER, *supra* note 24, at 125-26.

[27] Moore, *supra* note 25, at 72.

[28] S. MORISON, THREE CENTURIES OF HARVARD 417 (1936).

> "the old-fashioned College cases"—sons of families that have been American for generations,—farmers and ministers, and most of all those of families with traditions of refinement and liberal education. . . . There is another—an increasing class—also interesting,—that is, the foreigners, and especially the Russian Jews. They, however, as a rule accept help with a readiness which cannot but lessen one's interest in them, in comparison with that American spirit which seeks to conceal need.[29]

What had been merely a festering resentment against the intrusion of an alien element into the sanctums of New England Protestantism soon became a crusade at Harvard, especially in the hands of its outspoken president, A. Lawrence Lowell.[30]

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[29] Letter from B. S. Hurlbut to Joseph Warren (October 16, 1907), *quoted in* M. SYNNOTT, THE HALF-OPENED DOOR at xvii (1979).

Ms. Synnott's book, which provides much of the source material for this section of our paper, is the result of exhaustive archival and historical research. It documents the use of admissions policies to discriminate against Jews, blacks, Catholics, and other groups. The book is an outgrowth of an earlier Ph.D. dissertation by Ms. Synnott, M. Synnott, A Social History of Admissions Policies at Harvard, Yale, and Princeton 1900-1930 (1974) (on file at University of Massachusetts) [hereinafter cited as Synnott Dissertation]. References made here to material from the Harvard archives, which has been cited in the book or dissertation or both, have been independently verified.

[30] Lowell's attitude might seem to indicate that Harvard University—as an institution—fostered an anti-semitic atmosphere. In fact, comparatively speaking, Harvard was among the more welcoming of American universities when Lowell assumed the presidency in 1909. "[U]nder President Eliot's administration, Harvard earned a reputation as the most liberal and democratic of the 'Big Three' and therefore Jews did not feel that the avenue to a prestigious college was altogether closed." S. STEINBERG, *supra* note 22, at 17. Harvard was confronted with large numbers of applications from education-hungry Eastern European Jews precisely because these students stayed away from campuses with a reputation for bigotry such as Princeton, which, according to a 1910 survey of 14 American universities, was perceived to have the most anti-semitic feeling. E. SLOSSON, GREAT AMERICAN UNIVERSITIES 105 (1910), *cited in* M. SYNNOTT, *supra* note 29, at 174; *cf.* H. BROUN & G. BRITT, CHRISTIANS ONLY 83-84 (1931) (Princeton adopted a policy of admitting a lower percentage of Jewish students than other big eastern schools). At Princeton, between 1900 and 1920, while the student population grew from 1,161 to 1,814, M. SYNNOTT, *supra* note 29, at 189, the *total* number of Jews on campus during any given year ranged from a high of twenty to a low of two. *Id.* at 181-82.

The purpose of the above analysis is not, therefore, to cast aspersions upon Harvard University as such; any institution as complex as Harvard has necessarily had a mixture of vice and virtue. The purpose is to raise questions about the disturbing potential for abuse of the "diversity-discretion" model of admissions championed by President Lowell and, further, to question the appropriateness of Justice Powell's choice of the model as an exemplar.

Even President Lowell, however, had the virtue of being far more candid in his purposes than were administrators at some other Ivy League universities. Columbia and Yale, for instance, consciously and drastically reduced their percentages of Jewish students during this period. Although administrators could not deny the visible drop in Jewish enrollment at their schools, they vociferously denied pursuing any policies that aimed explicitly at such reduction. *See* notes 35 & 64 *infra*.

Lowell's efforts to curb the influx of Jews assumed a variety of forms. In January 1922, the Dean's office noted that "Mr. Lowell feels pretty strongly"[31] that Harvard should limit the percentage of total available scholarship aid that could be awarded to Jewish students to the percentage of such students in the class.[32] Because Jewish students (especially those from Eastern Europe) were often financially needy, a limitation on aid would inevitably curtail their numbers.[33] In 1922, the Committee on Scholarships and Other Aids, after consultation with President Lowell, voted to add to the financial aid administration the discretionary power to give money "primarily on the basis of high scholarship, but only to men of approved character and promise."[34]

In 1922, Lowell's campaign reached its zenith.[35] On April 14, he sent two proposals concerning Jews to the Committee on Admissions.

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[31] M. SYNNOTT, *supra* note 29, at 59.

[32] Letter from Dean C.N. Greenough to Asst. Dean K.B. Murdock (January 1922), *cited in* M. SYNNOTT, *supra* note 29, at 59.

[33] S. STEINBERG, *supra* note 22, at 10.

[34] Memoranda from Dean C.N. Greenough to A.L. Lowell (April 6 and 28, 1922), *cited in* M. SYNNOTT, *supra* note 29, at 59.

[35] At the time that President Lowell began his drive to cut down the number of Jews at Harvard, there was one other major university he could look to for precedent. Columbia, concerned that its position among the traditionally elite and "American" schools was being threatened by an influx of "foreigners," cut down its Jewish enrollment from 40% to 22% in a two-year period. H. BROUN & G. BRITT, *supra* note 30, at 73-74; S. STEINBERG, *supra* note 22, at 20; M. SYNNOTT, *supra* note 29, at 18. Columbia managed its reduction quietly, with no explicit use of quotas; in fact, little attention focused on what was happening until *The New York Times* published both an attack on Columbia for its decline in Jewish enrollment, *Says Bias Harms Harvard, not Jews*, N.Y. Times, Jan. 22, 1923, at 5, col. 1, and Columbia's response, *Fewer Jews at Columbia*, N.Y. Times, Jan. 23, 1923, at 22, col. 2. Columbia maintained that "[t]he increase of students from territory west of the Mississippi, which contains a smaller percentage of Jews, is believed to be the main cause of their decrease at Columbia." *Id.* Thus, "Columbia's administration conceded that there had been a 'decrease in the number of Jewish students in the last three years,' but attributed it to a natural change in the geographical distribution for the student body." S. STEINBERG, *supra* note 22, at 30 n.13.

It is not surprising that officials at Columbia lied about the discriminating admissions policies, since under New York law they were, in fact, pursuing policies that constituted a state crime punishable by imprisonment. N.Y. CIV. RIGHTS LAW §40 (McKinney 1976), *as amended by* Act of Apr. 13, 1918, ch. 196, §40, 1918 N.Y. Laws 812 (McKinney) provides: "All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of any places of public accommodations. . . . A place of public accommodation . . . shall be deemed to include . . . colleges and universities. . . ." Section 41 of the law makes any violation a misdemeanor punishable by fine or imprisonment. N.Y. CIV. RIGHTS LAW §41 (McKinney 1976). The law had been applied in the past to cases involving discrimination by educational institutions. *E.g.*, McKaine v. Drake Business School, 107 Misc. 241, 176 N.Y.S. 33 (Sup. Ct. 1919). One New York attorney pointed out that whether the reduction in numbers of Jewish students was achieved by the direct use of quotas or the manipulation of psychological tests, "the proposed course would in fact make those in charge of the colleges in question law breakers." M. Kohler, Anti-Semitic Discrimination at American

One proposal suggested "[t]hat in determining questions of admission under the New Plan all doubtful . . . cases shall be investigated with the nicest care, and that such of this number as belong to the Hebrew race shall be rejected except in unusual and special cases."[36] The other called for the rejection of all Hebrews applying for admission to the College and Engineering School by transfer from other colleges "except such applicants be possessed of extraordinary intellectual capacity together with character above criticism."[37]

Lowell's continued emphasis on "approved character and promise" and "character above criticism" was to take on great significance over the next decade. Much of the rhetoric bandied about concerning the Jews focused on their allegedly unrefined immigrant manners. "[T]he colleges have been identified for years with a certain product—'Harvard men,' 'Princeton men' being supposedly recognizable types—and they wish to continue delivering the kind expected of them. They do not consider the Jewish applicant good raw material."[38] In a 1926 article in the Harvard Liberal Club's magazine, *The Gadfly*, Admissions Chairman Pennypacker described the new admissions policies:

> Traits of character which tend to prevent a boy from becoming a part of our great Fellowship of Harvard will be weighed. Among

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Colleges—Excerpts from the Report of the Board of Delegates on Civil Rights to the Union of American Hebrew Congregations 8 (1923) (pamphlet).

Columbia actually employed several methods to achieve its illegal discriminatory objective, but the main one was "the intelligence examination—the psychological test regarded by Jews as the banner and symbol of exclusion." H. BROUN & G. BRITT, *supra* note 30, at 75; *see* S. STEINBERG, *supra* note 22, at 20. These psychological tests crudely attempted to select for character traits considered to be the *opposite* of those generally associated with immigrant Jews. *See* M. SYNNOTT, *supra* note 29, at 18. " '[F]air play,' 'public spirit,' 'interest in fellows,' and 'leadership,' " were the desired traits; Jews exhibiting too much of any such quality were merely "pushy" or "manipulative." S. STEINBERG, *supra* note 22, at 20.

Columbia also developed an eight-page application which included such questions as " '[r]eligious affiliation?'; 'place of birth?'; 'have you been known by another name or used any variations of your name?'; 'father's name, occupation, place of birth?; mother's maiden name in full, place of birth?' " H. BROUN & G. BRITT, *supra* note 30, at 74.

> Columbia's machine for regulating the flow of Jewish students through its classrooms is one of the most elaborate ever devised. Armed with its eight-page blank, its talk of scholarship standards, its personal interviews, psychological tests, physical examinations, and passport photograph requirements, Columbia can select exactly the applicants it desires, keep the Jewish quota down to the fractional percentage it may determine, and defy anyone to slip by unnoticed.

Id. at 102.

[36] Letter from A.L. Lowell to Committee on Admissions (April 1922), *quoted in* M. SYNNOTT, *supra* note 29, at 61.

[37] *Id.*

[38] H. BROUN & G. BRITT, *supra* note 30, at 85.

> these traits may be extreme racial characteristics. Race is a part of the record. It is by no means the whole record and no man will be kept out on grounds of race; but those racial characteristics which make for race isolation will, if they are borne by the individual, be taken into consideration as a part of that individual's characteristics under the test of character, personality and promise.
>
> That if there should result in fact any substantial change in the proportion of groups in the College following application of the test, this will be due, not to race discrimination or any quota system, but to the failure of particular individuals to possess as individuals those evidences of character, personality and promise which weighed with other evidences render them more fit than other individuals to receive all that Harvard has to offer. Of course there will be criticisms. It will be said that Harvard is discriminating on grounds of race. That will not be true.[39]

As Pennypacker's description makes clear, racial stereotypes of "character, personality and promise" associated with Jews came to represent symbols of all that threatened to intrude on the homogeneity of the white Protestant elite that had founded and maintained universities like Harvard.[40] "The tendency was to think of all Jews in terms of the immigrant, and to think of all non-Jews in terms of the highest standards of gentility and Christian virtue."[41]

During this period, admissions criteria underwent a major change. Formerly, the focus of the selection process was on academic achievement; diversity of background and personality was achieved—to the extent it was achieved—by random selection. Now, the selection process included an explicit search for students exhibiting certain desirable character traits and values. This new emphasis on acceptable moral values, unimpeachable character, and "educability" was a direct and unambiguous manifestation of a concerted effort to target and eliminate "undesirable" Eastern European Jews. "Character above criticism" was employed as a code word for "non-Jew."

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[39] *The New Admissions Plan*, THE GADFLY, May 1926, at 4 (hereinafter cited as *New Admissions Plan*). *See also* S. LIPSET & D. RIESMAN, EDUCATION AND POLITICS AT HARVARD 148 (1975).

[40] In light of this history, it is not surprising that many Jews still become uncomfortable when the government invokes similar symbols, even for very different reasons. *See, e.g.*, Policy Interpretation, *supra* note 8, at 58,511 (encouraging institutions of higher education that receive federal financial assistance to give "increased consideration to an applicant's character [and] motivation," among "other factors" in the admissions process). Such undefinable characteristics can obviously be used to include or exclude any targeted group. In the past they have been used as covers for discrimination against blacks, Chicanos, and women, as well as Jews.

[41] S. STEINBERG, *supra* note 22, at 19.

Thus, the kind of diversity that produced an increase of "alien" and "aggressive" elements was the last thing Harvard wanted. It desperately sought the safety of sameness in the face of an influx of new and different kinds of applicants.

The Admissions Committee at Harvard, while apparently sympathetic to Lowell's goal of reducing the number of Jewish students, was reluctant to "practice discrimination without the knowledge and assent of the Faculty."[42] Throughout the month of May 1922 the Harvard faculty, in meetings and memoranda, debated the Jewish question. Lowell, in correspondence with William Hocking (Alfred Professor of Natural Religion, Moral Philosophy and Civil Polity), rejected the notion of a psychological test of the type used successfully by Columbia, "because not enough Jews could be excluded by objective tests of any kind."[43] Instead, he wanted a clear Jewish *quota*—or, more accurately, a Jewish *ceiling*, since he was not concerned lest the number of Jewish students fall below any specified number. Although the proposed ceiling was designed primarily for Jews, it was also deemed applicable to other groups that threatened to diversify the entering class in unacceptable ways. Lowell suggested in his letter to Hocking that Harvard adopt a percentage system which could be:

> applied to any group of men who did not mingle indistinguishably with the general stream—let us say Orientals, colored men, and perhaps I can imagine French Canadians, if they did not speak English and kept themselves apart; or we might limit them by making the fact that we do not so mingle one of the causes for rejection above a certain percentage. This would apply to almost all, but not all, Jews; possibly, not probably, to other people.[44]

At one point the faculty did approve a motion that, while not expressly mentioning Jews, was understood to be intended to give the Admissions Committee power to restrict the number of Jews,[45]

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[42] Letter from Henry Pennypacker (Chairman of the Committee on Admissions) to A.L. Lowell (May 3, 1922), *quoted in* M. SYNNOTT, *supra* note 29, at 61. Pennypacker's letter is a response to the proposals quoted in text accompanying notes 36 & 37 *supra*.

[43] Letter from A.L. Lowell to Professor William Hocking (May 19, 1922), *cited in* M. SYNNOTT, *supra* note 29, at 63 [hereinafter cited as Lowell Letter].

[44] *Id.*, *quoted in* Synnott Dissertation, *supra* note 29, at 318-19.

[45] Motion by James Ropes, Meeting of the Faculty of Arts and Sciences (May 23, 1922), *cited in* M. SYNNOTT, *supra* note 29, at 64-65. The resolution, adopted without a recording of the votes pro and con, stated:

> [T]he Committee on Admissions be instructed to admit, for the academic year 1922-23, only applicants concerning whom the Committee is not merely satisfied (as at present) as to their mental attainments and moral character, but, in addition, is

but at a special meeting of the faculty on June 2, 1922, that vote was rescinded and the decision was finally made to appoint a special committee to investigate the problem.[46]

At the same time, a public announcement was made by Harvard and was reported in *The New York Times*, stating that increased applications and a growing student body "has brought up forcibly the problem of limitation of enrollment." Citing insufficient classroom and dormitory space, the announcement continued:

> It is natural that with a widespread discussion of this sort going on there should be talk about the proportion of Jews at the college. At present the whole problem of limitation of enrollment is in the stage of general discussion and it may remain in that stage for a considerable time.[47]

While the public announcement described the Committee's task as a general assessment of enrollment problems, the minutes of the faculty meeting of the same day, June 2, 1922, expose the real purpose of the "inquiry" in unambiguous terms: "The President stated that there could be no doubt that the primary object in appointing a special committee was to consider the question of the Jews and that if any member of the faculty doubted this, he might speak now or forever hold his peace."[48]

Lest he be charged with advocating quotas in order to hurt Jews, Lowell quickly assured the public that what he had in mind was a benign quota designed to "help" the Jews:

> The anti-Semitic feeling among the students is increasing, and it grows in proportion to the increase in the number of Jews.
>
> If their number should become 40 percent of the student body, the race feeling would become intense. When, on the other hand, the number of Jews was small, the race antagonism was small also. . . .

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convinced that their presence as members of the College will positively contribute to the general advantage of the College.

Id., *quoted in* M. SYNNOTT, *supra* note 29, at 65.

[46] Special Meetings of the Faculty of Arts and Sciences (June 2, 1922), *cited in* M. SYNNOTT, *supra* note 29, at 69.

[47] *Discrimination Against Jews Suspected in New Harvard Policy on Admission*, N.Y. Times, June 2, 1922, at 1, col. 4, *quoted in* S. STEINBERG, *supra* note 22, at 21.

[48] Dictated Statement from A.L. Lowell to George W. Cram, Secretary of the Faculty of Arts and Sciences (June 3, 1922) (to be incorporated into the minutes of the special meeting of June 2, 1922), *quoted in* Synnott Dissertation, *supra* note 29, at 302, 336, *cited in* M. SYNNOTT, *supra* note 29, at 69.

> If every college in the country would take a limited proportion of Jews, I suspect we should go along [*sic*] way toward eliminating race feeling among the students, and, as these students passed out into the world, eliminating it in the community.[49]

The Special Committee proceeded with its task by gathering statistics on Jewish students and soliciting the opinions of prominent alumni on the question of quotas. Judge Learned Hand's response to the Committee was among the most memorable, particularly for its direct refutation of Lowell's "benign quota" argument:

> I cannot agree that a limitation based upon race will in the end work out any good purpose. If the Jew does not mix well with the Christian, it is no answer to segregate him. Most of those qualities which the Christian dislikes in him are, I believe, the direct result of that very policy in the past. Both Christian and Jew are here; they must in some way learn to live on tolerable terms. . . .
>
> But the proposal is not segregation or exclusion but to limit the number of Jews. That, however, is if anything worse. Those who are in fact shut out are of course segregated; those who are let in are effectively marked as racially undesirable. Intercourse with them is with social inferiors; there can be no other conceivable explanation for the limitation. . . .
>
> If anyone could devise an honest test for character, perhaps it would serve well. I doubt its feasibility except to detect formal and obvious delinquencies. Short of it, it seems to me that students can only be chosen by tests of scholarship, unsatisfactory as those no doubt are. . . .

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[49] Letter from A.L. Lowell to A. Benesch (June 9, 1922), *reprinted in* N.Y. Times, June 17, 1922, at 1, col. 6, at 3, col. 4, *quoted in* Steinberg, *How Jewish Quotas Began*, 52 COMMENTARY 67, 73-74 (1971).

A historian of this period provides further evidence of Lowell's attitude toward Jews at Harvard:

> Lowell's protestations that he was primarily concerned with preventing anti-Semitic feeling were somewhat discredited by the published report of a private discussion he had had with an alumnus, in which he indicated his belief that Jews would have to give up their "peculiar practices" if they wanted to be treated equally. . . . On another occasion, he told a distinguished alumnus who pressed him on the Jewish admissions issue that 50 percent of the students caught stealing books from the library the previous year were Jewish. When the alumnus, who reported this discussion to Felix Franfurter, subsequently, under Frankfurter's urging, asked Lowell, how many students had been caught, he was told, "Two." Another version of the story had Lowell saying that 100 percent of the book thieves were Jewish, and it turning out that the 100 percent was composed of one person.

S. LIPSET & D. RIESMAN, *supra* note 39, at 146; *see* H. BROUN & G. BRITT, *supra* note 30, at 53-54; W. HIXSON, MOORFIELD STOREY AND THE ABOLITIONIST TRADITION 121 (1972).

> . . . If there are better ways of testing scholarship, let us by all means have them, but whatever they are, success in them is success in the chief aim of a college, an interest in, and aptitude for, learning. . . . A college may gather together men of a common tradition, or it may put its faith in learning. If so, it will I suppose take its chance that in learning lies the best hope, and that a company of scholars will prove better than any other company. Our tests do not indeed go far to produce such a company but they are all we have.[50]

The report of the Committee when finally issued in 1923 repudiated quotas as inconsistent with Harvard's tradition of "equal opportunity for all, regardless of race and religion."[51] The declared intention of the report is described as having been threefold: "reject racial and religious discrimination in admissions, eliminate weaker students, and attract more applicants from the South and West."[52] As part of the effort to "nationalize" Harvard by making it more accessible to students from schools outside the Northeast, the report also recommended that entrance examinations be waived for such students if they had satisfactorily completed an approved school course, had ranked in the highest seventh of their graduating class, and had the recommendation of their school.[53]

It seems clear, however, that the primary purpose behind the Committee's decision to increase the proportion of students from outside the Northeast was a compromise designed to reduce the number of Jewish students without the need for express quotas.[54]

> The men who drafted this proposal must have been aware that, if implemented, it would drastically alter the religious com-

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[50] Letter from Judge Learned Hand to Charles Grandgent (Nov. 14, 1922), *reprinted in* L. HAND, THE SPIRIT OF LIBERTY 21-23 (3d ed. 1960).

[51] Report of the Committee Appointed "to Consider and Report to the Governing Boards Principles and Methods for More Effective Sifting of Candidates for Admission to the University" 2 (April 1923) (pamphlet on file at Harvard archives) [hereinafter cited as Report to Governing Boards].

[52] M. SYNNOTT, *supra* note 29, at 105.

[53] Report to Governing Boards, *supra* note 51, at 6.

[54] Harvard had, of course, been seeking a national constituency for some time. As early as 1911 when the "New Plan" for college admissions was introduced, one stated rationale was making Harvard accessible to public school graduates from all over the country, *see* Moore, *supra* note 25, and the standardization of admissions requirements was often praised for having this effect. *See* J. GARDINER, *supra* note 24, at 126-27. But it was only with the adoption of the Special Committee Report and the subsequent changes in admissions criteria and procedures that the geographical distribution concept was implemented with controlling seriousness. *See* Holmes, *The University*, 31 HARV. GRADUATES' MAGAZINE 531 (1923); Report to Governing Boards, *supra* note 51.

> position of Harvard's undergraduates. Jews were overwhelmingly concentrated in the urban centers on the Eastern seaboard, and "to raise the proportion of country boys and students from the interior" would obviously reduce the Jewish representation.[55]

Direct evidence of an intent to limit the number of Jews can be found in a 1923 article in the *Harvard Graduates' Magazine*, which informed alumni that the new policies of geographic distribution limitations on transfers, and stricter English writing requirements, "will keep out a group of students in which many are certainly unfit. Of these, at present, a considerable proportion are Jews, but they will not be excluded, either in name or in fact, *on racial grounds*."[56] But if reduction of "Jewish representation" was the motivating force behind geographic distribution, it did not succeed—at least in the short run. After Harvard's well-publicized rejection of religious quotas and its adoption of various new admissions criteria, the percentage of Jewish students actually *rose* from 21.5 percent in 1922 to 27.6 percent in 1925.[57] President Lowell became convinced that unless the admissions officers were given total discretionary authority the numbers would continue to rise. Wary of setting off another public fiasco, Lowell proceeded quietly this time by writing to Henry James, Chairman of the Admissions Committee, in 1925:

> To prevent a dangerous increase in the proportion of Jews, I know at present only one way which is, at the same time, straightforward

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[55] S. STEINBERG, *supra* note 22, at 30. The Committee's awareness of the implications of its final report is made clear in its minutes. Chairman Grandgent submitted proposals that "might, he thought, reduce the number of unfit students, including Jewish students who are unfit, and attract new groups of desirable students from communities in which Jews are not abnormally represented." Minutes of Committee Appointed "to Consider and Report to the Governing Boards Principles and Methods for More Effective Sifting of Candidates for Admission to the University" (Jan. 8, 1923) (on file at Harvard archives). These proposals were substantially adopted by the Committee in its final report. Report to Governing Boards, *supra* note 51.

[56] Holmes, *supra* note 54, at 533, *quoted in* S. LIPSET & D. RIESMAN, *supra* note 39, at 148 (emphasis added).

[57] M. SYNNOTT, *supra* note 29, at 107. There are several possible explanations for such a rise. First, the Harvard report condemning religious quotas was widely praised and publicized, and may have encouraged Jewish applicants. Also, during the same period, Columbia, Yale, and other schools began to implement policies of numerical limitation which diverted many Jewish applicants to Harvard. *See* H. BROUN & G. BRITT, *supra* note 30, at 72-124; M. SYNNOTT, *supra* note 29, at 498-564, 639-719; A. Bouton (Dean of College of Arts and Pure Science at New York University), The Colleges and Americanism 8-9 (1920) (pamphlet on file at Harvard archives). Finally, an increasing number of Jewish students, particularly first-generation Americans, were graduating from high schools and were able to meet even Harvard's stringent admissions criteria. *See* S. STEINBERG, *supra* note 22, at 30-31.

> and effective, and that is a selection by a *personal estimate of character* on the part of the Admission authorities, based upon the probable value to the candidate, to the College and to the community of his admission. . . . If there is no limit, it is impossible to reject a candidate who passes the admissions examinations without proof of defective character, which practically cannot be obtained. The only way to make a selection is to limit the numbers, accepting those who appear to be the best.[58]

In January 1926, a new Special Committee Report recommended that the total number of freshmen be limited to 1,000, that admissions, even within the group of academically acceptable candidates, be made highly discretionary, and that a greater emphasis be placed on qualities of "character and fitness."[59] These recommendations were accepted by the faculty, though with a request that candidates "whose examination average is unquestionably good" be admitted as a category, thus assuring that the academically best students would be admitted, whether Jewish or not.[60] Soon after, a photograph was required with all applications.[61]

It was not long before the Admissions Committee began to use its discretionary authority to exclude Jews.[62] "By the mid-1920's, Harvard had yielded to a selective system of admissions, which, with no apologies, aimed at reducing the percentage of Jews in the College."[63] And in 1926, Clarence Mendell, the new Dean of Yale College, was told by Harvard's Admissions Chairman Pennypacker that Harvard was "going to reduce their 25% Hebrew total to 15% or less by simply rejecting without detailed explanation."[64] This new

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[58] Letter from A.L. Lowell to Henry James (Nov. 3, 1925), *quoted in* Synnott Dissertation, *supra* note 29, at 448, *quoted in part in* M. SYNNOTT, *supra* note 29, at 108.

[59] Report of the Special Committee Appointed to Consider the Limitation of Numbers (Dec. 1925), *quoted in* M. SYNNOTT, *supra* note 29, at 109.

[60] OFFICIAL REGISTER OF HARVARD UNIVERSITY (HARVARD COLLEGE REPORTS), Mar. 9, 1927, at 297-98, 299-304, *cited in* M. SYNNOTT, *supra* note 29, at 109.

[61] *Id.* at 298, *cited in* M. SYNNOTT, *supra* note 29, at 110.

[62] M. SYNNOTT, *supra* note 29, at 110.

[63] *Id.*

[64] C. Mendell, Report on Harvard (Dec. 8, 1926), *cited in* M. SYNNOTT, *supra* note 29, at 110.

Harvard's well-publicized efforts to curb the tide of its Jewish "invasion" had produced among the Yale faculty as early as 1922 the feeling that Yale must act to avoid becoming, as Synnott aptly phrased it, "a dumping ground for Jews excluded from other colleges." Synnott Dissertation, *supra* note 29, at 499. *See* M. SYNNOTT, *supra* note 29, at 126. Yale assigned the Committee on Admissions to investigate the problem and consider the advisability of limiting the number of incoming freshmen, especially Jews, through the use of quotas, psychological tests, personal interviews, and restrictions on the availability of scholarship aid. *See* M. SYNNOTT, *supra* note 29, at 147. In two 1922 memoranda, Robert N. Corwin, Chairman of the Committee of Admissions, indicated that Yale would follow Harvard's lead in solving its "prob-

effort was successful; the percentage of Jews at Harvard dropped significantly.[65]

Harvard was, of course, not the only university that was searching for ways to perpetuate the white Protestant homogeneity of its student body. Another mechanism devised by some elite universities was the formalization of the preference given by admissions officers to descendants and relatives of alumni. At Yale, for instance, when an informal quota system was found inadequate to stem the rising tide of Jewish enrollment, one proposal that was adopted by the Board of Admissions was an across-the-board policy of admission for alumni sons who met minimal academic requirements.[66] This kind of "grandfather" preference assured perpetuation—at least to some degree—of past patterns of discrimination. Similarly, Harvard gave, and continues to give, significant weight to the genealogy of the applicant—particularly where the applicant's forebears had attended Harvard.[67] Since Harvard's past student and faculty bodies were anything but diverse, this "grandfather policy" guaranteed a significant amount of vertical homogeneity over the generations of Harvard College classes, as well as horizontal homogeneity within a significant segment of any given class. It also assured a degree of perpetuation of

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lem" by affording its admissions officers unlimited discretion to make subjective evaluations of each candidate. He wrote:

> Yale will receive "better publicity if we should speak of *selection* and of the rigid enforcement of high standards rather than of the limitation of numbers." . . . [D]oubtful candidates . . . should be admitted or excluded upon the basis of visible evidence of educability, it being understood that the Corporation and Faculty believe that the *alien and unwashed* element in college could be reduced rather than increased.

Memorandum from R. Corwin, "Limitation of Numbers" (1922), *quoted in* Synnott Dissertation, *supra* note 29, at 540-41, *cited in* M. SYNNOTT, *supra* note 29, at 151 (emphasis added).

Through judicious application of character tests, limits on total student numbers, and strengthening of policy favoring admission of alumni sons, Yale managed to decrease its Jewish enrollment from a high of 13.3% in the class of 1927 to 8.2% in the class of 1934 and to stabilize it around 10% until World War II. M. SYNNOTT, *supra* note 29, at 155-67.

[65] M. SYNNOTT, *supra* note 29, at 107, 112; *cf.* S. STEINBERG, *supra* note 22, at 28-30 (reports a similar drop in percentage of Jews at Columbia).

[66] Alumni sons could gain admission to Yale on minimum satisfactory academic credentials, whereas candidates with less desirable antecedents probably had to average ten points higher. M. SYNNOTT, *supra* note 29, at 154. The Board of Admissions voted explicitly for a resolution that any "limitation of numbers shall not operate to exclude any son of a Yale graduate who has satisfied all the requirements for admission." *Id.* at 152.

[67] M. SYNNOTT, *supra* note 29, at 206 (notes that alumni connections could be extremely helpful during this period in securing admission to Harvard); P. Feldman, *supra* note 14, at 121-24 (documents Harvard's current policy of explicit favoritism to alumni children, noting that the admissions rate for alumni sons applying to the class of 1975 was 42.6%, or 1.9 times the average rate of 22%, and 2.1 times the 20.4% admissions rate of non-alumni sons).

past discriminatory patterns, a practice that has been deemed of questionable constitutionality in other contexts.[68]

By the end of the period, Harvard, under President Lowell, had solved its "Jewish problem" by developing precisely the kind of discretionary admissions process legitimated—indeed, praised—fifty years later by Mr. Justice Powell in *Bakke*. Then, as now, Harvard purported to be seeking a diverse student body by having its admissions officers consider a variety of both subjective and objective data about each applicant. Both then and now, however, such unlimited discretion makes it possible to target a specific religious or racial group—then for decrease, and now for increase—and to apply what is in effect a different standard of admissions to that group.

II. The Diversity-Discretion Subterfuge

One of the inescapable conclusions to be drawn from this history is that Harvard's pretended quest for "diversity" was, in fact, designed to achieve precisely the opposite of a diverse student body: it was a desperate attempt to increase the relative homogeneity of its student population in the face of incursions by disturbingly diverse elements from the ghettos of Eastern Europe via the slums of New York and other urban centers.[69] What the college officials—such as Lowell, Pennypacker, and Corwin—feared most was the kind of diversity within their student populations that Jews and other minorities threatened to bring.[70] The last thing they wanted was an influx

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[68] The use of preferential policies which favor close relatives of those already safely among the privileged has been consistently struck down where such policies result in the discriminatory exclusion of less privileged groups. In the original "grandfather clause" case, Guinn v. United States, 238 U.S. 347 (1915), the Supreme Court struck down as a violation of the 15th amendment the suffrage amendment to the Constitution of Oklahoma of 1910 that mandated a literacy test for voter eligibility, but exempted from that test all lineal descendants of persons who were entitled to vote on or before January 1, 1866. Since only whites were eligible to vote on that date, the effect of the amendment was to deny forever the right to vote to blacks who could not pass the stiff test, while admitting most whites automatically.

Similarly, the Supreme Court in the recent case of International Bhd. of Teamsters v. United States, 431 U.S. 324, 349 n.32 (1977), cited as an "apt illustration" of a facially neutral, but operationally discriminatory practice, the policy of excluding from union membership persons not related to present members by blood or marriage, a policy that had been condemned by the Fifth Circuit in Local 53, Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969). The Fifth Circuit found that the "relatives only" policy "served no significant trade-related purpose" and "[w]hile the nepotism requirement is applicable to black and white alike and is not on its face discriminatory, in a completely white union the present effect of its continued application is to forever deny to negroes and Mexican-Americans any real opportunity for membership." *Id.* at 1054.

[69] *See* Lowell Letter, *supra* note 43.

[70] In this connection, it is important to note that the small number of immigrants who did enter elite institutions were subjected to intense efforts at "assimilation," which meant rejection

of "the alien and unwashed element," the "men who did not mingle indistinguishably with the general stream," the "not easily assimilated" minority groups.[71] What they wanted—and got—was an increase in the "old-fashioned college cases—sons of families that have been American for generations."[72]

The Midwestern farm boy and the Southern lawyer's son were admitted not so much because of the diversity they might provide, but primarily because they were seen as far more similar to typical Harvard students than was the first generation immigrant from New York. Although these Western and Southern students did add a modicum of diversity by way of some different values, the denomination of their Protestantism, and their accents, they could be counted on to "mingle" more "indistinguishably" and to become more "easily assimilated" into the mainstream of Harvard life. It seems clear that this new emphasis on "diversity" was designed, at least in part, to continue the dominance of native born white Protestant students in the overall college population. In order to accomplish this, the admissions committees had to diversify at a relatively superficial level: they had to extend the search for white Protestants to other geographic areas of the country, and to white Protestant public school students,[73] precisely in order to stem the influx of certain other diversifying "elements"—who were congregated in the urban Northeast.[74]

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of their own cultural values and characteristics. As one author explains: "[F]rom the outset, Protestant calls for American unity were hypocritically rooted in diversity: the Protestants assumed their own exemption from the melting pot. The rest of us would become acculturated, learning their behaviors and thought patterns, but we would never be the same, never equals, much less leaders." Greenbaum, *America In Search of a New Ideal*, 44 HARV. EDUC. REV. 411, 426 (1974).

[71] *See* note 64 *supra* and text accompanying note 44 *supra*.

[72] *See* text accompanying note 29 *supra*.

[73] One consequence of this search was a significant increase in the percentage of entering students at Harvard who had graduated from public high schools. Such students made up 40.6% of the entering class in 1920 and 51.3% of the entering class in 1936. OFFICIAL REGISTER OF HARVARD UNIVERSITY (HARVARD COLLEGE REPORTS), Feb. 26, 1923, at 251; Mar. 22, 1937, at 131. The new admissions plans also increased the number of public school students. The percentage of students admitted under the "highest seventh" plan who were from public high schools rose from 79.4% in 1926 to 95.7% in 1938. *Id.*, Mar. 9, 1927, at 304; Mar. 30, 1940, at 169.

[74] It may be argued, of course, that Harvard's attempt to impose a ceiling on the number of Jewish students was designed to encourage diversity in the face of an overly large influx of one particular diversifying element. Neither the data nor the expressed attitude of those who imposed the ceilings support any such intent: The places that were freed by the Jewish ceiling were not allocated to other diversifying elements, such as immigrant Catholics or racial minorities, but were instead returned to the "old fashioned college cases"—somewhat more broadly defined to include white Protestants from other regions of the country. President Lowell's inclusion of "orientals, colored men and perhaps . . . French Canadians" along with "almost

A. *The Return to Meritocracy*

In short, Harvard's concern over its Jewish problem in the 1920's led to the de-emphasis of academic criteria and the development of a discretionary admissions system capable of manipulating a variety of factors, such as personality, character, geography, and genealogy, in order to produce the desired ethnic balance in an entering class. "Thus Harvard's strict meritocratic standards were revised and the admissions committee was invested for the first time with the discretionary power which has characterized its deliberations ever since."[75]

After the Second World War, when universities became less preoccupied with the ethnic makeup of their entering classes, academic criteria began to regain their dominance in the admissions process.[76] In fact, by 1954, according to one scholar of Harvard admissions, "college board scores and predicted college grades were more important in determining admission to Harvard than they have been at any other time since examinations and ability to pay were the sole criteria of admission."[77]

B. *The New Diversity*

In the 1960's—after a generation of virtual desuetude—the need for "diversity" was resurrected for the commendable purpose of increasing the number of minority students at the University.[78] Again, however, the "diversity-discretion" rhetoric was invoked as a justification for the real goal of the Admissions Office: to increase the *number* of minority persons in the University and in the professions it feeds. But from the very beginning of this recent commitment to affirmative action, there have been grave doubts about the legality and public acceptability of race-specific programs explicitly designed to increase the number of minority students. Thus, in order to avoid a direct legal and political confrontation, the Harvard College Admissions Office employed its discretionary authority to adopt "[m]ultiple admis-

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all . . . Jews" in his listing of groups upon whom a percentage limitation should be imposed, *see* text accompanying note 44 *supra*, belies any likelihood that the ceilings were designed to foster diversity.

[75] P. Feldman, *supra* note 14, at 8.

[76] S. LIPSET & D. RIESMAN, *supra* note 39, at 180. Lipset and Riesman note that "academe generally modified its restrictions across the country during the postwar era, as part of a general change in the mood of America" and note also that during this period "the informal quotas that existed on Jewish enrollment [at Harvard] ended." *Id.* at 179.

[77] P. Feldman, *supra* note 14, at 18.

[78] *Id.* at 20.

sions criteria [that] also allow inclusion of academically disadvantaged blacks, whose access to Harvard is now given high priority by the committee."[79] While the Admissions Committee acknowledged its new commitment to minority students, it was circumspect about the methods it used to target them or the quantitative factors at work. It invoked a "policy of broad personal, academic and socio-economic diversity in the college" rather than acknowledging its adherence to any specific quota, floor, or target; or admitting that it was, in fact, significantly lowering its traditional academic standards for many minority applicants.[80] One significant public characterization of the change in Harvard College admissions appeared in Harvard's amicus curiae brief in the *DeFunis* case, written by Archibald Cox:

> The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Ten or fifteen or twenty years ago, however, diversity meant students from California, New York and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students.[81]

Whereas, during the 1920's, the Admissions Committee de-emphasized objective academic criteria in favor of "diversifying" factors in order to target and decrease the number of Jews, despite their high scores, in the 1960's, it selectively de-emphasized these objective criteria in favor of "diversifying" factors in order to target and increase the numbers of minority applicants, despite their lower scores.[82] In each case, the same vague, seemingly neutral admis-

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[79] *Id.* at 9. Feldman also notes that these multiple and subjective criteria allowed the Committee to admit "academically mediocre sons of wealthy alumni and important public figures." *Id.* at 8-9.

[80] *Id.* at 20-21. In this context, it is important to note that we are not necessarily questioning the good faith of those admissions officers who did believe in the value of general diversity per se. We are questioning the origins of diversity as a criterion, its effect on the makeup of the student body, and what we believe to be its perhaps unintentional but fundamentally camouflaging function.

[81] Brief of President and Fellows of Harvard College, Amicus Curiae, at 15, DeFunis v. Odegaard, 416 U.S. 312 (1974).

[82] P. Feldman, *supra* note 14, at 20-22. The amicus brief filed in *Bakke* by the Association of American Law Schools—a brief which urged the constitutionality of giving significant weight

sions tools have been employed, but to achieve remarkably different goals.[83]

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to race alone—provides the most compelling evidence that many professional schools currently consider race on a qualitatively different footing from other elements of diversity:

> Of course . . . law schools do not select students solely by "the numbers." Although an important factor in determining who will be admitted to law school, they are not the only one. To determine the number of blacks and Chicanos who would have been admitted to law school under a race-blind standard, it is necessary to estimate how they would have fared if non-quantitative predictors of success (letters of recommendation, experience, etc.) and other non-racial criteria affecting admissions (e.g., the school's interest in student diversity) were taken into account. Obviously, this cannot be done. It seems reasonable to assume, however, that if race were not a factor in the admission process, the applications of minorities would be affected by such factors in precisely the same way as those of whites. On that assumption, the *Evans Report* calculated the acceptance rates for whites for each LSAT-GPA [Law School Admission Test-Grade Point Average] combination. These acceptance rates were then applied to black and Chicano students who had the same combination of LSAT scores and GPAs. On this basis, 700 blacks and 300 Chicanos would have been admitted, a number equal to 40% of the blacks and 60% of the Chicanos actually admitted.
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> The ineradicable fact is that, as a group, minorities in the pool of law school applicants achieve dramatically lower LSAT scores and GPAs than whites. Illustratively, 20% of the white and unidentified applicants, but only 1% of blacks and 4% of Chicanos receive both an LSAT score of 600 or above and a GPA of 3.25 or higher. Similarly, if the combined LSAT/GPA levels are set at 500 and 2.75 respectively, 60% of the white and unidentified candidates would be included but only 11% of the blacks and 23% of the Chicanos. Such disparities exist at all LSAT and GPA levels. Their effect, under a race-blind system, must inevitably be to curtail sharply the number of blacks and Chicanos admitted to law school.

Brief Amicus Curiae for the Ass'n of Am. Law Schools at 28-30, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (footnote omitted).

[83] One recent instance of such manipulation is particularly instructive in demonstrating how the criterion of geography can be used just as easily to *exclude* persons from distant cities and towns as to *include* them. When several Midwestern universities in the late 1960's felt threatened by substantial numbers of Jewish students, they began drives to institute quotas against out-of-state students, especially those from the Northeast. these schools apparently had too much diversity and wanted a little hometown homogeneity.

In March 1970, the Anti-Defamation League of B'nai B'rith (ADL) published a report summarizing the findings of a study of policies concerning out-of-state students at 136 state universities. Braverman, *Admissions Policies of State Universities*, DISCRIMINATIONS REPORT, March 1970. The study found that 30 state institutions had adopted restrictions on admissions of out-of-state students since 1966. *Id.* at 3. The policies of two of these universities disfavored not merely out-of-state students but students from specific states—not coincidentally states with high Jewish and minority populations.

> In 1969 Purdue University instituted a 25% restriction on out-of-state students and qualified this further for the states of New York and New Jersey with a quota for students from these states based on the proportion of the populations of New York and New Jersey to the total national population.

Id. at 4.

The University of Wisconsin "adopted a policy that applications for admission from students living in 10 particular states would be 'held' until all other applications from Wisconsin and the 39 other states had been processed." *Id.* at 1. A Wisconsin State Assembly member is reported

The crucial point is that the "diversity-discretion" model, because it lacks real substantive content, is inherently capable of manipulation for good or evil results. The concept of "diversity" is so vague that it lends itself to a myriad of widely divergent and ever-changing definitions capable of masking the criteria actually at work.

The incredible staying power of the "diversity-discretion" model is due as much to the model's marvelous ability to mask genuine institutional criteria, which cannot or will not be publicly articulated, as it is to any deep-seated belief in the value of diversity as an educational desideratum.[84] Matters of political and social choice are packaged in the less vulnerable (and more constitutionally defensible) guise of educational policy.[85] Moreover, the persistent vagueness of the "diversity" concept makes it almost impossible to pin down and evaluate the particular content given to it at any time. It becomes difficult, therefore, to hold the university accountable for its admissions program or for any particular admissions decisions. The "diversity-discretion" model thus subverts the ideals of responsibility and candor that are the hallmarks of any institution of learning in an open and democratic society.[86]

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to have told a group of students, "It is the damned New York Jews we want to keep out, not Gentile out-of-state students." Rabinowitz, *Are Jewish Students Different?*, CHANGE, Summer 1971, at 47, 49. The attempt to cut the number of Jews on campus seems to have stemmed largely from the belief that Jewish radicals were campus leaders in the student protests of the late 1960's. When the University's faculty protested, the Wisconsin policy was replaced with a general percentage restriction on all out-of-state students. The new policy was quite effective, however, and the ADL reports that "the number of Jewish freshmen who enrolled at the University of Wisconsin in September, 1969, was less than one-fourth the number who enrolled in the academic year 1966-67." Braverman, *supra*, at 2.

[84] Apparently, the "diversity-discretion" model has developed a life of its own and some admissions officers undoubtedly have come to believe in the importance of diversity in the education of the students.

[85] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-19 (1978).

[86] The danger of untrammeled discretion is illustrated by a vignette in the *Bakke* case, which suggests that Alan Bakke himself may have been victimized by an unconscionable exercise of discretion by a small-minded administrator. The record discloses that after Bakke was rejected from the Davis Medical School in 1973 he wrote a letter to the "Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota." Record at 259, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). This exercise of first amendment rights may well have done Bakke in. When Bakke applied again in 1974, the associate dean was among the six people who interviewed him. The interview included a discussion of the Davis quota system. The dean concluded from Bakke's view of the Davis program—a view apparently shared by several past and present Justices of the Supreme Court—that Bakke was "rather limited in his approach" to the problems of the medical profession. The dean also apparently deducted points becasue he found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." Record at 276. (One wonders whether the dean likewise deducted points from applicants whose views on racial quotas agreed with his own but which similarly

Of course, while the diversity-discretion concept has been used to achieve reprehensible objectives,[87] it has increasingly been used to achieve positive goals, particularly to increase the numbers of minority students. The question is not whether universities should be acting to increase minority enrollment—surely they should be—but whether the judiciary should legitimate a mechanism designed to hide that legally and politically controversial objective behind the subterfuges of diversity and discretion.

III. The Powell Opinion: A Dangerous Precedent

In the *Bakke* case, Mr. Justice Powell answered the question of judicial legitimization affirmatively. He concluded that race may *not* be considered for the purpose of increasing the *number* of minorities in the universities and professions,[88] but that race could be considered as part of a discretionary process of enhancing the educational diversity of the student body.[89]

In *Bakke*, Mr. Justice Powell considered the four purposes purportedly served by the Davis special admissions program:

> (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," . . .
> (ii) countering the effects of societal discrimination;
> (iii) increasing the number of physicians who will practice in communities currently underserved; and
> (iv) obtaining the educational benefits that flow from an ethnically diverse student body.[90]

As to the first, the Court held that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[91] As to the second, in the absence of a governmental finding of past discrimination, universities may not set as an institutional goal the redressing of past discrimination against minorities:[92]

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were not based upon "a study of the total problem.") Accordingly, the dean gave Bakke the lowest score of any of the interviewers and exercised his discretion not to place him on the waiting list. Record at 64, 230. But for this unconscionable—indeed, perhaps even unconstitutional—exercise of decanal discretion, there might not have been a *Bakke* case (though surely someone else would have brought a similar suit).

[87] *See* notes 22-68 *supra* & accompanying text.

[88] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

[89] *Id.* at 311-15.

[90] *Id.* at 306 (footnote omitted).

[91] *Id.* at 307.

[92] *Id.* at 308-10.

> Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.[93]

Third, as to the purpose of increasing professional services to underserved communities:

> Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem.[94]

Finally, however, the Court held that a univeristy may legitimately design its admissions program to serve the purpose of achieving student body diversity, a goal Powell justifies in deference to academic freedom and the first amendment: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."[95]

The *Bakke* decision thus reflects the ultimate triumph of ambiguity and discretion over clarity and candor—a direction in which the Supreme Court seems to have been moving inexorably on several fronts over the past decade.[96] Out of one side of its judicial mouth,

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[93] *Id.* at 310.

[94] *Id.* at 311 (footnote omitted).

[95] *Id.* at 312.

[96] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978); Foley v. Connelie, 435 U.S. 291 (1978); Arizona v. Washington, 434 U.S. 497 (1978); Bordenkircher v. Hayes, 434 U.S. 357 (1978); Brady v. United States, 397 U.S. 742 (1970). For a sampling of the scholarly attention that has been focused on the issue, see Cox, *Discretion—A Twentieth Century Mutation*, 28 OKLA. L. REV. 311 (1975); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975); Rosett, *Discretion, Sincerity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12 (1972); Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130 (1975). *See also* TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976).

the Court condemns Davis Medical School for reserving a discrete number of places in each class for disadvantaged members of specified minority groups; out of the other side, it applauds Harvard College for employing a process that eschews "target-quotas for the number of blacks," but allows "the race of an applicant . . . [to] tip the balance in his favor just as geographic origin or a life spent on a farm tip the balance in other candidates' cases."[97] At bottom, therefore, Powell's opinion really says nothing about affirmative action as such. It simply delegates to universities the discretionary power to decide on the degree and definition of the diversity—including or excluding racial factors—that they feel enhance the educational experience of their students. Presumably, it would allow a university, at its discretion, to employ a purely "meritocratic" admissions process, even if that were to produce an entering class with little or no ethnic or geographic diversity. Taken to its frighteningly logical extreme, it could even allow a university to weigh an applicant's race or religion negatively—as Harvard did under President Lowell—in order to enhance diversity in the face of an overabundance of applicants from a particular racial or religious group.

This focus on diversity and academic freedom not only evades the real issues generated by current affirmative action programs, but it has created a precedent that in the end may be far more dangerous and less justifiable than might have been created by an opinion that confronted the real issues. The raison d'être for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of "diversity" demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals. In recent years it has been invoked—especially by professional schools—as a clever post facto justification for increasing the number of minority group students in the student body.[98] The major impetus behind race-specific affirmative action programs, especially in professional schools, has been the tragic paucity of blacks and other racial minorities in the medical and legal professions.[99] The small number of such minorities in these and

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[97] 438 U.S. at 316.

[98] *See* text accompanying note 81 *supra*.

[99] *See generally* O'Neil, *Racial Preference and Higher Education: the Larger Context*, 60 VA. L. REV. 925 (1974).

> Access to the learned and lucrative professions reveals an even more critical gap. In law, for example, there is one white attorney for every 625 persons, but about one black attorney for every 7,100 black persons. . . . Other minority groups are apparently even less well represented. . . . In medicine, similar conditions prevail. At last count there was one physician for every 750 persons in the general

other professions represents a serious societal problem with many facets.[100]

But the perceived need for racial diversity in our universities—as an *educational goal* as distinguished from diversity as a *means* of increasing the number of minorities in the professions—is simply not a very compelling state interest. Many excellent universities have long survived and flourished in the absence of universal diversity within their student bodies: Catholic and Jewish schools like Notre Dame and Yeshiva University, scientific schools like M.I.T. and Rensselaer Polytechnic Institute, regional schools like the University of Virginia, the University of California, and City College of New York, and women's schools like Wellesley, Mt. Holyoke, and Smith have all achieved excellent educational standards without the kind of universal diversity for which Harvard College, and now various professional schools as well, have recently discovered an alleged need.

Yet Mr. Justice Powell allows a candidate's race to be given positive weight—thereby, in practice, allowing other candidates' race to be given negative weight—in order to satisfy the relatively unimportant state interest of allowing universities to seek to improve their educational goals by the highly questionable technique of sacrificing intellectual excellence for racial diversity. By thus allowing a state agency to take race into account, for what is plainly not by any standard a compelling state interest, Mr. Justice Powell has trivialized the real issues and established a dangerous precedent: permitting consideration of race for relatively unimportant state purposes.

Had Mr. Justice Powell confronted the real issue more directly and acknowledged that the true impetus for race-specific affirmative action programs in professional schools is not the alleged need for educational diversity, but rather the need for an increase in the number of minority persons in the professions,[101] he could, at least,

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> population, but one black physician for every 3,500 black citizens. . . . Thus the extent of the minority group underrepresentation seems beyond question.

Id. at 943-44 (footnotes omitted).

[100] *See generally* Bell, *Racism in American Courts: Cause for Black Disruption or Despair?* 61 CALIF. L. REV. 165, 176 (1973); Gelhorn, *The Law Schools and The Negro,* 1968 DUKE L. J. 1069, 1073; O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education,* 80 YALE L. J. 699, 765 (1971).

For articulate statements of the importance of increasing the numbers of particular minorities in the professions, see the briefs submitted as amici curiae in the *Bakke* case by the Legal Services Corporation; Mexican-American Legal Defense and Education Fund; NAACP Legal Defense and Education Fund; Puerto Rican Legal Defense and Education Fund et al; and the American Medical Students Association.

[101] Justice Powell suggests that "genuine diversity"—as distinct from mere ethnic diversity—may indeed be a compelling state interest, but he offers no support or rationale for this

have relied on the less dangerous and more justifiable principle that race may arguably be taken into account by the state only if there is a compelling state interest that cannot be achieved by a less race-specific alternative.[102] He then, of course, would have had to con-

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questionable proposition; the fact that many great universities throughout the world have achieved distinction without universal diversity would seem to raise doubts about how compelling a need such diversity really is.

[102] For a succinct summary of the less restrictive alternative doctrine in the area of equal protection, see Note, *The Less Restrictive Alternative in Constitutional Adjudication*, 27 VAND. L. REV. 971 (1974):

> [S]trict scrutiny, characterized as the "compelling interest test," is triggered whenever a governmental classification is based upon a "suspect classification" or adversely affects a "fundamental right." The state must then satisfy a three-pronged standard: (1) the means selected are *necessary*, (2) to further a compelling interest, (3) aimed at a legitimate goal. As the requirement of necessity indicates, available alternatives must be investigated in every case applying this strict review.

Id. at 996-97 (footnotes omitted).

In his opinion for the California Supreme Court, Justice Mosk found that the University of California at Davis system was not the least intrusive means to achieve the goals of increasing minority representation in the professions and serving the minority community:

> Classification by race is subject to strict scrutiny, at least where the classification results in detriment to a person because of his race. In the case of such a racial classification, not only must the purpose of the classification serve a "compelling state interest," but it must be demonstrated by rigid scrutiny that there are no reasonable ways to achieve the state's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification. The burden in both respects is upon the government.

Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 49, 553 P.2d 1152, 1162, 132 Cal. Rptr. 680, 690 (1976), *aff'd in part & rev'd in part*, 438 U.S. 265 (1978) (footnote omitted).

In that part of his opinion in *Bakke* on strict scrutiny, Justice Powell purported to apply Justice Mosk's criteria, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287-305 (1978), holding that the program's explicit use of racial criteria could be justified only if the program's " 'purpose or interest is both constitutionally permissible and substantial, and . . . its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest.' " 438 U.S. at 305, *quoting In re* Griffiths, 413 U.S. 717, 721-22 (1973). Among the possible purposes justifying the Davis program, Powell held that only the interest of diversity was constitutionally acceptable, and further, that "the assignment of a fixed number of places to a minority group is not a necessary means toward that end." 438 U.S. at 316. Although he did not use the phrase, Powell offered the Harvard College admissions program as an example of a less restrictive means for a university to achieve the goal of diversity. Despite the use in both programs of race as a critical factor in the admissions process, "[a] facial intent to discriminate . . . is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element . . . in the selection process." *Id.* at 318.

Although the Harvard program may provide an alternative that is superficially less restrictive in that there are no places set aside for minority persons, in practice both the Harvard and the Davis programs, because they allow race alone to be the deciding factor in admissions decisions, are more restrictive than a race-neutral admissions program keyed to individual disadvantage. Whether the purpose being served by the program is the trivial one of diversity or the important one of increasing minority representation, an alternative that allows the goal to be achieved without using race alone is more acceptable than either covert or overt use of racial classifications. *See* note 132 *infra*.

front two critical questions: (1) whether the need to increase the number of minority professionals is indeed a compelling state interest; and (2) to what degree this need could be satisfied by less race-specific alternatives.

As to the first of these questions, Justice Powell seems to have given a negative answer. In rejecting the first three proposed justifications for the Davis system, Justice Powell strongly suggested that increasing the number of minority persons *as such* is not a compelling or, indeed, even a legitimate state interest.

But even if such an increase were deemed a compelling state interest—and we believe that a convincing case can be made for this contention—there should still be a heavy burden on those claiming that consideration of race *qua* race is the least restrictive (or invidious) way of achieving that goal.[103]

IV. RACE-NEUTRAL ALTERNATIVES

In our view, there are several appropriate steps that a university could take—short of considering the race of an applicant—that would increase the number of minority persons in their student bodies and in the professions.

The first race-neutral step would be the abolition of preferences that perpetuate past patterns of discrimination; such preferences include those currently given to relatives of alumni, faculty members, and the rich and powerful in general. These groups include a disproportionately small number of minority group members and a disproportionately large number of descendants of the beneficiaries of past discrimination. For every applicant from these groups that is favored, a minority applicant is disfavored. Also disfavored are the applicants who do not technically qualify as minorities, but whose forebears were discriminated against in admissions and faculty hiring decisions, or were for any reason foreclosed from entering elite institutions of higher education, *e.g.*, applicants whose forebears were Jewish, Catholic, immigrants, or simply poor.

The second, and related, step that a university could take would be the abolition of geographic quotas, floors, or preferences. In this age of increased mobility, mass media, and national homogeneity, geography *as such* contributes very little to genuine diversity. The upper middle-class white Protestant son of an Ivy League doctor or lawyer from Atlanta is not likely to bring very different perspectives

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[103] *See* Note, *supra* note 102, at 996-1002.

to his college class than the upper middle-class white Protestant son of an Ivy League doctor or lawyer from Phoenix, Seattle, Minneapolis, or New Haven. The son or daughter of a small farmer may indeed contribute some diversity, but this diversity would come from the family occupation and experience, not the area in which the farm happens to be located: the farm boy from rural New York or New Jersey may add more diversity than would the Harvard educated lawyer's son from Des Moines. Yet despite the current unimportance of geography as a diversifying factor, and despite its disreputable origins, it continues to be widely used as a factor in college admissions.[104] At Harvard, current admissions policies continue to favor students from the South and West and to disfavor applicants from the urban Northeast.[105] There are some who argue that geography continues to be used at least in part because it allows admissions officers to preserve an artificially high representation of white Protestants in the student body of most elite colleges. Whether or not this is one of the purposes—conscious or unconscious—of some current admissions officers is not the critical point. The critical point is that this is the undeniable *effect* of geographic distribution policies. White Protestants are geographically distributed more evenly around the country than others. In comparison with blacks, Jews, and Catholics, Protestants are less likely to live in metropolitan areas.[106] It follows, there-

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[104] *See, e.g.*, J. CASS & M. BIRNBAUM, COMPARATIVE GUIDE TO AMERICAN COLLEGES at xxi (8th ed. 1977) (author's warning to students that "[a]n institution that is actively seeking a cosmopolitan, national or international student body is likely to give special consideration to the competent student who applies from another part of the country").

A recent article in *Time* about freshman admissions at Brown University documents the persistence of differential admissions by geographical area: "While just over 20% of the New York State applicants will get in, almost 40% will be admitted from region 7—Oklahoma, Texas, Arkansas, and Louisiana." *Choosing the Class of '83*, TIME, April 9, 1979, at 73-74.

[105] In Feldman's exhaustive study of current Harvard admissions policies, P. Feldman, *supra* note 14, at 112, it was found that varying acceptance rates for applicants from different geographical areas "tends to support the hypothesis that the Committee prefers applicants from the South, the north Midwest, and the Mountain States." The acceptance rates for these areas were 26.6%, 29.2%, and 25.1%, respectively, while the percentage of applicants accepted from geographical dockets comprising New York and Philadelphia private schools, New York and Philadelphia public schools, and New England public schools were 18.7%, 17.1%, and 15.5%, respectively. *Id.* at 112-16.

[106] One study indicates that Protestants make up 60% of the total American population, 45% of the population of the East, 62% in the Midwest, 80% in the South, and 58% in the West. RELIGION IN AMERICA, GALLUP OPINION INDEX (1977-78), at 36, 59 (H. Gallup ed. 1978) [hereinafter cited as GALLUP OPINION INDEX]. Jews, who make up 2% of the national population make up 6% in the East, less than 1% in the Midwest and South, and 2% in the West. *Id.* at 36, 95. Catholics, with 28% of the national population, make up 41% in the East, 30% in the Midwest, 14% in the South, and 23% in the West. *Id.* at 36, 89.

fore, that blacks, Jews, and Catholics are relegated under a geographic distribution approach to fighting among themselves for the smaller pieces of the pie allotted to them by current admissions policies. For example, geographic distribution imposes, in effect, a quota (or more precisely, a ceiling) on the number of students taken from the various Northeastern metropolitan areas, such as New York City, Boston, Philadelphia, and Washington. These metropolitan areas contain very heavy concentrations of black, Jewish, and Catholic applicants.[107] Accordingly, if black students are given a preference in admissions, and if geographic considerations are kept constant, then the black preference is obtained disproportionately at the expense of Jewish and Catholic applicants.[108] Since a large proportion

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Similarly, although Protestants make up only 40% of the population of cities of more than one million, they make up 66% of cities between 2,500 and 49,999 and 78% of towns of less than 2,500. *Id.* at 36. Jews make up 6% of cities over one million, 1% of cities between 2,500 and 49,999, and less than 1% of towns of less than 2,500. *Id.* Catholics represent 41% of the population of cities over a million, 26% of cities between 2,500 and 49,999, and 15% of towns under 2,500. *Id.*

Figures for blacks show that they make up 9.6% of the population in the Northeast and 8.5% in the West. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 33 (99th ed. 1978) [hereinafter cited as STATISTICAL ABSTRACT]. Blacks make up 27.0% of the population of cities over one million but only 8.8% of the population of non-metropolitan areas. THE BLACKS IN AMERICA 1492-1976: A CHRONOLOGY AND FACT BOOK 139 (4th rev. ed. 1977). According to census figures for 1970, 56.5% of all blacks live in central cities, 12.3% in urban fringes, 12.0% outside urban areas, and 19.3% in rural areas. STATISTICAL ABSTRACT, *supra*, at 23. In interpreting the significance of statistics on blacks for admissions to universities, it is important to note that a high proportion of black applicants to elite colleges come from Northeast urban areas, although the black U.S. population includes large numbers who live in the South. It is also important to remember that just as whites are not a monolithic majority, Protestants too include a wide variety of groups with differing values and relative economic status.

[107] *See* GALLUP OPINION INDEX, *supra* note 106; STATISTICAL ABSTRACT, *supra* note 106, at 23.

[108] John Hart Ely, one of the most persuasive proponents of the constitutionality of race-specific affirmative action programs, supports the view that it would be unconstitutional to favor minorities at the direct expense of white minorities such as Jews:

> Justice Powell's observation that we can be subdivided along lines we have not here chosen to recognize is thus one that would be relevant only in a different case, where the places for which blacks and other racial minorities were being granted preferences were being systematically denied in unusually high percentages to the members of one or more white ethnic subgroups—if, for example, an unusually high percentage of those "black places" were being taken from Jews. I am not aware that anyone claimed *Bakke* was such a case. If it had been, the answer would be clear: the program would simply have to be invalidated. . . . (The Brennan opinion is correct on this as well. [438 U.S. at 359 n.35]. The fact that the political power of the Hasidic community was unusually diluted—obviously knowingly diluted—by the intentional aggrandizement of black political power effected by the plan at issue in United Jewish Organizations v. Carey, 430 U.S. 144 (1977), is one of the reasons that that decision strikes me as highly questionable.) Paradoxically, the Powell opin-

of the qualified black applicants come from the same metropolitan centers as qualified Jewish and Catholic applicants, the policy of geographic distribution pits Jewish, Catholic, and black applicants against each other for a geographically limited number of places. Thus, while all white applicants are affected by any race-specific affirmative action program, Jews and Catholics appear to be affected disproportionately while leaving many white Protestants disproportionately privileged.[109]

It should not be surprising to learn, therefore, that when Harvard College began to accept significant numbers of black students, the immediate concern was that there would be a concomitant reduction in the number of Jewish students. This phenomenon led to the now famous "doughnut" exchange:

> ion praises (and thereby induces schools like Davis to move toward) a program with just such tendencies. I refer, again, to the "Harvard plan" for which he has such kind words, and in particular to that feature of it that proclaims: "A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer." [438 U.S. at 316]. It seems unfortunate that Justice Powell went out of his way to laud a plan whose de facto effect at any rate will be to guarantee that an inordinately low percentage of white Northeasterners (a group that conspicuously includes an unusually high percentage of Jews and other white ethnic subgroups) will be admitted. His observation that we are a nation of white minorities thus seems irrelevant to any apparent feature of the case that was before him, but disturbingly relevant to the sort of plan he indicated he would be willing to sustain.

Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 14 n.47 (1978).

[109] Any minority admissions program which increases the percentage of minority students while the total number of students is kept constant will necessarily displace a certain number of white students. If, for example, the percentage of minority students is raised from 3% to 10%, then for every thousand students enrolled, seventy minority students will take seats formerly filled by students now not eligible. And if 25% of the student body is Jewish, one would expect 25% of the displaced students to be Jewish. But if Jews and blacks come from the same geographical areas, and if there are "targets" for those areas that remain constant, then the seventy white students who are displaced may not be a representative sampling of whites in the applicant pool but will tend to be from the same geographical areas that the minority students come from. If this is so, and if Jews make up a large proportion of the applicants from the greater New York geographical areas, then they will constitute a disproportionately higher percentage of the displaced students.

The pitting of blacks against Jews for a limited number of spaces at elite universities is one of the tragedies of the many complex issues and implications of race-specific affirmative action programs. It may be argued that Jews, who make up only 2% of the national population, are already overrepresented at elite schools, and therefore should not complain if their numbers are trimmed somewhat by efforts to make spaces available to other minority persons. It is not the fact of decreased representation that many Jews complain of, however, but *disproportionately* decreased representation achieved by programs that select for group characteristics only (*i.e.*, minority group status) rather than for individual characteristics.

> Dr. Chase N. Peterson, dean of admissions at Harvard, recently addressed a group of Jewish faculty members suspicious that Harvard had decided to reduce the number of Jews it would admit. Peterson averred that there is no particular "docket" or area of the country whose quota of admissions has been reduced. Rather, he said, it is "the doughnuts around the big cities" which are not as successful with the Harvard Admissions Committee as they used to be. "This is not based on statistics, but merely on my impressions," Peterson concluded. "But now we have to be terribly hard on people with good grades from the good suburban high schools, good, solid clean-nosed kids who really don't have enough else going for them." The doughnuts, said Peterson, included such areas as Westchester County and Long Island, New York, suburban New Jersey, and Shaker Heights, Ohio. When he described these areas to the Jewish faculty members, the *Crimson* reports, one stood up and said, "Dr. Peterson, those aren't doughnuts, they're bagels."[110]

Whatever its current purpose, there can be no question that geographic distribution has the effect of artificially increasing the number of white Protestant students while artificially decreasing the number of black, Jewish, and Catholic students. In our current world, geographic considerations disserve any claimed policy of increased diversification of the student body and should be eliminated—especially while efforts are being made to increase the number of minority students in the universities.

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[110] Rabinowitz, *supra* note 83, at 48-49 (1971). *See also* N. SAYRE, SIXTIES GOING ON SEVENTIES 147 (1973). This differential impact is magnified if alumni preferences also continue to operate, since Jews and Catholics were discriminated against by many universities during the relevant past. *See generally* H. BROUN & G. BRITT, *supra* note 30; S. STEINBERG, *supra* note 22. Many Jews and Catholics currently benefit from alumni preference policies, of course, but they are still outnumbered by the sons and daughters of alumni with more traditionally favored characteristics. It is important to note that we use "discriminate" in the simplest and most obvious sense: a group is discriminated against if, all other factors being equal, it is harder (even only slightly harder) for a member of that group to gain admission. The simple test is as follows: if, on the whole, it takes higher numbers—*i.e.*, grades, test scores—for members of any group to be admitted, then that group is discriminated against. If, on the other hand, it takes lower numbers for the members of any group to be admitted, then that group is favored by discrimination. (This assumes, of course, and studies have shown, that the numbers do not overpredict academic performance for the former group, or underpredict performance for the latter group.) *See* notes 126-28 *infra* & accompanying text.

If, for example, it turns out that the typical admitted Jewish applicant has slightly higher numbers than the typical white Protestant applicant, then it follows under our definition that Jews are discriminated against to some degree. It should come as no surprise to learn that, all other things being equal, to the extent that a particular group is discriminated against in admissions, and to the extent that the numbers are predictive of academic performance, that group—considered on the whole—will perform proportionately better than groups that are not discriminated against or that are favored by discrimination.

The third race-neutral step would be the development of affirmative action programs based on non-racial considerations.

We will cite but some of the arguments presented by two distinguished liberal jurists—Mr. Justice Douglas and California Supreme Court Justice Stanley Mosk—in favor of requiring universities to seek to achieve their commendable goals without using race *qua* race as a factor in admissions decisions.

Mr. Justice Douglas put it this way:

> The key to the problem is consideration of such applications in a racially neutral way. . . . There is . . . no bar to considering an individual's prior achievements in light of the racial discrimination that barred his way, as a factor in attempting to assess his true potential for a successful legal career. Nor is there any bar to considering on an individual basis, rather than according to racial classifications, the likelihood that a particular candidate will more likely employ his legal skills to service communities that are not now adequately represented than will competing candidates. Not every student benefited by such an expanded admissions program would fall into one of the four racial groups involved here, but it is no drawback that other deserving applicants will also get an opportunity they would otherwise have been denied. Certainly such a program would substantially fulfill the Law School's interest in giving a more diverse group access to the legal profession. Such a program might be less convenient administratively than simply sorting students by race, but we have never held administrative convenience to justify racial discrimination.[111]

Mr. Justice Mosk put it this way:

> 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 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.[112]

If one goal of affirmative action is to remedy past wrongs, then race *qua* race should indeed be irrelevant. It is true that a great many minority group members have suffered educational disadvantages, financial hardship, and other forms of discrimination as a direct

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[111] DeFunis v. Odegaard, 416 U.S. 312, 340-41 (1974) (Douglas, J., dissenting).

[112] Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 48, 553 P.2d 1152, 1166, 132 Cal. Rptr. 680, 694 (1976), *aff'd in part & rev'd in part*, 438 U.S. 265 (1978).

result of their race; but it is also true that not all minority group members have been educationally disadvantaged. An increasing number of minority group members have benefited considerably in recent years as a direct result of their minority group status. Any effort to remedy past wrongs should focus on whether and to what extent the particular candidate for admission has *himself* or *herself* suffered educationally relevant disadvantages.[113] The well-educated wealthy black from a cultured and prominent family should not be given an undeserved educational advantage in order to compensate for the handicaps suffered by another person who may have nothing in common with him other than the pigmentation of his skin.[114]

Many proponents of race-specific affirmative action programs acknowledge that an applicant's race *itself* is not relevant to these goals. They argue in favor of race-specific programs on grounds of statistical likelihood and convenience. One prominent proponent put it this way:

> If preference is given to blacks because of past discrimination and present poverty, the basis for this preference is not that these people are black but rather that they are *likely* to have been victimized by discrimination, to have fewer benefits and more bur-

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[113] It may be true, as some have argued, that the color of a person's skin *standing alone* subjects that person to repeated discrimination, both overt and subtle. Thus, according to the argument, every black—regardless of wealth, educational opportunity, or class background—must be deemed disadvantaged for purposes of college admission. Without disputing the tragic fact of American life that members of racial minorities do suffer discrimination in a wide variety of ways, it is also undoubtedly true that many persons who are not members of racial minorities may suffer severe educational disadvantages on the basis of their individual handicaps, such as blindness, deformity, physical or mental disability, or poverty. The crucial point is that whether or not an applicant's minority racial status *as such* may constitute an educational handicap, it is surely not the only such handicap, and in many cases it is not a handicap comparable in severity to those suffered by other candidates for admission. This is not necessarily an argument against ever taking race *as such* into account in the admissions process; it is an argument against taking race into account as the *sole* educationally disadvantaging factor.

[114] In this important respect, the admissions program at Harvard is ultimately less fair than the program at Davis. In order to receive special consideration under the discredited Davis program, an applicant had to be both (a) individually disadvantaged, and (b) a member of a specified racial minority. Regents of Univ. of Cal. v. Bakke, 438 U.S. at 272 n.1. Under the Harvard program, the applicant's race alone "may tip the balance" in his favor, even if he is the scion of a wealthy and powerful family who attended the best schools and has not been substantially scarred or disabled by the trauma of racial discrimination. *Id.* at 316. Harvard's program thus has the effect of preferring the wealthy and advantaged black applicant, for example, over the poor and disadvantaged black or white applicant. In practice, then, Harvard probably makes at least as much turn on race alone as did Davis. Harvard's emphasis on the group characteristic of racial identity rather than on individual advantages or disadvantages of the applicant is thus classically overinclusive (including advantaged blacks) and underinclusive (not including disadvantaged whites).

> dens than is fair, to be members of an underrepresented group, or to be the sorts of persons that can help public institutions meet the needs of those who are now poorly served. Being black does not itself have any relevancy to these goals, but the facts which are associated with being black *often* do in the present context.[115]

But this argument, because it uses statistical correlations between race and individual disadvantage to justify racial stereotyping, ignores the important reasons that underlie the traditional objections to such stereotyping. There are a great many characteristics that are "likely" or "often" "associated with" a person's race. Some of these characteristics are perceived as positive, some as negative, and others depend on the context. But it is morally wrong, factually incorrect, and constitutionally dangerous to allow the state or even a private university to make judgments about an individual on the basis of the "likely" characteristics which are "often" "associated with" that person's race. (Recall President Lowell's stereotypes about racial and religious minorities.)[116] We generally demand—and correctly so—that individuals be judged on their individual merits and not on their racial characteristics, even if it might be easier, quicker, cheaper, or more convenient to consider such superficial characteristics as skin color, surname, and linguistic background.[117]

It is often argued that if individual disadvantage rather than race was to become the criterion for eligibility in an affirmative action program, then the majority of students admitted under such a race-

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[115] Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534, 550 (1975) (emphasis added).

[116] *See* notes 28-38 *supra* & accompanying text.

[117] A program based on individual disadvantage will inevitably be more costly than one which gives blanket preference to all members of specified minority groups, because a more thorough investigation of the individual's background will be required. Such a program will not be more expensive than the current Harvard program, however, which already claims to seek out and evaluate not only academic credentials but *"a wide variety of interests, talents, backgrounds, and career goals"* among its applicants. 438 U.S. at 322 app.

A program providing admissions preference for individually disadvantaged students might be designed to maximize efficiency and minimize the dangers of unlimited discretion inherent in the Harvard system. One approach might include quantification of characteristics associated with disadvantage—economic deprivation, ghetto residence, English not spoken in the home, substandard schooling, and so forth. A checklist of these and many other factors might be devised, with space for an applicant to add in any other factors he or she considers significant. Such a program would allow admissions committee members to determine which applicants are appropriate subjects for special admissions. At the same time, it would preserve a detailed record of which qualities were taken into account in a specific case. Such records would increase the accountability of the admissions system by demystifying the process, at least to some extent, and by replacing subjective "hunches" about applicants with reviewable, comparable assessments.

neutral program would be whites,[118] since the vast majority of disadvantaged Americans in straight numerical terms in this country are, in fact, white.[119] But if it is true—as the proponents of race-specific affirmative action programs argue—that a disproportionately high *percentage* of minority persons are disadvantaged, then it should follow that a disproportionately high number of persons admitted under a race-neutral affirmative action program will be minority persons.[120] The fact that certain *advantaged* minority persons who benefit under

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[118] *See, e.g.*, A. SINDLER, BAKKE, DEFUNIS AND MINORITY ADMISSIONS 276-77 (1978). The author concludes that a "disadvantagement program would benefit a class of whites at present underrepresented in the professional schools, but it would not result in a scale of minority enrollment anywhere near current levels. . . . At bottom, however, advocates of the disadvantagement position [can] offer no credible 'guarantee' of adequate proportions of minority admittees." *Id.* (footnote omitted).

See also SCHOOL OF LAW (BOALT HALL), UNIVERSITY OF CALIFORNIA AT BERKELEY, REPORT ON SPECIAL ADMISSIONS AT BOALT HALL AFTER BAKKE, *reprinted in* 28 J. LEGAL EDUC. 363 (1977) [hereinafter cited as BOALT HALL REPORT]. The Admissions Committee at Boalt Hall considered at length the practicalities and implications of a race-neutral program for disadvantaged students and prepared a model of such a system based on data from its current applicant pool. The Committee analyzed the files of all minority candidates and examined a sampling of rejected white candidates for evidence of disadvantage to produce a racially mixed pool of 261 disadvantaged students. (The Committee also prepared a model based on applicants who had asked for fee waivers, but since it felt the waiver to be an unreliable indicator of disadvantage, results are not included here.) Within this pool, the Committee selected the 75 candidates with the highest projected grade point averages. Although blacks and Chicanos made up 67% of the disadvantaged pool (whites and Asians making up the rest), they made up only 32% of the group within the pool that had the highest averages. *Id.* at 371-75.

> Based on this data, the Committee concluded that any racially-neutral special admission program, whether drawn from a disadvantaged pool as defined by subjective factors, or by strictly objective, economic factors, will have a substantial impact upon the admission of minority candidates to Boalt. This is certainly not surprising. To the extent that disadvantaged non-minority students crowd out minority students, some portion of the commitment to integrate the bar is undermined.

Id. at 376.

[119] Poverty is the most obvious, though clearly not the sole, significant measure of disadvantage. The Bureau of Statistics reports that, in 1977, 16.4 million white persons in the United States were below poverty level and 8.3 million "blacks and other races" were below poverty level. STATISTICAL ABSTRACT, *supra* note 106, at 466 ("Blacks and other races" is the classification used by the Census Bureau.).

[120] In absolute numbers "blacks and other races" constitute only about half of the persons currently below poverty level in the U.S. *See* note 119 *supra*. (At the same time, the percentage of blacks and other races who are below poverty level (29.0%) far exceeds the percentage of white persons in that category (8.9%). STATISTICAL ABSTRACT, *supra* note 106, at 466.) If a program for disadvantaged students were based on economic factors alone, for every hundred students admitted, 66 would be white and 34 black and other races (based on a population of 24.7 million people being below the poverty line: 8.3 million "blacks and other races" and 16.4 million whites). *See* note 119 *supra*. The representation of blacks and other races in the program, however, (34.0%) would still be two and one-half times the percentage of blacks and other races in the population as a whole (13.4%) (percentages calculated from figures in STATISTICAL ABSTRACT, *supra* note 106, at 28 (for population in 1977)).

race-specific programs would no longer receive windfall benefits under a race-neutral program should not be cause for distress; these are precisely the persons who do not—under any principle of morality—*deserve* to be given any special advantage. To give advantaged members of a minority a preference in admissions is simply to reward them for the accident of their race—a fact that "does not itself have any relevancy"[121] to the goals of affirmative action except insofar as the simple increase in the number of the target group is deemed to be a valid goal.

Even if the goal of affirmative action were diversity of the student body for purposes of enhancing educational experiences—a goal whose importance we question—it would not follow that race, *as such*, would be a significant contributing factor. An applicant's potential ability to contribute to the diversity of the student body is uniquely a function of his or her *individual* experiences, interests, approaches, talents, and characteristics. The prep school black brought up in a middle-class neighborhood by professional parents might contribute far less diversity than a Hasidic Jew from Brooklyn, a Portuguese fisherman from New Bedford, a coal miner from Kentucky, or a recent emigré from the Soviet Union. Again, it may be more "likely" that—*all else being equal*—a black will contribute more to the diversity of an entering class than would a white; but the whole point is that *all else is not and cannot be deemed equal* in the already questionable enterprise of creating a diverse class. As with geography and genealogy, the unequal "all else" contributes far more to real diversity than does the relative superficiality of color pigmentation, linguistic background, or surname.

The strongest claim for the consideration of race *qua* race in affirmative action programs is the simple tautological argument that, given the need for *more* minority group members in the universities and professions, it follows that the most direct way of achieving that goal is by giving preferential treatment to minority group members at every relevant entry point in the process. This surely is the concern that actuates the movement for university affirmative action today, though it was expressly rejected as unconstitutional by Mr. Justice Powell, in *Bakke*.[122]

There are several problems, however, inherent in the tautology. In the first place, the argument contains no limiting principle: ac-

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[121] *See* text accompanying note 115 *supra*.

[122] 438 U.S. at 307.

knowledging that "more" minority persons are "needed" in the universities and professions, how does a university—or a court—decide *how many more* of *which* minorities are needed, and at what cost. Once a university is permitted to attach numbers to this need, then a quota inevitably emerges. And there is simply no principled basis for calculating the appropriate proportions in any quota system.[123]

We are aware of no reliable empirical basis, moreover, for predicting the number of minority students that would be admitted under vigorous affirmative action programs that eschewed geographic and alumni preferences for individually disadvantaged applicants, regardless of race.[124]

Finally, there can be no serious doubt that significant costs—both moral and constitutional—inhere in allowing a state or a university to consider race *qua* race in admissions decisions. At the most fundamental level, it is simply wrong to do so. To reward some per-

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[123] Surely it is unacceptable to allocate places in a university on the basis of racial, religious, or ethnic proportions in the general population. As Justice Douglas said in his dissent in *DeFunis:*

> The reservation of a proportion of the law school class for members of selected minority groups is fraught with similar dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group.

DeFunis v. Odegaard, 416 U.S. 312, 338 (1974) (Douglas, J. dissenting).

Even if one could overcome the formidable technical barriers inherent in the overlapping categories of racial, ethnic, religious, gender, and other purportedly relevant groupings, a system based on current proportions in the population would, *inter alia*, reflect some of the worst racist and discriminatory immigration policies practiced by this country during the first half of the century, policies that were motivated by the same anti-Jewish and anti-Catholic sentiments that led to the imposition of admissions quotas and restrictions at the elite colleges during the 1920's. *See* R. DIVINE, AMERICAN IMMIGRATION POLICY 1924-1952, at 14-18 (1957); J. HIGHAM, STRANGERS IN THE LAND 300 (1971); C. MCWILLIAMS, A MASK FOR PRIVILEGE 35-37 (1948).

[124] In its report, the Admissions Committee at Boalt Hall investigated special admissions programs around the country and concluded that:

> [T]here is no real body of experience in dealing with a disadvantagement approach to special admissions in law schools—and, for that matter, other schools as well. . . .
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> . . . [I]t appears that no law school has in place a formal disadvantagement program, with a defined set of criteria, number of slots, etc. And no school seems to have figured out the relationship, if any, between a disadvantagement approach and the expansion of the number of racial minorities at the bar.

BOALT HALL REPORT, *supra* note 118, at 372.

In formulating its disadvantagement model, the Committee noted the difficulties in determining the number of disadvantaged non-minorities who were potential applicants and the number of actually disadvantaged students even among those who did apply. "Therefore, any conclusions as to the relative number of disadvantaged non-minority candidates are highly tentative, and should be considered subject to revision, most probably upward, once hard data are elicted from an entire applicant pool in a more systematic manner." *Id.* at 374.

sons for the accident of their race is inevitably to punish others for the accident of theirs.[125]

Also important, however, is the impact that race-specific affirmative action programs inevitably have on racial stereotyping, at least in the short run. If persons of any given race are admitted to a particular school with significantly lower test scores and grades than persons of other races, it will follow with near certainty that the persons in the preferentially admitted racial group will perform less well than other persons whose scores and grades had to be higher for them to be admitted. This is so because, as one prominent scholar has shown:

> High school rank in class, academic aptitude test scores, and achievement test scores are still the best predictors of grades the applicant would earn in a particular college. . . . I do not know any convincing evidence that different predictors or even differently weighted predictors of current criteria of academic success are needed for the disadvantaged versus the advantaged.[126]

If grades and test scores are relatively valid predictors of academic success,[127] then admitting a particular group for *any* reason with

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[125] One of the most unfortunate aspects of Mr. Justice Powell's decision in *Bakke* was his resurrection of the discredited precedents of Korematsu v. United States, 323 U.S. 214 (1944) and Hirabayashi v. United States, 320 U.S. 81 (1943). 438 U.S. at 287, 290-91. In those cases, the Supreme Court upheld the World War II exclusion of all Japanese Americans from the West Coast, and approved their relocation in concentration camps. The cases—which surely were among the most racist and repressive in recent American history—had legitimated the use of race as a basis for governmental action during times of perceived crisis. This led Mr. Justice Jackson to warn that the principle embodied in those cases "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." 323 U.S. at 246 (Jackson, J., dissenting). *Korematsu* and *Hirabayashi* allowed the government to stigmatize an entire race by assuming the disability of all of its members. *See* 323 U.S. at 236-39 (Murphy, J., dissenting). Scholars had hoped that the Japanese exclusion cases would receive a welcome burial. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-6, 16-14 (1978); Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945). Regrettably, Mr. Justice Powell has now cited them approvingly for the proposition that not all racial or ethnic classifications "are per se invalid." 438 U.S. at 287. It is to be hoped that such approval will be strictly limited in the future in order to avoid the possibility of the Court once again stigmatizing an entire race through government action. *But see* Narenji v. Civiletti, No. 79-2460 (D.C. Cir. Dec. 27, 1979) (Iranian Students Case).

[126] Stanley, *Predicting College Success of Educationally Disadvantaged Students*, in COLLOQUIUM ON BARRIERS TO HIGHER EDUCATION, COLLEGE ENTRANCE EXAMINATION BOARD, BARRIERS TO HIGHER EDUCATION 58, 70-71 (1971). For reports of similar results, see Cleary, *Test Bias: Prediction of Grades of Negro and White Students in Integrated Colleges*, 5 J. EDUC. MEASUREMENT 115-24 (1968).

[127] A recent study, announced by Ralph Nader on Jan. 14, 1980, casts doubt on the continuing validity of standardized tests as accurate predictors of academic performance. A. NAIRIN, THE REIGN OF ETS: THE CORPORATION THAT MAKES UP MINDS (1980). We note the importance of the study, but note also that the controversy over test scores continues.

higher or lower grades and scores will tend to produce higher or lower grades for that group after admission.[128] The corollary to this is that if any particular group is discriminated *against*—by which we mean nothing more than that higher scores are generally required of them for admission—it will follow that admitted persons from that group will perform better than admitted members of other groups.

This probably explains two disturbing phenomena that have been observed over the years: (1) that minority applicants admitted under race-specific affirmative action programs (and subsequently evaluated on a race-blind grading system) appear to be performing less well, on the whole, than persons from other groups;[129] and (2) that during the period when Jews were being significantly discriminated against in elite college admissions, they tended, on the whole, to do better than average once admitted.[130]

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[128] This would be true of geographic preferences as well: if applicants from Montana need lower test scores and grades than applicants from New Jersey, then—on the whole—applicants from New Jersey will probably perform better than applicants from Montana once they are admitted.

[129] In the last ten years, extensive studies have been conducted of the predictive validity of standardized tests with respect to minority group members. As one expert in the field concluded:

> The common expectation or charge against tests . . . has been that the actual grades of black students would tend to be above that predicted from the equation for white students. In other words, the test was expected to be "unfair" in the sense that predicted grades would tend to underestimate actual achievement. The empirical results tend to be just the opposite, however. . . .
>
> . . . [T]here appears to be some tendency for the question based upon white students to overpredict in comparison to predictions based upon black students . . . In other words, in 18 of 22 cases the predictions based on equations for white students slightly overpredict actual performance.

Linn, *Fair Test Use in Selection*, 43 REV. EDUC. RESEARCH 139, 143 (1973).

Findings of overprediction mean that, if anything, the use of standardized tests and grades to predict performance after admission will favor rather than handicap minority students. It is important to remember, however, that the criterion for success used in these studies is first and second-year grades after enrollment in college or professional school. Although standardized tests do appear to be valid predictors of academic success for minority persons, they do not attempt to predict job performance or career success.

For similar findings of overprediction in the Scholastic Aptitude Test, see Pfeifer & Sedlacek, *The Validity of Academic Predictors for Black and White Students at a Predominantly White University*, 8 J. EDUC. MEASUREMENT 253 (1971); Silverman, Barton & Lyon, *Minority Group Status and Bias in College Admissions Criteria*, 36 EDUC. PSYCH. MEASUREMENT 401 (1976); Temp, *Validity of the SAT for Blacks and Whites in 13 Integrated Institutions*, 8 J. EDUC. MEASUREMENT 245 (1971).

For discussion of studies finding overprediction of grades in use of the Law School Admission Test, see Linn, *Test Bias and the Prediction of Grades in Law School*, 27 J. LEGAL EDUC. 293 (1975).

[130] On the academic success of Jewish students in the 1920's, see S. LIPSET & D. RIESMAN, *supra* note 39, at 145-49; S. STEINBERG, *supra* note 22, at 10.

The problem is that these observations—especially the former—seem to reify invidious racial stereotypes, at least in the short run. So long as it is significantly easier for certain minority applicants to be admitted to a particular school, persons from these groups will tend to perform less well once admitted. And there is a danger that this may confirm the racial stereotyping that is at the core of the problem.[131] It may be argued, of course, that it is far better to have significant numbers of minority elite professional school graduates with somewhat lower grades than no—or fewer—minority graduates at all. This is especially so because *some* of the students admitted with lower grades will, in fact, do extremely well at the elite schools, thus disproving the racial stereotyping. The real question here is thus a matter of degree, depending on how far a school is willing to go in reducing the scores required for members of preferred groups and in elevating the scores required for members of non-preferred groups.

CONCLUSION

Before the Supreme Court took the extraordinary step of legitimating the consideration of race as a constitutionally valid factor in university admissions, it should have—at the very least—required a showing that the states' interest in increasing the number of minority group members in the universities and professions is compelling, and that this goal could not be achieved by means that were less race-specific.

It is impossible to know with certainty the precise effect of vigorous race-neutral affirmative action programs on the number of minority persons that would be admitted to a university. There surely would be an increase; we believe that under the right types of programs there would be a substantial increase.[132] The increase would

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[131] As Justice Powell noted, "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (citing DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting)).

[132] One encouraging example is the Special Admissions and Curriculum Experiments Program (S.P.A.C.E.) at Temple University Law School, which "reserves one quarter of its enrollment for the disadvantaged, whatever their color or ethnic background, who show exceptional promise." Roberts, *Temple Law School Offers Unusual Affirmative Action Plan For Deprived Students*, N.Y. Times, Feb. 7, 1978, at 25, col. 1. While three-fourths of the students are selected on the basis of traditional quantitative academic criteria, "the remaining places are open to just about anyone who can demonstrate that he or she has overcome some significant deprivation, whether it is poverty, language or blindness." *Id.* Under the direction of Dean

probably not be as great as it would if race were considered, since minority persons who were not individually disadvantaged would be ineligible. But the question then remains: assuming that more minority persons would be admitted under race-specific than under race-neutral affirmative action programs, do such incremental increases justify the extraordinary costs and dangers—both constitutional and moral—that inevitably result from considering race, as such, in the admissions process?

By placing its imprimatur of constitutionality on the Harvard College "diversity-discretion" model of admissions, the Supreme Court in *Bakke* avoided facing up to that crucial question of constitutional policy.

Peter J. Liacouras, the program has admitted blacks, whites, and members of many minority groups based on individual disadvantage. Although the number of minority group students admitted under the program has varied widely from year to year as the composition of the applicant pool has varied, minority students made up 12% of the entering class in 1978 and 10% of the entire student body. *Id. See* Liacouras, *Towards a Fair and Sensible Policy for Professional School Admissions*, 1 CROSS REFERENCE 156 (1978).