

# THE *BAKKE* PROBLEM—ALLOCATION OF SCARCE RESOURCES IN EDUCATION AND OTHER AREAS\*

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## I.

Whenever many apply and few are chosen individual pain is inescapable, but the way is open for processes that do not automatically pit one race or class against another.<sup>1</sup>

The Supreme Court has spoken, as so often these days, with many voices. It is fortunate that it is so, for the pervasive problems it raises in the field of education can perhaps be most accurately described as philosophical or social problems, not necessarily resolvable by anything in the Constitution or by the decisions of the Court.

Much has been written about the *Bakke* case,<sup>2</sup> both before and since the Court's pronouncement. I do not propose to review these writings, or even to examine the opinions of the Court in any detail. It is enough, and fortunate, I think, that we are able to continue the essentially social process of experimentation in this area, knowing that race may be taken into account in academic admissions, but that quotas based on a two-track system are invalid. We should not forget, though, that Justice Powell, who is the only member of the Court who clearly agrees with all aspects of this conclusion, recognized that "an admissions program which considers race only as one factor" may be only "a subtle and more sophisticated—but no less effective—means of according racial preference."<sup>3</sup> The difference is largely one of emphasis and approach, which also reflects the fact that we are dealing with what is essentially a social problem. But quotas are inherently invidious, even

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1. Bundy, *Beyond Bakke—What Future for Affirmative Action*, ATLANTIC MONTHLY 69, 73 (Nov. 1978).

2. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

3. *Id.* at 318.

when their purpose is benign. Consideration of race as one factor is not much different, and we must not forget that when we follow the *Bakke* problem in the years ahead. But it may be different enough, simply as a matter of approach, so that we can properly proceed along that line, and we do know that a rather complexly constructed majority of five members of the Supreme Court has said that we can travel down that road. Yet it remains a narrow road, with precipices on each side, and experimentation must be thoughtfully constructed and carefully carried out, with its results more thoroughly evaluated than has perhaps been the case in the past.

In some aspects of our society when dealing with the allocation of scarce resources, we rely on the market place, which acts in economic terms on the basis of the law of supply and demand. Gold is a scarce commodity, and it is allocated at the price that those who want it and have the means are willing to pay. I have not yet heard of any "affirmative action" program with respect to gold. We could, I suppose, use the same method for allocating places in institutions of higher education. I have not heard of any one who thinks that that would be a wise or effective course to follow. The tradition of financial aid for students in schools of higher education is of long standing. Although we have not achieved full equality of opportunity as far as financial need is concerned, we have gone far down the road that enables any person who has adequate intellectual qualifications to obtain an advanced education regardless of his financial need.

## II.

What then is the difference between gold or other items that we allocate through the market place and education or other benefits for which some other form of allocation is thought to be relevant and has traditionally been used? I suppose that the underlying distinction, often not clearly articulated, is that with respect to education and some other areas, we are dealing with what is essentially a social problem in which human factors are rightly relevant. This is surely part of the clue to the difference between quotas and affirmative action.

Speaking in human or social terms, there are several factors that merit consideration. With respect to professional schools, including law and medical, a strong case can be made for the "mix." The presence of blacks and other minorities in a class of students can be supposed to be advantageous in at least two ways. First, it can be thought

to be a part of the educational process to have variety and diversity in the student body. In this way members of the class can meet, and be acquainted with, and sometimes be friends with, members of different backgrounds. In sharing approaches and reactions they can contribute to the common educational process, so that all members of the class can go into the outside world with a broader background and increased understanding. And second, the presence of increased numbers of students from minority groups will help the educational institution to meet its perceived obligation to train and introduce into society an increased number of professional practitioners who will be available to serve members of their own communities. For the time being, at least, in the light of past discrimination, it is felt that many black clients or patients may be better served, or may think they will be better served, by black lawyers or doctors—though at the same time we look askance at the suggestion that white clients or patients can properly prefer to have white lawyers or doctors. That, indeed, is discrimination, or racism. We are truly in the midst of the modern stage of the American dilemma—which, despite its difficulties, real and theoretical, is surely an improvement over the situation about which Gunnar Myrdal wrote some forty years ago.<sup>4</sup>

Another factor in favor of taking race into account in the matter of admission to professional schools is the fact that unless we do for the time being, at least, very few members of certain minority groups will be admitted into the professions, and thus be made available to meet the needs that are felt on behalf of the minority communities.<sup>5</sup> This problem was strikingly stated in two of the many briefs that were filed with the Supreme Court in the *Bakke* case. One of these was filed by the deans of the four state-supported law schools in California.<sup>6</sup> The other was filed on behalf of the Association of American Law Schools (AALS), and was written by an excellent committee of faculty members in member schools.<sup>7</sup>

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4. G. MYDRAL, *AN AMERICAN DILEMMA* (1944).

5. This is relevant in many ways. There is the waste of talent that results if qualified persons cannot find opportunities. Law and medicine are inevitably involved in politics in the broad sense, and minority groups will be underrepresented in the political process if their members cannot gain admission to the professions. And there are many other social benefits that are dependent on "access to the system."

6. Dean Sanford H. Kadish of Berkeley, Dean Pierre R. Loiseaux of Davis, Dean William D. Warren of Los Angeles, and Dean Martin J. Anderson of Hastings.

7. Provost A. Kenneth Pye and former Deans Francis A. Allen and Robert B. McKay

The California deans included a number of striking tables in their brief, based on actual experience at the law school at Berkeley over the years through 1976 when the brief was prepared. At the outset, they contended that without "special admissions" programs the consequence would be "the near total exclusion of minority groups and their continued token representation in the bar" of California.<sup>8</sup> They pointed out that in 1970 there were 355,242 lawyers in the United States of whom only 3,845 were black, or scarcely more than one percent.<sup>9</sup> And they added that the number of Chicano, or Mexican-American, lawyers was far smaller both in absolute numbers and in relation to population percentages.<sup>10</sup> Without special consideration, they contended, "the movement of minority groups toward meaningful representation in the profession . . . will virtually cease."<sup>11</sup>

On what did they base this unhappy prediction? The figures, alas, are clear. In the past ten years, there has been an enormous increase in applications to law schools (and to medical schools). As a result, when conventional tests are used, only persons with very high scores can be admitted at many schools. There are a large number of applicants who have scores that indicate they could successfully complete the work of the law school, but only the top fifth—and at least in some law schools, the top tenth—can be accepted. Unfortunately, for better or for worse, very few minority students are in the top group. The fact was that at Berkeley during the three years 1974, 1975, and 1976, there were 8,042 white applicants of whom 4,126, or 51%, had PGA's (Predicted Grade Averages, based on a combination of college records and scores on the Law School Admissions Test) of 75 and above.<sup>12</sup> On this basis virtually no blacks or Chicanos would have been admitted. Yet under "affirmative action" or "special admissions," 86% of the blacks and Chicanos who had PGA's of 75 or above were admitted, but only 33% of the whites, while of those below 75, 26% of the blacks and Chicanos were admitted, but only 3% of the whites.<sup>13</sup>

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signed the brief, and Dean Ernest Gellhorn and Professors David E. Feller and Terrance Sandalow were of counsel.

8. Brief for Deans of California Schools at 2, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

9. *Id.* at 13.

10. *Id.*

11. *Id.* at 4.

12. *Id.* at 22.

13. *Id.* at 25.

As the California deans said, what termination of special admissions "implies in terms of the vertical integration of American society, assertion of legal rights on behalf of minority groups, and access to the political process requires no elaboration."<sup>14</sup> They pointed out that any effort to deal with the problem in terms of "disadvantaged" students involves exceedingly difficult problems in defining who is "disadvantaged," and would, in any event, require ignoring the basic disadvantage that all our history shows has been most significant in producing the present situation. Even the expedient of taking all of the applicants who meet the minimum qualifications and drawing their names from a hat would produce only a relatively small increase in the number of minority students, since the number of minority applicants, in terms of minority percentage of the total population, is smaller than the corresponding percentage of white applicants—and the number of white applicants could be expected to increase very greatly under such a system because of the large amount of self-selection that is now present in white applications to many American law schools.

The brief filed for the AALS fully reinforced the position of the California law school deans. It showed under one of its headings that: "The Use of Race as a Factor in the Admissions Process Is Necessary If There Are To Be a Substantial Number of Minority Students in Law School."<sup>15</sup> It pointed out that in 1964 there were only 700 black students in all the accredited law schools of the country—1.3% of the total enrollment of more than 54,265—and 267 of them, or more than a third, were enrolled in what then were essentially segregated black schools.<sup>16</sup> With the development of special admissions programs, this situation changed so that in the fall of 1976 a total of 1700 black and 500 Chicano students were admitted. They represented 4.9% and 1.3%, respectively, of the total of 43,000 students who were admitted that year.<sup>17</sup> A careful and thorough study made of 1976 admissions to law schools by F. Evans on behalf of the Law School Admissions Council showed that without the special admissions programs, "the nation's two largest racial minorities, representing nearly 14% of the population, would have had at most a 2.3% representation in the nation's law

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14. *Id.* at 4.

15. Brief for the Ass'n of Am. Law Schools at 21, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

16. *Id.* at 22.

17. *Id.* at 27-28.

schools and, more likely, no more than about 1%.”<sup>18</sup>

How could this result be? It goes back to one of the basic underlying facts with which we must wrestle in this whole area. Before proceeding further, I would like to make it plain that we know of no precise measure of “intelligence”; indeed, we have no very precise or generally accepted definition of that term. Nor do we have any clear definition of “success at the bar,” or of what makes a “useful and constructive practicing lawyer.” Over the past thirty years we have developed a predictive test of “success in law school,” in terms of the law school grades likely to be achieved by the applicant. This is a combination of the score on the Law School Admission Test and the applicant’s grade point average based on his college grades. No other method of law school admission is as effective in predicting success in law school as this one. Better results are not achieved by personal interviews, by letters of recommendation, by lot, or otherwise. We also know, as a result of five separate carefully conducted studies, that these measures are not racially biased, and that they do not underpredict the law school performance of blacks or of Mexican-Americans.<sup>19</sup>

With this background about the tests, we encounter “[t]he ineradicable fact,” as put in the AALS brief, “that, as a group, minorities in the pool of law school applicants achieve dramatically lower LSAT scores and GPA’s than whites.”<sup>20</sup> In specific terms, 20% of white and unidentified applicants, but only 4% of Chicanos and 1% of blacks receive both an LSAT score of 600 or above and a GPA of 3.25 or higher. Similarly, if one sets the combined LSAT/GPA levels at 500 and 2.75 respectively, 60% of the white and unidentified candidates would be included, but only 23% of the Chicanos and 11% of the blacks.<sup>21</sup> The effect of this under a race-blind system inevitably would be to curtail sharply the number of blacks and Chicanos admitted to law school. If all applicants were assigned an index number based on the two widely used predictive tests, “the number of blacks in the top 40,000”—which was the number admitted to law schools that year—“would have been 370 on one formula and 410 on the other. The equivalent figures for Chicanos are 225 and 250.”<sup>22</sup> And the schools to which these blacks

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18. *Id.* at 28.

19. *Id.* at 13. Nor are the tests sexually biased. *Id.*

20. *Id.* at 28-29.

21. *Id.* at 29.

22. *Id.* (footnote omitted).

and Chicanos would have been admitted are predominantly the least selective law schools in the country.<sup>23</sup> These are, generally speaking, schools that lack financial resources, including funds for financial aid to students.<sup>24</sup> Accordingly, a high percentage of minority students would, for financial reasons, be unable to attend the only schools to which they could gain admission.

As a result, the AALS brief contended, "the number of black and Chicano students enrolled in the first-year class in 1976 would have been approximately 1% of the entering class, roughly the same as in 1964. The progress of a decade would have been wiped out."<sup>25</sup> On a race-blind basis, "12 of the nation's most selective law schools, which during 1975 had total minority enrollment of approximately 1,250, nearly 15% of the national total, would have enrolled 'no more than a handful of minority students.'"<sup>26</sup>

Isn't there some other way? Both the California Supreme Court in *Bakke*<sup>27</sup> and Justice Douglas in his dissent in the *DeFunis* case<sup>28</sup> have contended that substantial minority enrollments in professional schools can be maintained without using admission criteria based on race. To this the AALS brief replied:

If there are means by which that can be done, they are not known to the law schools. We do know, however, that none of those suggested would work. None would permit the enrollment of minority students in numbers even close to those that now exist and some would, in addition, have a destructive effect upon the quality of legal education and of the profession, requiring law schools to admit students—white and black—who are less qualified to study law than students now being admitted.<sup>29</sup>

All of these matters, including the inadequacy of any known alternatives, could be discussed in greater detail. If we start with the premise that we ought to have more black and other minority lawyers and doctors, or that there ought to be greater opportunities for blacks and other minorities to enter the professions—both because of past discrimination and because of a current social need in the black and other minor-

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23. *Id.* at 31.

24. *Id.*

25. *Id.*

26. *Id.* at 31-32.

27. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

28. *DeFunis v. Odegard*, 416 U.S. 312, 340-41 (1974) (Douglas, J., dissenting).

29. Brief for Ass'n of Am. Law Schools at 32, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

ity communities for professional people who share their background and problems—then we are forced to the conclusion, I think, that we cannot accomplish this result by proceeding on a race-blind basis.<sup>30</sup> Consequently, largely for the reasons so well advanced in the AALS brief, I support the *Bakke* judgment in reversing the California Supreme Court's conclusion that admission to public professional schools must be on a race-blind basis.

### III.

At the same time, I do not like quotas in admissions, and at least I understand the reasons why there are serious concerns about quotas. No matter how you look at it, the admission system at the medical school of the University of California at Davis was a quota system. There were sixteen places out of one hundred that were reserved for minority students; and the system was clearly a two-track system, with the minority applicants being considered on a different basis by a separate group of admissions officers, and without any comparison on any basis with the nonminority applicants whose admission followed the regular track. Consequently, I am persuaded by Justice Powell, and the four other members of the Court who were with him on this issue, that the admissions system actually before the Court in the *Bakke* case was bad and that Bakke had been illegally discriminated against because of the purely numerical system, which, by preventing his being compared in any way with the minority applicants, resulted in his being denied admission to the medical school.<sup>31</sup>

What is the difference between a quota, such as that involved in the Davis admissions plan, and an overall consideration of all of the applicants taking into account "all relevant factors," such as was apparently approved by the judgment in the *Bakke* case? Not much.<sup>32</sup> It is clearly

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30. On this I concur with Mr. Justice Blackmun's statement in his opinion in the *Bakke* case: "In order to get beyond racism, we must first take account of race." 438 U.S. at 407 (Blackmun, J., concurring in the judgment in part and dissenting in part).

31. See *id.*

32. Professor Louis Lusky, who disapproves of the *Bakke* result, trenchantly observes: "It is less than twenty years since covert anti-black discrimination through similar administrative abracadabra formed an effective barrier to implementation of *Brown v. Board of Education*—almost to the point of nullification." Lusky, *Government by Judiciary: What Price Legitimacy?*, 6 HASTINGS CON. L.Q. —, — (1979). And he adds, with respect to the construction of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), that "in 1964 the consequence of covert anti-black discrimination through sophisticated administrative 'plans' were too painfully evident to be overlooked or used as a model for civil rights legislation." *Id.* at —.

a difference of degree, and “none the worse for it,” as Holmes observed many years ago.<sup>33</sup> It is a question of approach or emphasis. I do not think that it can be mathematically or logically demonstrated that one way is bad and the other is good, particularly when it is clear that many of the factors that are relevant in any admissions system are not quantifiable and cannot be put on any sort of a scale to be weighed one against the other in any conclusive fashion. It should be remembered, too, that in many—if not most—professional schools, after you select the top applicants who are clearly admissible on any basis, there is next a large group of applicants whose numerical predictors—test scores and GPA’s—are not much different from each other, often not different enough to have any statistical significance. It is at this point that other factors can play a wholly legitimate role to affect the mix in the class, to give recognition and weight to factors of background, experience, interest, and maturity, all of which may contribute to the educational process of the group and point to the possibility that a particular applicant may have potential for greater service to the community than another who lacks his personal background or qualities. These factors may well be relevant over a considerable spread in the numerical predictors, as long as all persons selected are of a calibre so that the predictors show that they have a high probability of successfully completing the work of the professional school. But there remains a serious risk.<sup>34</sup>

#### IV.

Thus, on all of its conclusions, I support the opinion of Justice Powell, and the judgment of the Court. You will note that in reaching this point, I have cited no cases or other legal authorities. I have not even quoted the equal protection clause,<sup>35</sup> or any other part of the Constitu-

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33. *Haddock v. Haddock*, 201 U.S. 562, 631 (1906) (Holmes, J., dissenting).

34. *Cf.* Wall St. J., Aug. 11, 1977, at 14, col. 4 (observations of former Under Secretary of Labor Lawrence H. Silberman). He concluded, with respect to affirmative action in the labor field, “I now realize that the distinction we saw between goals and timetables on the one hand and unconstitutional quotas on the other, was not valid.” *Id.*

35. U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

tion, or Title VI of the Civil Rights Act of 1964.<sup>36</sup> This is because, as I said at the beginning, I think of the question as primarily a philosophical and social question, and hardly a legal question at all.<sup>37</sup> Indeed, I do not think that there is anything in the Constitution that really says very much of anything about it. Yes, I know there is the equal protection clause, but that never has been regarded as requiring mathematical equality, or as preventing differential actions from being taken on grounds that at the time are considered as rational.

If the question presented by *Bakke* is not a legal question, what was it doing in court? As de Tocqueville observed a century and a half ago, we have a tendency, sometimes unfortunate, to throw all questions into court.<sup>38</sup> The mere fact that an issue presents essentially a social and philosophical question, not really covered by anything in the Constitution, has never kept our courts from considering it. Hours of labor,<sup>39</sup> minimum wage,<sup>40</sup> child labor,<sup>41</sup> and abortion<sup>42</sup> may be cited as examples.

If a more substantial support for my conclusion is thought to be needed, it can be found, I believe, in the long and troubled history in this part of North America—from the first landing of blacks in Virginia in 1619<sup>43</sup> through the slave codes, on the one hand, and the abolitionists, on the other. We did have a great civil war, which, though ostensibly fought to “save the Union,” would never have occurred if the country had not been torn by the social, economic, and moral questions

36. “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (1976).

37. Cf. Kimball, *An Historical Perspective on the Constitutional Debate over Affirmative Action Admissions*, 7 J.L. & EDUC. 31, 48 (1978) (“the ‘special admissions programs’ are one more expression of the social service commitment of the university and professional schools”).

38. “Scarcely any political question arises in the United States which is not resolved, sooner or later, into a judicial question.” A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 357 (2d ed. Cambridge 1863) (1856).

39. See, e.g., *Bunting v. Oregon*, 243 U.S. 426 (1917); *Miller v. Wilson*, 236 U.S. 373 (1915); *Muller v. Oregon*, 208 U.S. 412 (1908); *Lochner v. New York*, 198 U.S. 45 (1905); *Holden v. Hardy*, 169 U.S. 366 (1898).

40. See, e.g., *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Morehead v. Tipaldo*, 298 U.S. 587 (1936); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

41. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Sturges & Burn v. Beauchamp*, 231 U.S. 320 (1913).

42. See, e.g., *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

43. See A.L. HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR* 20 (1978).

of slavery. The war was resolved on the battlefield, and this resolution was put into our fundamental law by the thirteenth,<sup>44</sup> fourteenth,<sup>45</sup> and fifteenth amendments.<sup>46</sup> Then came a century of relative quiescence, while we waited too long to make the amendments effective, and took steps to perpetuate the social and economic deficiencies with the excuse that we had resolved the moral question. The way out of this period of stagnation has been led by the Supreme Court, relying heavily on the equal protection clause of the fourteenth amendment, aided by some delayed, but important, federal legislation.

Of course, a legal basis must exist for any court decision. In this instance, it seems to me that it can be readily found in the fourteenth amendment in the light of its history and the total history of our country. Though the problem is and remains a social, economic, and moral problem, we have deliberately constructed our fundamental law so as to make it possible for courts to deal with it. This is surely true, it seems to me, as far as blacks are concerned. Perhaps the same reasoning can be applied to Indians, or Native Americans. The history with respect to other groups, such as Chicanos (Spanish Americans or Puerto Ricans), may well be different. They, or their ancestors, were not brought here against their will or held as slaves. But some of the same factors may be relevant there, enough so that it is not easy to draw an adequate line between them and others whom the fourteenth amendment was clearly intended to protect.

In his dissent in the *DeFunis* case, Justice Douglas spoke eloquently when he said:

The purpose of the University of Washington cannot be to produce Black lawyers for Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans, and not to place First Amendment barriers against anyone.<sup>47</sup>

This is surely an ideal towards which we should aspire and towards which we must move. As far as many segments of the public are concerned, we have made great strides in that direction, not through ho-

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44. U.S. CONST. amend. XIII, § 1: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

45. See note 35 *supra*.

46. U.S. CONST. amend. XV, § 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

47. 416 U.S. at 342 (1974) (Douglas, J., dissenting).

mogenizing all the people in the great American melting pot, as some sought to do in the early part of this century, but by greater understanding and greater common acceptance of persons of widely different ethnic background—as long as they came from Europe, and not Asia or Africa. But we still have a long way to go with respect to other elements of our population. The success we have achieved in some areas leaves room for hope that we can bring about improvements with respect to the more difficult problems. But we cannot do so unless we provide real practical equality of opportunity to qualified members of the racially disadvantaged groups. This is what the *Bakke* case and the fourteenth amendment are all about.

## V.

Having come out in support of the *Bakke* judgment, basically on social and moral grounds, but with, I believe, an adequate legal foundation, I will now say that it leaves me with a feeling of profound unease. I have a disturbing doubt whether I am a do-gooder who undertakes to intervene in the lives of other people because it gives me satisfaction to feel that I am disposing of some of the world's largess in a way that I think will be useful.<sup>48</sup> Some say that taking such action is simply a means of assuaging our own guilt feelings. I do not think that is a correct analysis. As far as I can tell, I do not have a fundamental guilt feeling in this area, though I surely have had some failings. Talk about guilt feelings in terms of the wrongs done in the seventeenth, eighteenth, and nineteenth centuries seems to me to be nothing but a massive charge of guilt by long-range and highly attenuated association. By our present standards, there were grave abuses in those days; but no one now living owned a slave, or engaged in the slave trade, or acted on the basis that the Negro "had no rights which the white man was bound to respect."<sup>49</sup> The problem is with us, and we—all of

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48. See W. GAYLINE, I. GLASSER, S. MARCUS & D. ROTHMAN, *DOING GOOD: THE LIMITS OF BENEVOLENCE* (1977), reviewed in Orwin, *Neo-Liberalism*, 53 PUB. INTEREST 124 (1978). It is hard to be sure that the attempt to do good really results in accomplishing something that is really good. See B. GROSS, *DISCRIMINATION IN REVERSE* (1978). Affirmative action may in fact benefit "more privileged blacks, with the unintentional effect of contributing to growing economic-class differences within the black community." Williams, *Race and Economics*, 53 PUB. INTEREST 147 (1978). A federal study shows that "in certain income categories, a higher proportion of black college-age youth attend college than do their white counterparts." 53 PUB. INTEREST 119-20 (1978).

49. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). It has been correctly noted that

us—surely have responsibilities. I think that we should do what we can to meet those responsibilities, not because of any guilt feelings, but because the problem is a social problem, and we are all members of society.

There is a related aspect to the problem, though, that gives me considerable concern. It is good to do good, but who bears the burden? When I was dean of a law school, we had serious admission problems, because there were far more applicants than we could accept. One of the functions of the dean is to receive pressure in such cases, and to resist it as wisely and courteously as he can. Some of the pressure came from good alumni of the school who had sons or daughters whom they wanted to have admitted. These situations could be very appealing. Most of the alumni were reasonably understanding about it, but all were hurt when an adverse decision was made. I found that the way that I could hold the line and keep myself from too much distress was by recognizing that when you have a limited number of places, the admission of any one person means that some other well-qualified person will be excluded. It was hard to tell the alumnus that we could not take his son. It would have been harder to tell the next man on the list, better qualified by hypothesis than the son of the alumnus, that we could not take him because we were taking the alumnus' son.

In the *Bakke* case, that man is Bakke. But for the unfortunate way in which the admissions program at Davis was set up—with a quota and a separate admissions track—Bakke would have been denied admission in order to admit a minority applicant. And in the future under the *Bakke* decision, various well-qualified applicants will be excluded because other applicants have qualities, such as blackness or a Spanish surname, that are thought by admissions committees to make them more eligible for acceptance. It is impossible to say that Bakke was himself guilty of any injustice to other applicants. It is equally hard to say that others who will be excluded in the future under the rule approved by the judgment in the *Bakke* case have been guilty of any injustice to those who are accepted. It is only by seeing that we are dealing with a social and moral problem, made particularly intense by our long history of discrimination, that I can bring myself to accept what would have been the injustice to Bakke if he had not been eventu-

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Chief Justice Taney spoke of the American situation prior to and including 1776. A.L. HIGGINBOTHAM, *supra* note 43, at 6.

ally admitted, and what has been, or will be, the injustice to other applicants who have been excluded from many schools that have followed more skillfully prepared plans of selective admission than the one used at Davis. Professor William Van Alstyne puts this question strikingly:

In brief, the Davis plan as an engine for amortizing the national racial debt is a zero sum game which arbitrarily disadvantages a few whites very greatly indeed and no one else at all; a system of transfer payments enforced at the gates of a state university medical school . . . . The system of racial transfer payments is perfectly calculated to dissipate its entire impact on otherwise "marginal" white applicants, *i.e.*, those from circumstances least profiting from the antecedent racism in America and among the least able to pay that debt.<sup>50</sup>

Apart from this individual burden, it should be observed, too, that there is an inherent element of invidiousness in any affirmative action program, no matter how carefully it is prepared or sincerely advanced. For the time being this can be justified, but it does warrant a note of caution. Racism will not wholly cease until the time comes when we can ignore race while we allocate scarce resources.

## VI.

My unease also derives from another ground, which adds to my concern. Our society is moving in one way or another towards an egalitarianism that is more rigid than we have thought wise in the past, and this may be particularly true in the field of education. In the past the commonly accepted standard has been "equality of opportunity," with the expectation that "excellence" is the ultimate objective and that our society will be so arranged that it will, in normal course, provide encouragement for superior achievement.<sup>51</sup> Along with this is a large element of *noblesse oblige* under which the more successful are given opportunities in various ways to aid the less successful, and are expected to use those opportunities at least to a reasonable extent. It has long been our experience and expectation that a relatively few members of the society will provide most of the innovation, most of the ideas, most of the initiative, and most of the motive power and leadership necessary to the

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50. Van Alstyne, *A Preliminary Report on the Bakke Case*, 64 A.A.U.P. BULL. 286 (Dec. 1978).

51. This is pejoratively called "the intellectual meritocracy" in Kimball, *supra* note 37, at 44, perhaps indicating a bias that is currently active among professional educators.

sound development of our social and economic systems, and that persons who have these qualities should be encouraged.

In recent years, though, education and many other aspects of society have been moving or drifting towards that sort of absolute equality that we call egalitarianism. In elementary schools children do what they want instead of what will draw them out and lead them to an awareness that they have greater capabilities than they realize. In colleges and universities we have pass-fail and the absence of requirements, and there are many other trends of this sort.

The problems in this area have been thoroughly explored by Arthur M. Okun in his book on *Equality and Efficiency: The Big Trade Off*,<sup>52</sup> and in his subsequent article on *Further Thoughts on Equality and Efficiency*.<sup>53</sup> Mr. Okun's survey shows, as I think we have all come to see in recent years, that greater equality leads almost inevitably to lower efficiency or decreased excellence.

How far is this involved in the *Bakke* problem? There is no way to be sure, but I find that I cannot escape the feeling that it is involved, and probably to a significant extent. Under the judgment in the *Bakke* case, which, as I have said, I favor and accept, I feel that there will be some reduction of average standards, perhaps an appreciable reduction. This is a price we have to pay, but I think that it is of some importance that we recognize that we are paying that price, and that over the years we do what we can to restore the highest standards in education that we can maintain. Hopefully, as more minorities enter the mainstream of American professional life through the doorway of the *Bakke* case, they will successfully meet new challenges, and devise new roads for innovation and new means of leadership. In the long run, the provision of greater "equality of opportunity" through the *Bakke* decision need not result in the deadening absolute of egalitarianism. But there is a risk; and we must watch.

## VII.

The *Bakke* problem has been discussed principally in terms of admissions because that is the field in which it and its forerunner, the *DeFunis* case, arose. There are, however, other situations presenting

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52. A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADE OFF* (1975).

53. Okun, *Further Thoughts on Equality and Efficiency*, in *INCOME REDISTRIBUTION* 13 (D. Campbell ed. 1977).

aspects of the question of the extent to which race may be a factor in allocating scarce resources.

Probably the closest problem is that of financial aid to education; that is, the granting of preferences in the award of scholarships and other financial aid. Experience shows that most persons admitted under a special admissions program are not able to avail themselves of the opportunity if they have to rely on their own financing. Accepting the *Bakke* judgment, the question then arises how far may race be taken into account in allocating financial aid, which, at virtually every institution, is a scarce resource. Here, as with respect to admission itself, we must recall that every dollar of financial aid made available to one student means that there will be that much less available for one or more others.

This problem was presented in the case of *Flanagan v. President and Directors of Georgetown College*.<sup>54</sup> Plaintiff was a white student, who successfully contended that he had been discriminated against in violation of sections 601 and 602 of the Civil Rights Act of 1964<sup>55</sup> when Georgetown established an affirmative action program of financial aid. Under this program sixty percent of available financial aid was allocated to minority students. The term "minority" was defined rather broadly to include persons with educational, social, and cultural disadvantages, and could be applied to white students.<sup>56</sup> The result was, though, that in plaintiff's case, he was awarded \$400 while many black applicants in similar financial circumstances were awarded \$2500 in financial aid.<sup>57</sup> As indicated, the court held that this program was discriminatory and contrary to the statute.<sup>58</sup> Following this decision about liability, Georgetown settled the case with plaintiff, so no appellate decision became available. It should be noted, too, that this was before the *Bakke* decision in which only four members of the Supreme Court felt that the Civil Rights Act was applicable.

There are, or have been, a number of federally funded grants specifically designated for minority or disadvantaged persons. These include the funds made available to the Council on Legal Education Opportunity and the Graduate and Professional Opportunities Fellowships.

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54. 417 F. Supp. 377 (D.D.C. 1976).

55. 42 U.S.C. §§ 2000d, 2000d-1 (1976).

56. 417 F. Supp. at 379.

57. *Id.* at 381.

58. *Id.* at 385.

Since these were provided by Congress, it seems clear that they do not violate Title VI.<sup>59</sup> No one, as far as I know, has suggested that they are subject to any constitutional infirmity.

Apart from admissions itself and financial aid, expenditures have sometimes been made by educational institutions on what might be called a differential (or, indeed, discriminatory) basis. For example, special programs have been developed by public institutions and by private institutions that in one way or another receive public support, which are designed to recruit minority students. Indeed, the Supreme Court of California in its *Bakke* decision<sup>60</sup> suggested such special efforts at recruitment as one of the means that might be followed by a state educational institution. It can hardly be contended that such programs and expenditures have always been race color-blind. Desirable as they may be, it seems likely that they should be carefully scrutinized, and care should be taken to ensure that they are broad enough to cover a fairly wide spectrum of disadvantaged students. The same may be said with respect to special programs such as tutoring and counselling, which an institution may make available to its students. Confining these to a fairly narrow group may have a stigmatizing effect. Though the matter is analytically close to the *Bakke* problem, it can be readily avoided by the exercise of reasonable care in seeing that these services are made available to all students who have need of them.<sup>61</sup>

Another case in the field of education gets us into sex discrimination and employment. As employment is the subject of another program in this series, I shall make only brief reference to it. This is the case of *Cramer v. Virginia Commonwealth University*.<sup>62</sup> A stipulation filed in the district court showed that plaintiff was a white faculty member. He received a temporary appointment in the Department of Sociology and Anthropology. During the year of his appointment, he applied for promotion to either one of two regular positions. A total of 385 applications were received by the University for these two positions, of which 57 were from female applicants and 328 were received from males. In the selection process, the files of the applicants deemed qualified were

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59. See note 36 *supra*.

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

61. THE *BAKKE* DECISION: IMPLICATIONS FOR HIGHER EDUCATION ADMISSIONS, AMERICAN COUNCIL ON EDUCATION, AND ASSOCIATION OF AMERICAN LAW SCHOOLS (W. McCormack ed. 1978).

62. 415 F. Supp 673 (E.D. Va. 1976), *aff'd per curiam*, 586 F.2d 297 (4th Cir. 1978).

first pulled out. Then, these files were divided into three groups: females, minority males, and white males. Only applications in the female pile received further consideration; only they were interviewed for the two vacant positions; and two females were eventually appointed. In taking this action the department appointment committee was clearly influenced by the "goals and timetables" provision of Executive Order 11246,<sup>63</sup> as made applicable to sex in 1967,<sup>64</sup> and by the corresponding Executive Order No. 29 issued by the Governor of Virginia.<sup>65</sup> Acting under the Virginia executive order, the Board of Visitors of the University had promulgated "The Affirmative Action Program of Virginia Commonwealth University" on November 15, 1973.

The court held that plaintiff had been wrongfully discriminated against in violation of the United States Constitution and the provisions of Title VII of the Civil Rights Act.<sup>66</sup> It should be noted, of course, that this was prior to the *Bakke* decision. After the decision, the Civil Rights Division of the Department of Justice, on behalf of the Secretary of Labor, filed a motion to intervene in the case.<sup>67</sup> This is the fifth brief filed by the Department in affirmative action cases, but the first one involving sex discrimination. Just how the problem stands in the light of the judgment in the *Bakke* case remains to be seen.

Before proceeding to the next problem, I would like to make brief reference to another employment case—which may well become the next *cause célèbre*. This is *Weber v. Kaiser Aluminum and Chemical Co.*,<sup>68</sup> decided late in 1977 by a panel of the Fifth Circuit Court of Appeals. There, without any showing of prior discrimination,<sup>69</sup> a collectively bargained labor agreement provided that an on-the-job training program should admit minority workers on a one-for-one basis.<sup>70</sup> The court held that this was a quota system, which violated the Civil

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63. 30 Fed. Reg. 1231 (1965).

64. Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967).

65. 415 F. Supp. at 675.

66. *Id.* at 682.

67. Wash. Post, Nov. 1, 1978, § 1, at 7, col. 4. Thereafter, the court of appeals filed a new opinion, remanding the case to the district court to find the facts, saying that if Cramer was given consideration, then "the legal question may not be present." 586 F.2d at 300. The opinion of the court of appeals shows that the stipulation before the district court may not have been accurate, and that, in fact, Cramer was considered "for each of the three positions," but "he was not rated highly among the candidates for either." *Id.* at 299.

68. 563 F.2d 216 (5th Cir. 1977), *cert. granted*, 99 S. Ct. 720 (1978) (No. 78-435).

69. *Id.* at 224.

70. *Id.* at 222.

Rights Act,<sup>71</sup> and that, to the extent that the program was carried out in an effort to comply with the “goals and timetables” provision of Executive Order No. 11246,<sup>72</sup> the executive order would have to yield to the congressional prohibition against such discrimination.<sup>73</sup> Judge Wisdom filed a long and careful dissent—all, of course, prior to the *Bakke* decision.<sup>74</sup> How this problem will eventually be resolved remains to be seen.<sup>75</sup>

The next problem in this area relates to the ten percent set-aside for minority business, which is provided by the Public Works Compensation Act.<sup>76</sup> This, of course, provides a quota and eliminates any necessity for showing prior discrimination by any of the contractors involved. In *Rhode Island Chapter of Associated General Contractors v. Kreps*<sup>77</sup> Judge Pettine wrote a long and careful opinion upholding this provision of the statute. The opinion is an important one because it stresses that different considerations may apply in different areas, and that a “quota” in a business area may be upheld when it would not be sustained in the field of education. He said:

Quotas in educational institutions are much more disruptive than goals because they seem to require the substitution of whatever notions of merit prevail at a particular institution with a non-meritorious, indeed suspect, criterion. We need not address that issue here for this case does not involve the disruption of an institution. Nor does it involve divesting those with reasonable expectations for the benefit of others. In the marketplace, no such expectations become firm and there is no accrued right to a government contract, especially to funds only recently made available on an emergency basis. No on-going private institutional arrangements are being disrupted by the use of this quota. The market, not a private institution, is the locus of this remedy.<sup>78</sup>

This suggestion is interesting, but not wholly persuasive. There is no “right” to welfare, but if it is made available, we know that it cannot be

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71. *Id.* at 227.

72. 30 Fed. Reg. 12319 (1965).

73. 563 F.2d at 227.

74. *Id.*

75. Petitions for certiorari filed in the Supreme Court, including one by the Solicitor General on behalf of the Equal Employment Opportunity Commission, have been granted, and the case was argued on March 28, 1979. No. 78-435, 1978 Term.

76. 42 U.S.C. § 6705(f)(2) (1976), *as amended* by Pub. L. No. 95-28, § 103, 91 Stat. 116 (1977).

77. 450 F. Supp. 338 (D.R.I. 1978).

78. *Id.* at 352 n.7.

provided on a discriminatory basis.<sup>79</sup> Suppose, for example, the statute before Judge Pettine had provided that *no* contracts would be awarded to blacks. We know that such a statute would be invalid, and it would not be saved on the ground that “[i]n the market-place, no such expectations become firm and there is no accrued right to a government contract.”<sup>80</sup>

With respect to another and important aspect of the problem, Judge Pettine pointed out that whatever may be the powers of state and private parties (as in the *Bakke* and the *Weber* cases), “to implement affirmative action remedies without specific findings of discrimination, it is beyond doubt that Congress has that power.”<sup>81</sup>

This may well be, in the long run, the key to the problems in this area. As I suggested early in this article, the problems do not seem to me to be really legal in anything but a rather narrow and technical sense. Rather, they are social, philosophical, and moral problems of our society, which, insofar as they can be resolved by governmental action—and I think governmental action is important—may well be better resolved by legislative action than by the courts. Congress has the power—certainly as to blacks—under section five of the fourteenth amendment,<sup>82</sup> and it may well be that the congressional power, and also the power of Congress under the commerce clause,<sup>83</sup> extends to other racial minorities as well.

## VIII.

Let me now turn to another area in which there has been a considerable though still rudimentary development that can be fairly denominated as a judicially created affirmative action in the allocation of scarce resources. This is the question of the granting of radio and television licenses to competing applicants, and the extent to which race, other minority status, or sex can or must be taken into account by the Federal Communications Commission. There is no federal statute that mandates or expressly allows “affirmative action” in this area. Must

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79. *Dandridge v. Williams*, 397 U.S. 471, 483 (1970).

80. 450 F. Supp. at 352 n.7.

81. *Id.* at 354 n.14. See also Glazer, *Why Bakke Won't End Reverse Discrimination*, 2 COMMENTARY 36 (Sept. 1978).

82. U.S. CONST. amend. XIV, § 5: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

83. U.S. CONST. art. I, § 8, cl. 3: “The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian tribes.”

the Commission take these factors into account—and how—in going about the delicate task of allocating the nation's scarce radio and television frequencies?

This question apparently first arose in the opinion of Judge Fahy of the Court of Appeals for the District of Columbia Circuit in the case of *TV-9, Inc. v. Federal Communications Commission*.<sup>84</sup> That case involved competing applications for a construction permit to operate a commercial television station in Orlando, Florida. One of the applicants relied on the fact that two of its owners were local black residents. One of them had a 7.17% voting interest, and the other was a local doctor with a 7% voting interest. Both lived in the local area where about 25% of the people were black. Both were directors of the corporation. One of them was to assume the office of vice president and to devote two days a week to the station.<sup>85</sup>

The Commission, through its various layers of review, gave no weight or effect to this black ownership.<sup>86</sup> The Review Board said that black ownership cannot and should not be an independent comparative factor.<sup>87</sup>

The court of appeals reversed this conclusion.<sup>88</sup> It said: "To say that the Communications Act, like the Constitution, is color blind, does not fully describe the breadth of the public interest criterion embodied in the Act."<sup>89</sup> On this basis the court concluded that "credit" should be given for the participation of the two black shareholders, and that "merit should be awarded" on their account.<sup>90</sup> In support of these conclusions, it said:

It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship.<sup>91</sup>

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84. 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). See also *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213-14 n.36 (D.C. Cir. 1971).

85. 495 F.2d at 935.

86. *Mid-Florida Television Corp.*, 33 F.C.C.2d 34, 268 (1970).

87. *Mid-Florida Television Corp.*, 33 F.C.C.2d 1, 17-18 (1972).

88. 495 F.2d at 936.

89. *Id.*

90. *Id.* at 937-38.

91. *Id.* at 937.

A petition for rehearing en banc was filed.<sup>92</sup> This was denied,<sup>93</sup> but the court wrote a further opinion in which it qualified its statement somewhat. In answer to the contention that its opinion called for a "new comparative policy of awarding preferences for Black or minority ownership, *per se*," the court wrote that "our opinion makes no mention of a preference in this matter."<sup>94</sup> It added<sup>95</sup> that "the court determines only that Comint was entitled to be accorded merit due to the ownership and participation of Dr. Smith and Mr. Perkins."<sup>96</sup> And it concluded:

However, in view of the nature of the issues in this case, and the probability that Black persons having substantial identification with minority rights will be able to translate their positions, though not technically "managerial," and their ownership stake, into meaningful effect on this aspect of station programming, we think that such material factors residing in the evidence cannot reasonably be totally and rigidly excluded from favorable consideration.<sup>97</sup>

A petition for certiorari was filed in the Supreme Court, seeking review of this decision, particularly in the light of the then pending *DeFunis* case. The Solicitor General joined in this petition, but it was denied.<sup>98</sup>

So the case went back to the Federal Communications Commission, where it now remains, believe it or not, in its twenty-fifth year. In the further proceedings before the Commission, a new element appeared. One of the competing claimants relied on the fact that thirty-three percent of its stock was owned by a woman who planned to spend full-time in the operation of the station. It advanced the contention that a far higher proportion of the audience in Orlando was made up of wo-

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92. *Id.* at 941.

93. *Id.* at 942.

94. *Id.* at 941.

95. *Id.*

96. *Id.* at 942.

97. A subsequent decision of the court of appeals is *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975). *Garrett* involved the application of a radio station seeking authority to construct facilities that would enable it to change from daytime-only to unlimited-time broadcasting. The Commission refused this authority. The court of appeals reversed, relying largely on the fact that the applicant is "solely owned by appellant, Leroy Garrett, who is black." *Id.* at 1061. The court pointed out that the administrative law judge did not even allude to this factor in his initial decision, and the Review Board designated it as "without decisional significance." *Id.* (quoting *Leroy Garrett*, 38 F.C.C.2d 112, 116 (1972)). The court of appeals referred to its *TV-9* decision, and said: "It is evident that the Review Board's treatment of WEUP's blackness cannot be harmonized with the principles articulated in *TV 9*." *Id.* at 1063.

98. 55 F.C.C.2d 112 (1975).

men than of blacks, and that it was entitled to a "merit" more than sufficient to outweigh the "merit" due to Comint because of its smaller element of black ownership and participation in the operation of the station. There are other issues in the case, and it is not at all clear what weight eventually will be given to black ownership, or ownership by women, either on an absolute or a comparative basis. It is clear, though, that once minority status of one sort is found to be relevant, the situation can become rather complicated.

This can be illustrated by another decision of the Review Board of the Commission in *Gainesville Media, Inc.*<sup>99</sup> The case arose out of three mutually exclusive applications for authority to construct a new FM broadcast station in Gainesville, Florida. I will not go into the details. Reference to the case is simply intended to illustrate the semantic problems that arise in connection with considerations of this sort. On several occasions the Review Board said that a "credit" or "an important credit" should go to one of the applicants because one of the owners, with a ten percent interest, was black. In other places the Review Board said that "merit" should be awarded for minority ownership, but added that "merit" meant only favorable consideration or a plus factor, not a "preference."<sup>100</sup> In still other places the Review Board said that "minority stock ownership . . . is a consideration relevant to a choice among applicants"<sup>101</sup> and that "favorable consideration" should be given "to an applicant who . . . in good faith . . . gives a local minority group media entrepreneurship."<sup>102</sup> Just what is the relevant weight to be given to "credit," "merit," "preference," "relevant consideration," or "favorable consideration" is not clear. Perhaps it can be said that problems of this sort—that is, of the weight to be given to many diverse factors—are often encountered in comparative decisions before the Federal Communications Commission.

There has been a further development in this area that may prove to be of considerable importance. On January 31, 1978, the Office of Telecommunications Policy in the Executive Office of the President and the Department of Commerce jointly filed a formal petition with the Federal Communications Commission,<sup>103</sup> seeking to have the Com-

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99. *Gainesville Media, Inc.*, 43 Rad. Rep. 2d 604, 610 (Review Board 1978).

100. *TV-9, Inc. v. FCC*, 495 F.2d 929, 941 n.2 (D.C. Cir. 1973).

101. *Id.* at 937.

102. *Id.*

103. Statement by Sec'y of Commerce Juanita M. Kreps on the Petitioning of the FCC to

mission adopt a rule that would "establish a policy of promoting ownership of broadcast facilities by minorities especially in those areas where minorities constitute a significant percentage of the population and have little or no present ownership."<sup>104</sup> For this purpose, the petition filed with the Commission defines "minorities" as including "persons of Black, Hispanic surnamed, American Indian, Native American and Asiatic-American extraction."<sup>105</sup> The petition also asserts that "[w]omen, of course, are also included to the extent that they are also within one of the stated minorities."<sup>106</sup> Thus, women as a class are not covered, unless they are minority women. The petition adds: "We would not propose to include women generally because of the potential for defeating the objective of the proposed policy through family stock ownership arrangements."<sup>107</sup>

Upon its filing, the White House Press Secretary issued a news release summarizing the petition and announcing that "[t]o ease initial financing problems, the [Small Business Administration] and the [Economic Development Administration] have announced rule changes to extend their loan and loan guarantee problems to broadcast and cable facilities."<sup>108</sup> In addition, "[b]oth agencies intend minorities to be the major beneficiaries of their rule changes."<sup>109</sup> At the same time, the Department of Commerce issued a news release saying that they had joined in petitioning "the FCC to establish a policy of promoting minority ownership of U.S. broadcast facilities."<sup>110</sup>

The Commission has taken several actions in this area. It established a Minority Ownership Task Force, which held a conference in April 1977. That Task Force put out a report on May 17, 1978, which the

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establish a policy of promoting minority ownership of U.S. broadcast facilities, News Release, U.S. Dep't of Commerce (Jan. 31, 1978).

104. *In re* Petition for Establishment of Policy to Promote Broadcast Ownership by Minorities, and Related Implementing Policies, F.C.C. 1 (filed Jan. 31, 1978) (footnote omitted).

105. *Id.* at n.1.

106. *Id.*

107. *Id.*

108. 14-NO.5 TELECOMMUNICATIONS MINORITY ASSISTING PROGRAM, WEEKLY COM. OF PRES. DOC. 252, 253 (1978).

109. *Id.* at 254.

110. Statement by Sec'y of Commerce Juanita M. Kreps on the petitioning of the FCC to establish a policy of promoting minority ownership of U.S. broadcast facilities, News Release, U.S. Dep't of Commerce (Jan. 31, 1978).

Commission published.<sup>111</sup> On May 25, 1978, the Commission issued a Statement of Policy on Minority Ownership of Broadcasting Facilities,<sup>112</sup> which deals primarily with steps to be taken to facilitate the transfer of interests in radio and television stations to black purchasers.<sup>113</sup> And on November 1, 1978, the Commission announced that it would soon be issuing a response to the petition filed by the National Telecommunications and Information Administration, formerly the Office of Telecommunications Policy, and the Department of Commerce.

There are almost no limits to the areas in which similar problems and approaches may be used. Any field that is subject to government regulation or inducement may become an occasion for "affirmative action." Consider, for example, the Judicial Selection Commissions, which have been established in the past year-and-a-half<sup>114</sup> and which have an especially important role to fill under recently enacted legislation establishing many new federal judgeships.<sup>115</sup> Recently, I heard about a special problem of the allocation of scarce facilities; namely, that of landing slots at our most crowded airports such as LaGuardia Airport, National Airport, O'Hare Field, and Los Angeles International. These, I am told, are now allocated by agreement among the affected airlines. Will priorities have to be given for minority airlines? Indeed, how will we establish minority airlines in a time of deregulation?

### CONCLUSION

Apart from the labor field, which is the subject of another lecture in this series, I have tried to give a summary of the possible impact of the *Bakke* decision on various aspects of education and other fields. In the

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111. FEDERAL COMMUNICATIONS COMMISSION'S MINORITY OWNERSHIP TASK FORCE, MINORITY OWNERSHIP REPORT (1978).

112. 68 F.C.C.2d 979 (1978). The statement concludes with a footnote, *id.* at 984 n.22, which reads: "while today's actions are limited to minority ownership because of the weight of the evidence on this issue, other clearly definable groups, such as women, may be able to demonstrate that they are eligible for similar treatment."

113. *Id.* at 982-83. On November 2, 1978, the Commission announced that it "will maintain a list of minority persons who are interested in purchasing broadcast facilities." Public Notice 78-772, 43 Fed. Reg. 52054 (1978).

114. Exec. Order No. 11972, 3 C.F.R. 96 (1978), *amended* by Exec. Order No. 11993, 3 C.F.R. 126 (1978), *revoked and replaced* by Exec. Order No. 12059, 43 Fed. Reg. 20949 (1978).

115. Pub. L. No. 95-486, 92 Stat. 1629 (1978) (to be codified at 28 U.S.C. §§ 44, 44 note, 133 & 133 note).

process I have endeavored to suggest my evaluation of the *Bakke* decision itself. If this seems rather inconclusive, that does not surprise me, for we are dealing with a movement, with a development in our national history, with something that transcends the law and lawyers' lucubrations.

Where is the line between "affirmative action" and "quotas"? How far will the implications of the *Bakke* case spread? Indeed, in view of the ad hoc nature of the ultimate "majorities" in the *Bakke* decision, how long will that case last? These questions I cannot answer, and I am not much concerned that that is so.

There are some questions with which the Supreme Court deals that are not resolvable in ultimate detail and, I venture to say, fortunately so. In the *Pentagon Papers*<sup>116</sup> case the Court held that there could be no prior restraint on the publication of the particular papers then before it; but a clear majority of the Court refused to say that there could never be prior restraint on publication in the name of national security. Where is the line between freedom of the press and fair trial? We know a number of things about that line, but no one can say precisely where it is. Even everyday questions, like negligence and fraud and the line between tax evasion and tax avoidance, have never been finally delineated and, I would suppose, never will be.

As I said at the beginning of this paper, the *Bakke* problem is, in my view, more a social and philosophical and moral question than it is a legal question with which lawyers are peculiarly fitted to deal. This does not deny that there are legal elements in it; nor does it suggest by any means that there is no appropriate role for the courts, especially in the application of any determinations that the legislature, as the authorized spokesman for society, may make. For affirmative action, justice in society, justice for all, is fundamentally a social and political problem. The *Bakke* decision has performed an important function in bringing this sharply to public attention. Let us get on with the job, being careful in the process to weigh into the scales the new problems that affirmative action itself inevitably creates.

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116. *New York Times Co. v. United States*, 403 U.S. 713 (1971).