

# PREFERENCE BY RACE IN UNIVERSITY ADMISSIONS AND THE QUEST FOR DIVERSITY

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## I. UNIVERSITY ADMISSIONS AND RACE PREFERENCE

The President of the University of Michigan publicly admits that in admissions at his university, "We do discriminate."<sup>1</sup> But he and many others believe that the kind of racial discrimination embodied in recent and current admission preference given to ethnic minorities is justifiable, and that it is constitutionally defensible in the name of diversity. I will argue in what follows that this is not correct.

At issue is *race preference*, not affirmative action. In its original and proper sense, "affirmative action" denoted a variety of positive steps aimed at the eradication of racial discrimination. The Civil Rights Act of 1964,<sup>2</sup> expressly authorizing courts to take affirmative action to uproot ensconced discriminatory practices, was plainly intended by its sponsors to prohibit (in most spheres of public life) all

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1. Lee Bollinger, *World News Tonight with Peter Jennings*, ABC television broadcast, Dec. 2, 1997. Professor Bollinger is a Constitutional scholar of distinction whose judgments deserve thoughtful consideration. He is a colleague and friend of the author and also, in his personal capacity, is one of the respondents in two law suits filed in October of 1997 in the U.S. District Court for the Eastern District of Michigan: *Gratz v. Bollinger* and *Grutter, v. Bollinger et al.* In both cases the admissions practices of the University of Michigan are at issue.

2. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

racial discrimination, all preference by race.<sup>3</sup> This prohibition applies without a doubt to universities receiving federal financial assistance. Section 603 of the Civil Rights Act of 1964<sup>4</sup> reads in full: "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."<sup>5</sup>

This seems rather clear. Four of the justices of the U.S. Supreme Court held, in *Regents of the University of California v. Bakke*,<sup>6</sup> that this federal statute had been so plainly violated by the racially discriminatory admissions system of the medical school at the University of California at Davis that it was not necessary to go beyond Title VI to establish the impermissibility of that admissions program. But race preferences in admissions at universities today are as blatant as they were in 1978. This is proved beyond doubt by documents prepared by some leading universities.<sup>7</sup>

Racial classifications are "constitutionally suspect."<sup>8</sup> A majority

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3. See *Steelworkers v. Weber*, 443 U.S. 193, 221 (1979) (Rehnquist, J. dissenting). In *Steelworkers*, Justice Rehnquist cites at length the unambiguous statements made by the sponsors of that legislation, during the debates upon the Civil Rights Act on the floor of the House and of the Senate. See *id.* (citing 110 CONG. REC. 1511-14,511 (1964)).

4. 42 U.S.C. § 2000d (1994).

5. *Id.*

6. 438 U.S. 265 (1978).

7. Here, and in what follows below, I refer in part to documents that I have obtained on several occasions since 1996 from the University of Michigan under the Michigan Freedom of Information Act. Among these documents are the following: (1) "Guidelines for All Terms of 1996," College of Literature, Science and the Arts, Office of Undergraduate Admissions; (2) "Profile of the University of Michigan: Group—Underrepresented Minorities"; (3) Profile of the University of Michigan: All Units Total"; (4) "Admissions Grid of LSAT & GPA for Caucasian Americans" (1995) The University of Michigan Law School Admissions Office; (5) Admissions Grid of LSAT & GPA for African Americans (1995), the University of Michigan Law School Admissions Office; (6) "Screen Groups for Applicants," University of Michigan Medical School Admissions Office (1996); (7) "Matriculant Information (Standard Pool Only)" University of Michigan Medical School.

The intent to discriminate by race could hardly be hidden in the University of California admissions system struck down in *Bakke*; but that intent had to be (and was) inferred from the structure and the results of the admissions system there. Admissions systems today say, in plain English (intended for internal use only) how they intend to discriminate by race. No inferences are needed. University documents make formally explicit the different standards that are applied to applicants depending only upon the color of their skin.

8. See *Personnel Administration of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld

of the Supreme Court has held unambiguously that, as Justice O'Connor put it in *Croson*, "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and the single standard for the review of all racial classifications is "strict scrutiny"<sup>9</sup>: no racial classification by the state is permissible unless it is essential for the service of a state interest that is compelling, and unless it can be shown that that racial classification is narrowly tailored to address the compelling state objective in view.<sup>10</sup> All this is settled law.

Two grounds for the use of race preference in university admission that are commonly put forward may be firmly dismissed in the light of this standard. Both of these were addressed explicitly by Justice Powell in *Bakke*, and both were rejected categorically.<sup>11</sup> Before turning to my central purpose, I review these two arguments and their failings briefly, so that we may be clear about what cannot justify race preference in university admissions.

First. The University of California had argued in *Bakke* that the number of blacks and Hispanics in some professional spheres is simply too low. Preferential admissions for minorities are justified, the University argued, in order to "reduc[e] the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession."<sup>12</sup> That same argument is heard repeatedly today: more blacks and Hispanic students are sorely needed, and to achieve that greater representation of minorities in the student body, preference given to them in admissions is justified.

This argument in defense of race preference was rejected flatly by Justice Powell, who dismissed it with one crisp paragraph:

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring

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only upon an extraordinary justification.").

9. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989).

10. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-13 (1995).

11. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

12. Brief for the Univ. of Cal., at 32, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.<sup>13</sup>

Using racial devices to undo historical imbalance is unconstitutional on its face. Not only is racial balance not a compelling objective; it may not even be a lawful one. Racial balance cannot possibly serve as the compelling interest that may satisfy the standard of strict scrutiny. No justification for admission preference is to be found here.

Second. The University of California explained that its preferential admissions were intended to counter the effects of "societal discrimination."<sup>14</sup> Damage earlier done to blacks and Hispanics by society, the University argued, justifies admissions preference given as compensation to members of those ethnic groups.

This defense of preference was also rejected categorically in *Bakke*.<sup>15</sup> The *Bakke* Court stated that any agency of government aiming to give compensatory relief may do so only after there has been a reliable identification of the persons injured and the nature of the injuries they suffered.<sup>16</sup> Any systematic preference in admissions would therefore certainly require that there had been "judicial, legislative, or administrative findings of constitutional or statutory violations."<sup>17</sup> Only then, with the kind and extent of the injury known, might the preference be conceivably defensible as remedy. But the University of California then, like every other university now, "[did] not purport to have made, and [was] in no position to make, such findings."<sup>18</sup> The *Bakke* Court stated that the University of California's "broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. . . . [I]solated segments of our vast governmental structures *are not competent* to make those decisions."<sup>19</sup> Moreover, a university does

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13. See *Bakke*, 438 U.S. at 307.

14. *Id.* at 306.

15. See *id.* at 307-10.

16. See, e.g., Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 330 (1998).

17. *Bakke*, 438 U.S. at 309.

18. *Id.*

19. *Id.* (emphasis added).

not and cannot have “the authority and capability to establish, in the record, that the [racial] classification used is responsive to identified discrimination.”<sup>20</sup> Therefore a university, however noble its intentions, certainly may not impose burdens upon some, and give advantages to others, using racial devices. Powell is very emphatic on this point: “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 social discrimination.”<sup>21</sup>

The incompetence of any university to award what it may claim to be compensatory relief deserves emphasis, in view of the great frequency with which such compensatory justifications are put forward today. The phrase “remedy for societal discrimination” would fly in the face of *Bakke* and is of course avoided. But very often we are told that race preference in admissions is a way of “creating a level playing field,” or “making up for the handicap suffered by a long-shackled runner in a great race,”<sup>22</sup> and so on. Such metaphors are introduced to defend race preferences as compensation for societal injury—compensatory devices not within the authority of universities to employ.

Wrongs deserve redress, of course; their remedy may be a demand of justice. But it is arrogant of university administrators to suppose that they and their admissions officers, often operating in secret,<sup>23</sup> have the wisdom and the competence to decide which racial groups will be favored and which disfavored, by how much, and how individuals will be classified by group—to satisfy their vision of how the playing field is to be properly “leveled.”

The justification of university preferences as compensatory is doomed to fail where scrutiny is strict; such reasoning could conceivably apply only in settings in which the injury for which redress is being given had been inflicted by the institution giving that redress, because only then would it be possible to tailor such a

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20. *Id.* at 310.

21. *Id.*

22. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 134 (Harper & Row 1964).

23. Documents in which university preferential admissions programs are detailed are commonly hidden, and as at the University of Michigan “CONFIDENTIAL: INTERNAL USE ONLY.”

remedy to the wrong. State universities today, even when they parade the ugliest chapters of their ancient history in self-abnegation, cannot show that the race preferences they give do compensate, or can compensate, persons who have earlier suffered racial wrongs.<sup>24</sup>

Just as "racial balance" fails to justify university admissions preference, "compensation" also fails. What remains that might succeed? Diversity.

## II. THE RESORT TO DIVERSITY

As most commonly used in universities today, "diversity" is simply a euphemism for the impermissible goal of racial balance, a mix of ethnic proportions more closely approximating those proportions in the population at large. In spite of its constitutional failings, noted earlier, this remains an appealing and "correct" objective in academic politics: student bodies (it is commonly said) must become more "representative," must more nearly "reflect" the population of the state, must more truly "look like America." The plausibility of ethnic proportionality as a standard of justice is rooted in the tacit premise that, had there been no racial oppression, all attainments and skills would be homogeneously distributed among all persons and groups, with no patterns or clusters. That premise is certainly false, of course. But here I simply note that when university officers assert that they give preferences to make their institutions more "diverse," they generally mean nothing more than that they are in pursuit of racial balance. In this sense, as we have seen, "diversity" cannot serve as a justification, moral or legal, for the race preferences commonly awarded.

But "diversity" can mean something quite different from racial balance in an educational context. The point made by Justice Powell

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24. The University of Texas tried to rescue the compensatory justification by arguing in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), that the race preferences in admission at their law school were designed to compensate for racial damage done by Texas public schools. But the preferences were given, as the Fifth Circuit Court of Appeals pointed out, to minority applicants who had never attended Texas schools, to some who never lived in Texas, and even to applicants who had never lived in the United States. The compensatory justification of race preference in admission was there, as it most often is, a story not worthy of belief.

in 1978 (and echoed repeatedly since) is that where obtaining truth is the aim, a “wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues”<sup>25</sup> is very useful. Responding to this interest (a constitutional interest because it is associated with the First Amendment protection of free speech), Justice Powell offers diversity as a consideration that may justify taking race into account in some admissions decisions.

It cannot be emphasized too strongly that what might, in this view, sometimes justify taking race into account, is *intellectual* diversity—variety of judgment and attitude. Only in that sense might “diversity” serve as a First Amendment consideration, clearly. Therefore, when anyone (including Justice Powell) takes skin color or race to be a feature of an applicant that can serve to enhance diversity, he makes the assumption that judgments and attitudes are *linked* to race, that persons of a given race may be expected to approach intellectual issues with certain known convictions or with certain states of mind, while other standpoints and states of mind may be expected in those of other colors. This is a dangerous and deeply troubling supposition. The slippage from the quest for *intellectual* diversity to the quest for *racial* diversity relies tacitly but essentially on racial stereotypes, some of which are outrageous. We rightly ridicule them as ignorant and unfair, and we have long sought to uproot them. But many stereotypes remain embedded and fester, and they are the links upon which the “diversity” justification of race preference depends.

Enhancing intellectual diversity among students is not truly the reason universities give race preference in admission. If it were, we would witness far more strenuous efforts to achieve such diversity through the use of screens that might increase intellectual variety much more directly and surely than does race. Conservatives would be sought in a liberal context, liberals where conservatives predominate; creationists and communists, elitists and civil libertarians, ascetics and atheists and religious fundamentalists, and so on—all would be sought out. Student recruiting would go on in ways fashioned to catch at least some fish from these and other intellectual ponds. This is very rarely done. Moreover, the racial

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25. *Bakke*, 438 U.S. at 312 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)).

preferences now given actually undermine any genuine quest for intellectual diversity. On most controversial matters, preferred minority applicants exhibit political and moral views essentially identical to those of the majority of white students. The supposition that race preference in admission would yield diversity of view turns out to be thoroughly mistaken; with respect to intellectual standpoints adopted, current preferences almost invariably serve the interests of *conformity*. Powell's "First Amendment" concerns do not begin to support the uses of race in admissions.

In any event, it is not intellectual diversity but intellectually promising students whom the universities mainly prize in the real world; truly able students are wanted whatever their points of view. The truth is that universities do not really much care what convictions students happen to hold, so long as they are smart.

In not much caring, they may be wise, as there is very little beyond anecdotal evidence to support the claim that a variety of viewpoints among students does, in fact, have any significant impact upon the quality of the learning that goes on. When Justice Powell referred to "the robust exchange of ideas which discovers truth out of a multitude of tongues," he was quoting an earlier case in which the focus was on the reporting of the news.<sup>26</sup> In that context, of course, it is important to promote the availability of reports formulated by persons with different perspectives and biases, rather than to provide one news report (as Powell's citation continues) "through any kind of authoritative selection."<sup>27</sup>

But this does little to support the truth of hyperbolic claims regarding the allegedly overwhelming importance of "diversity." And the inattention of university officers to genuinely intellectual diversity casts serious doubt on the plausibility of such propositions as "Without diversity there can be no excellence!" to which lip service is now commonly given in academic circles.<sup>28</sup> Very few

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26. *See id.* (quoting *Associated Press*, 52 F. Supp. at 372).

27. *Id.* (quoting *Associated Press*, 52 F. Supp. at 372).

28. Typical is the remark of L. Lee Knefelkamp, a King, Chavez, Parks visiting Professor at the University of Michigan, made during a public lecture in Ann Arbor on February 9, 1998: "[W]e cannot have excellent universities if they do not mirror the diversity in our society." 53 U. MICH. RECORD 7 (Feb. 18, 1998).

In this arena hyperbole knows almost no limit. The Vice-Chancellor for Student Affairs



seriously believe such a claim to be true—and indeed it is not true. The great English and German universities of generations past rose to intellectual excellence with student bodies that were remarkably lacking in diversity; in our own Ivy League colleges, intellectual achievement seems not to have been greatly hindered by the absence of great diversity.<sup>29</sup>

But intellectual diversity has been held, in *Bakke*, to be weighty enough that (on the implicit supposition that points of view are regularly linked to skin color) race may be a factor in some admissions.<sup>30</sup> This defense of intellectual diversity as a support for state-imposed racial classifications was shared by no other member of the Court in *Bakke* and by no justice of the U.S. Supreme Court from that time to this. Justice Powell is lonely in relying upon it. But he did rely upon it. And as a consequence of the configuration of that Court on the key questions raised in *Bakke*, Justice Powell's opinion was and is controlling.<sup>31</sup> If the principles expressed by the Fifth

and Special Programs for the entire State University of New York system expresses the conventional wisdom more simply: "[D]iversity is excellence." 11 ACADEMIC QUESTIONS 52 (Winter 1998).

29. The President of California State University at Northridge, Ms. Blenda Wilson, was questioned in October of 1996 by the Chairman of the Education Finance Subcommittee of the California State Assembly, and by Special Counsel Robert Corry. Part of the exchange went as follows:

Mr. Corry: Do you believe that ethnic diversity . . . is essential to quality in higher education?

Ms. Wilson: Yes, I do.

Mr. Corry: Do you have any evidence or studies or scholarly works that bolster that opinion?

Ms. Wilson: No, I don't. I would acknowledge . . . that higher education has failed in the scholarly sense to establish the principle . . . [W]e haven't justified the assumption that diversity is important in scientific ways. We haven't done the kinds of analysis and research studies . . . to demonstrate the validity of the principle.

*The Use of Race, Gender, and Ethnic Considerations at Institutions of Higher Education*, Education Finance Subcommittee, California State Assembly (1997).

30. See *Bakke*, 438 U.S. at 311-15.

31. Briefly: Four justices (led by Justice Stevens) held that Title VI of the Civil Rights Act completely resolves the matter in *Bakke*'s favor; they would strike down the University's racially preferential program and order *Bakke* admitted. Stevens is very sharp:

[T]he meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program.

In short, nothing in the legislative history justifies the conclusion that the broad language of 601 should not be given its natural meaning. We are dealing with a

Circuit Court of Appeals in *Hopwood v. Texas*<sup>32</sup> come to prevail, as one day they may, the entire diversity defense will become a nullity. But it is only in the Fifth Circuit that *Hopwood* governs now; elsewhere it is the rules laid down by Justice Powell that must be obeyed. So we are obliged to ask: under the principles laid down in *Bakke*, can the quest for diversity justify the racial preferences now widely given by our universities?

### III. ARE THE PRINCIPLES OF THE *BAKKE* DECISION INTERNALLY INCONSISTENT?

The price of inconsistency is this: from any two contradictory propositions taken as premises, any proposition whatever may be validly inferred.<sup>33</sup> Some contend that the contradictions within

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distinct statutory prohibition, enacted at a particular time with particular concerns in mind; neither its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a constitutional appendage. In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race. As succinctly phrased during the Senate debate, under Title VI it is "not permissible to say 'yes' to one person; but to say 'no' to another person, only because of the color of his skin."

*Id.* at 418.

Four other justices (led by Justice Brennan) held that because Title VI was intended to implement the Equal Protection Clause of the Fourteenth Amendment, it could mean no more than that Clause does. The plurality further held that because the Equal Protection Clause was designed to support the advancement of blacks, and the programs in question were designed with the same purpose, the Equal Protection Clause does not proscribe them, and, consequently, Title VI does not proscribe them either.

Justice Powell held the deciding vote. He held, with Brennan, that a constitutional investigation here was unavoidable: the issue posed by race preference in admission is whether such preference does deny to those disfavored by such preference the equal protection of the laws. But Powell also held with Stevens that the University of California admissions preferences must be struck down, and that Bakke must be admitted to the university, because the answer to the constitutional question was very clear: preference given by race does most certainly deny the equal protection of the laws. The posture of each of the three positions left Powell's opinion in control; it was through his opinion that the judgment of the Court was announced. And because, in that very famous opinion, the recourse to diversity is given some legitimacy, that reference in Powell's opinion has been the refuge of university admissions offices from that day to this.

32. 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

33. The explanation (far from universally understood) is this: Suppose one asserts both that (1) P is true, and that (2) P is false. From the fact that P is true one may infer, validly, that (3) either P is true or the moon is made of green cheese. From that proposition, plus the falsity of P, one may validly infer that the moon is made of green cheese. In sum: from two

Powell's opinion explain how it happens that all sides find support in his language. This criticism of Powell is not sound. His *Bakke* opinion is complicated, and it is in some ways confusing; but it is not confused and it is not internally inconsistent.

What puzzles many is this: Powell rejects race preference emphatically. He finds it a violation of the Constitution if color be used as a criterion by which people are treated differently. That is exactly what the admissions program at the University of California did: it classified applicants by race and responded to applicants of different races differently. Under our Constitution, Powell holds, using race in that way is totally unacceptable, a manifest violation of the Equal Protection Clause of the Fourteenth Amendment. ["No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."] Eloquently, Powell writes: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."<sup>34</sup>

So far, clear enough. But then, later in the opinion, Powell explains that race may indeed be taken into account on some occasions in evaluating some applicants. Now if race may be taken into account in weighing an application, are we not treating people differently simply because of their color? Is it then not the case that Powell's passages in which the use of race is condoned contradict the passages in which classification by race is condemned?

No, that is not the case. In understanding why Powell's principles are consistent we will also better understand the narrow limits within which (in his view) race may be taken into account, and why the admissions preferences now commonly awarded go very far beyond those limits.

Consider first the context in which Powell sought to make room for some consideration of race. Allan Bakke's case had reached the

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contradictory propositions: (1) that race may never be considered in university admissions, and (2) that race may sometimes be considered in admissions, it may be validly inferred that the moon is made of purple cheese—or Gorgonzola, if you like. For a detailed explanation of the consequences of self-contradiction, see I.M. COPI & C. COHEN, INTRODUCTION TO LOGIC 420-23 (Prentice-Hall 10th ed. 1998).

34. *Bakke*, 438 U.S. at 289-90.

California Supreme Court on cross appeals. The Superior Court of California had held that the University of California's admissions program was clearly not constitutional; it ordered that the University was henceforth prohibited from taking race into account in any way in making admissions decisions. The University appealed, of course. But Bakke also was unsatisfied because he had not won from the trial court what Marco DeFunis, in Washington four years before, had obtained: the order that he be admitted.<sup>35</sup> So Bakke appealed.

The Supreme Court of California (one of the most liberal in the nation at the time) gave Bakke the order of admission that he sought,<sup>36</sup> and it gave him also a resounding victory on matters of principle, affirming those portions of the trial court's judgment declaring the special admissions program unlawful and holding that the University would be henceforth enjoined from considering the race of any applicant. No consideration of race by the University, *of any kind*, was permissible under the Constitution.

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35. See *Defunis v. Odegaard*, 416 U.S. 312 (1974). Ironically, it was because DeFunis had been admitted to the University of Washington School of Law at the order of the lowest court that his case was ultimately held moot by the U.S. Supreme Court. For on appeal to the Washington Supreme Court, DeFunis's victory on matters of principle was reversed, but he was allowed to remain in law school as the case continued up the appellate hierarchy. By the time his appeal had reached the U.S. Supreme Court, DeFunis was well into his third year in law school, and the University of Washington conceded at oral argument that because he was advancing very satisfactorily toward his degree, even if the University were to prevail, DeFunis would not be ejected. Whereupon the Supreme Court—over the vehement dissent of Justice William O. Douglas—held the matter moot, but invited other cases of similar sort. Bakke's was the first of these to arrive.

In *Defunis*, Justice Douglas evidenced his plain disgust with the emphasis given to the skin color of lawyers by the University of Washington. He wrote:

The equal protection clause commands the elimination of racial barriers, not their creation in order to satisfy our theory of how society ought to be organized. 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 the Irish. It should be to produce good lawyers for Americans.

*Id.* at 342.

36. The trial court had held that, although the admissions program was clearly unconstitutional, it could not now be determined whether, absent its racial preferences, Bakke would indeed have been admitted. But in the California Supreme Court he won the order of admission on the ground that, fault by the University having been shown, it must either admit him or sustain the burden of showing that he would not have been admitted in the absence of those wrongful preferences. The burden of proof shifted, and that burden the University admitted it could not sustain.

This categorical exclusion, much like that adopted by the Fifth Circuit in *Hopwood*, was what confronted the Supreme Court in 1978. Powell thought it too rigid, too preclusive. He had been President of the American Bar Association, and was well acquainted with worldly complexities. The intellectual aims of the premier universities he understood, and he sympathized with their efforts to select appropriate entering classes from among the very many who applied for admission. Powell's was a balanced mind. His response to the rigid exclusion of the California Supreme Court was nuanced. Said he, in effect: Classification by race is wrong, to be sure. The Constitution forbids it. We begin there. Must we therefore insist that there be no consideration of race under any circumstances whatever? No, that extreme response is not called for. There will be times when a university, doing the very best job it can in selecting an entering class, and seeking the diversity that helps to make it a rich and exciting environment, may, in weighing applicant A against applicant B, want to reason roughly as follows:

Candidate A exhibits this virtue and that, while Candidate B exhibits that virtue and the other; the two are very close, academically and in other ways. But B, reared in upper middle class suburbia, is very similar in background to many others already accepted, while A is from the inner city and is black. For the sake of diversity let's go with A.

That, Powell thought, would not be an impermissible consideration of race. It meets the Constitutional standard, he believed, because when weighed in this fashion, race would have entered the picture only in considering the application of *an individual applicant*, all of whose merits and demerits had been weighed. This is the nub of the matter. If race is ever to be taken into account it must be only in certain very limited ways, ways very clearly specified in the judgment of the Court. First, it must, if considered at all, be considered only as part of the genuine quest for intellectual diversity. And by intellectual diversity, Powell says in no uncertain terms, "I mean just that." If a university uses race in ways that are merely aimed to achieve ethnic diversity, they fail; that

would misconceive what is involved in seeking diversity.<sup>37</sup> We mean genuine diversity, real variety of viewpoint on as many dimensions as can be explored—hence, the need to weigh many factors, not ethnicity alone.

Second, if ever race be taken into account (and it is certainly not the obligation of any university to take it into account), it must serve as no more than one of those many factors enriching the pool—as a “plus factor” at most, in the response given to the file of a “*particular applicant*.”<sup>38</sup> This particularization is absolutely critical because, if the consideration of race be always particularized, no one will be treated unfairly by its consideration, or denied equal protection. Each applicant so considered will have benefited from the weighing of all of the factors that may advance his or her application. One applicant may get plus consideration for musical talent that others lack, another for laboratory experience, a third for a contribution to ethnic diversity in the entering class, and so on. Some applicants must lose out in the end, of course. And some successful applicants may then have benefited from the fact that they are of this or that ethnicity. But every applicant will, individually, have been treated with attention to the merits of his or her entire file, competing against all the other applicants treated in like fashion. Such a system involves no discrimination by race. That was Powell’s vision.

This vision excludes all classification by race as a systematic device for sorting applicants. Automatic or routine advantages given to black applicants, or to applicants of any ethnic group would, in

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37. Here follows the critical passage:

The argument [of the University of California that racial classification by itself serves the interest of diversity] is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element . . . [The University of California’s] special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.

*Bakke*, 438 U.S. at 315 (emphasis added).

38. *Id.* at 317 (emphasis added).

Powell's view, be the very negation of individualized appraisal. The University of California system was, as many university systems now are, pervaded by precisely such systematic classification. That was, and remains, morally intolerable and Constitutionally impermissible.

In Powell's view, therefore, no admissions system may be allowed to employ deliberate discrimination by ethnic category. Under no circumstances may it be a "means of according racial preference."<sup>39</sup> Advocates of preference commonly contend that what was ruled out in the *Bakke* decision was no more than "rigid quotas," while the use of less rigid "goals" was there approved. This is not so. Powell is explicit: "This semantic distinction [between quotas and goals, as applied to the University of California system] is beside the point: The special admissions program is undeniably a *classification* based on race and ethnic background."<sup>40</sup>

There follows immediately a passage that highlights the fundamental failing of every generalized preference by race. Whether described as a "quota" or a "goal," Powell observes, such preference exhibits this feature: "*it is a line drawn on the basis of race and ethnic status.*"<sup>41</sup> But that is unacceptable, he continues, because "[i]t is settled beyond question that the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed *to the individual*. The rights established are *personal rights*."<sup>42</sup> Any system that draws such lines, that relies upon such classifications, that treats applicants differently on the basis of their color, manifestly violates the Equal Protection Clause of our Constitution.

The consistency of Powell's principles (however wise or unwise one may think them) may now be seen. Race taken into account in some cases for some individual applicants, as one of the "plus factors" supporting that individual's application, when weighed just as other factors are weighed for other individual applicants—musical talent for B, bi-lingual skills for C, etc.—leaves all applicants treated in essentially the same way. A given factor may be weighed in the

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39. *Id.* at 318.

40. *Id.* at 317 (emphasis added).

41. *Id.* (emphasis added).

42. *Id.* (emphasis added). The language referred to is the Equal Protection Clause: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

case of one individual that we do not weigh in the case of another. Considered occasionally, for some persons, race is not elevated to special status; no systematic racial discrimination is invoked. But if applicants are *classified* by race, all applicants of one race treated in one way, all applicants of another race treated another way, advantage or burden is attached to ethnic category and that is, indeed, impermissible discrimination.<sup>43</sup> When applicants are sorted by skin colors, in a system in which there are institutional “goals” (even if not rigid) for the ideal percentage of this or that skin color, the admissions system is built on a system of racial classification that is “odious to a free people whose institutions are founded upon the doctrine of equality.”<sup>44</sup> That is systematic discrimination by race.

Powell thought these two ways of taking race into account to be profoundly different. They may seem similar if we are inattentive, and some will treat them as identical for political purposes, but in spirit and in essence they are contrasting. He writes:

It has been suggested that an admissions program which considers race as only one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference. . . . [However, a] facial intent to discriminate is evident in petitioner’s [University of California’s] preference program and is not denied . . . . No such facial infirmity exists in an admission program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. “A boundary line [he quotes Justice Frankfurter] is none the worse for being narrow.”<sup>45</sup>

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43. For the year 1998, the University of Michigan has devised a scheme in which points are added to the scores of applicants for various reasons, yielding what is now called the “Selection Index.” In a system in which 1 point is given for an applicant’s outstanding essay, 1 point is given for an applicant’s exhibition of state-wide leadership and service, and an applicant with an SAT score of 1600 receives 6 points more than an applicant with an SAT scores of 930, every applicant with “Underrepresented Racial/Ethnic Minority Identification” gets 20 additional points. This very substantial preference for certain skin colors is automatic, not individualized, and, of course, it is often dispositive. See The University of Michigan, Office of Undergraduate Admissions, *Selection Index Worksheet* (1998).

44. *Bakke*, 438 U.S. at 294 (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967)).

45. *Id.* at 318 (quoting *McLeod v. Dilworth*, 322 U.S. 327, 329 (1944)).



Powell was no simpleton. He realized well enough that the individualized way of taking race into account for which he was making some room might be abused by unscrupulous administrators, transformed into systematic preference. Being an honorable man, he began with the presumption that others would act honorably as well. University admissions officers, clearly shown the ways in which they may and may not take race into account, would not deliberately cheat, would they? Toward the very end of his lengthy opinion Powell writes: "And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed . . ."<sup>46</sup>

But good faith has not been the primary concern of those confronting what they take to be a pressing political need to pursue ethnic balance.

#### IV. APPLYING PRINCIPLES TO FACTS

The central question of whether the quest for diversity can justify the race preferences in admission widely given by universities today may now be answered without reservation. No, certainly not. If "diversity" is no more than a code word for racial proportionality, its insufficiency has long been settled. And if "diversity" is taken to mean the intellectual diversity sought through the individualized appraisal of applications, the preferential systems now commonly employed fly directly in the face of the principles laid down in *Bakke*. They do so because they invariably use race as a *generalized* sorting device, a screen for the classification of applicants. Based directly on such sorting systems, different actions are taken with respect to persons *alike in all known respects save their race*. It is simply false to say that current admission preferences treat race merely as a plus factor in the weighing of individual applicants.

Proof of this is most readily given by exhibiting an actual preferential system recently in use. I refer in what follows to The University of Michigan as exemplar, not because it is alone in using systematic racial classifications, but because it is a very prominent

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46. *Id.* at 318-19.

user of them, and because it happens that documents obtained from the admissions offices of that University, using the Freedom of Information Act, are in my possession.<sup>47</sup>

*A. Example 1: Classifying by Race on First Review*

A large university of good repute receives tens of thousands of applications for admission to its undergraduate colleges; at the University of Michigan the yearly applicant pool exceeds 20,000. There must obviously be some preliminary sorting to identify those who cannot qualify for admission, but must not be left without early response. This "First Review" has long been done by creating a grid, with 90 cells, based upon known academic performance. Applicants' grade point averages (GPA, on a four-point scale) in secondary schools appear on the vertical axis: top row 4.0; second row 3.99-3.80; third row 3.79-3.60; and so on, down to 2.0. Applicants' test scores (SAT or ACT) appear on the horizontal axis: the column at furthest right headed 1500-1600 (SAT), 34-36 (ACT); the column at furthest left headed 400-840 (SAT), 0-17 (ACT).<sup>48</sup>

Each applicant's file falls into one of the resultant cells. Admissions counselors are given precise instructions regarding the letters of response to be sent to the applicants in each cell. These responses are coded; apart from the codes beginning with D (indicating delay, for cases in which critical information is missing from the file, or for other reasons), there are two large families of response: those beginning with A (directing a letter of admission of some kind) and those beginning with R (directing a letter of rejection of some kind).

In each cell, therefore, one would expect (apart from delays) a unique instruction for response: reject (with possible qualification), admit (with possible qualification), or delay for good reason.<sup>49</sup> On the grid prepared by the University, however, each cell contains *two* rows

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47. For the specific identification of some of these documents, see *supra* note 7.

48. The University of Michigan, College of Literature, Science and the Arts, *Guidelines for All Terms of 1996* Office of Undergraduate Admissions, at 2 (1996). The author obtained this document in response to a request made under the Michigan Freedom of Information Act.

49. The many possible qualifications contribute to the complexity of the process and the need for coded instructions.

of instructions (and in a few cells, three rows). The top row in many cells is coded R, for rejection, while the middle and bottom rows are coded A, for admission. How can this make sense? How could counselors respond consistently to this apparently contradictory set of instructions?

The answer is to be found in the overriding instruction, in bold face type, that appears at the top of the grid: "In General, [sic] use the top row in each cell for majority applicants and the middle and bottom rows for underrepresented minorities and other disadvantaged students."<sup>50</sup> In cell after cell, in which have been placed the applications of hundreds or thousands of applications for first review, applicants with the very same credentials, so far as those credentials are then known, are treated differently by race: majority applicants are commonly rejected while minority applicants (defined in this document as "American Indians, Black/African-American, and Hispanic/Latino Americans"<sup>51</sup>) in that same cell are admitted.<sup>52</sup>

Nothing could be clearer than that, in the University's admissions system using this grid for first review, there are "line[s] drawn on the basis of race and ethnic status."<sup>53</sup> Systematic racial classification is the ground of decisions made, preference is being accorded, applicants are routinely given different treatment, for no reason other than the color of their skin. The critical questions may be answered by each reader for himself: Is race preference of this kind what Justice Powell, in *Bakke*, had sought to accommodate? Or is this system, when used by an agency of the State, a denial of the equal protection of the laws?

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50. *Guidelines for All Terms of 1996*, *supra* note 48, at 2.

51. *Id.* at 12.

52. University spokespersons defend their practices by saying that race is taken into account late in the appraisal process, as a "plus factor." That is probably true; but it is also plainly true that race is taken heavily into account very early in the appraisal process, as very much more than a marginal plus factor. The grid here described is headed "First Review Decisions." Majority applicants routinely rejected—many, as the instructions to the right of the grid prescribe, "automatically by clerks"—will certainly never have their race reconsidered as a plus factor.

53. *Bakke*, 438 U.S. at 289.

### *B. Example 2: Differential Cut-off Scores by Race*

Admission to some demanding academic programs is very highly prized. The Integrated Premedical-Medical Program (INTEFLEX) at the University of Michigan is one of these. Admitted as freshmen, students in this program begin medical studies in their sophomore year and graduate after six years with both B.A. and M.D. degrees. There are very few slots for very many applicants: competition for entry is fierce. The requirements are stiff even to be considered for the program: to enter the pool, applicants must have SAT scores of 1320+ (or ACT score of 30+) and a GPA of 3.6 (3.8 if the applicant is not a Michigan resident).

Those are the cut-off scores which, if not equaled or exceeded, result in routine rejection—but they apply to “Non-Minorities”<sup>54</sup> and not to everyone. The cut-off scores are very different if the race is different. For “ALL [sic] Underrepresented Minority Students” the test scores required are: SAT 1170+ (or ACT 26+), and the GPA required is 3.4 (for both residents and non-residents of Michigan).<sup>55</sup> Between the SAT scores of 1320 and 1170 there is a very substantial difference; between the GPAs of 3.8 and 3.4 there is an enormous difference. Is this the consideration of race as a “plus factor” for individual applicants? Or is it systematic preference by race?

### *C. Example 3: Differential Admission Rates by Race*

Documents prepared by the University of Michigan thus provide indisputable evidence of the “facial intent” to discriminate by race, the clearly formulated plan upon which applicants are to be treated differently on the basis of their skin color. But other documents, reporting the admission rates for minorities and for non-minorities in the several colleges of the University, show that the results of such discriminatory policies are very marked. Grids are often prepared, showing the number in any intellectual category who applied, and the number in that category who were accepted.

Item: One such grid from the University of Michigan reveals that,

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54. See *Guidelines for All Terms of 1996*, *supra* note 42, at 9.

55. See *id.* at 9-10.

for students with good (but not outstanding) test scores and mediocre high school records, admission is difficult—if the applicant is white. In three such middling cells, of 478 “non-minority” applicants 56 were admitted—an admission rate of under 12%. For Hispanic, Indian, and African-American applicants with identical intellectual credentials the story is very different. In those same three cells the number of “underrepresented minority” applicants was 48 and the number admitted was 48—100%.<sup>56</sup>

Item: The University of Michigan School of Law (where admission is highly competitive) produced a grid showing several cells in which the number of “Caucasian American” applicants is great, the number of admissions offered is very small: in one cell there were 51 applicants but only 1 admission; in another cell 61 applicants but only 1 admission; in a third cell 126 applicants but only 5 admissions. The admission rate for “Caucasian Americans” in these categories is under 3%.<sup>57</sup> But in the very same cells on the identical matrix prepared (also by the School of Law) for “African Americans” the ratios are sharply different. In the first of the three cells noted above, 10 applicants and 10 admissions; in the second, 3 applicants and 3 admissions, in the third, 4 applicants and 4 admissions—an admission rate of 100%.<sup>58</sup> The applicants reported on the two sheets differ (so far as these calculations apply) only in their race.

The examples given here are only few of a great many. Systematic race preferences such as these—typical of the preferential practices of universities around the country—cannot be justified under the principles laid down in *Bakke*.

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56. See University of Michigan, Office of Undergraduate Admissions, *Profile of the University of Michigan; Underrepresented Minorities and Total Units* (1994). Requests for the updated version of these grids are met with the response that the Office of Undergraduate Admissions no longer prepares such records.

57. The University of Michigan Law School Admissions Office, *Admissions Grid of LSAT & GPA for Caucasian Americans* (Dec. 7, 1995). The author's request for the analogous document for the academic year 1996-1997 was met by the response that this record is no longer prepared by the Law School.

58. The University of Michigan Law School Admissions Office, *Admissions Grid of LSAT & GPA for African Americans* (Dec. 7, 1995). The author's request for the analogous document for the academic year 1996-1997 was met by the response that this record is no longer prepared by the Law School.

## V. OBJECTIONS AND REPLIES

A series of objections commonly made to the arguments above deserve consideration. One objection no longer much heard is the denial that race preferences are given.<sup>59</sup> Such denials are no longer believable or believed. Forced now to admit that they do take race into account, university spokespersons argue that they do so for very good reasons and in ways permitted by law. I address each common objection in turn:

### Objection 1:

We do take race into account, of course—but race for us is not the only or the most important factor weighed. In *Bakke* the Supreme Court said that race may be weighed as one among a variety of factors. We do weigh race as one among a variety of factors. Therefore “We are doing what the Supreme Court has said we can do.”<sup>60</sup>

This argument is very bad. It is true that under *Bakke* race must be one of many factors if its use is to be permitted. It is true that the University weighs race as one of many factors; school grades, test scores, place of residence, and so on, are also weighed, of course. But it certainly does not follow that the present uses of race are in compliance with the law.

The University’s argument here is an egregious example of the fallacy of affirming the consequent (P implies Q; Q is true; therefore P is true).<sup>61</sup> One could as well argue that because remaining in good health requires that one eat a balanced diet, and because I do eat a balanced diet, I must be in good health. A balanced diet may be a

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59. The Director of the Office of Undergraduate Admissions at the University of Michigan, whom we must suppose had a clear grasp of the preferences given by his office, wrote in response to my inquiry, in a letter of 9 January 1997, as follows: “I can assure you that the policies and practices of my office are fully in accord with the University of Michigan policy of nondiscrimination by race or ethnicity.” Letter from the Director of Undergraduate Admissions at the University of Michigan to Carl Cohen (Jan. 9, 1997) (on file with author).

60. Rene Sanchez, *Final Exam for Campus Affirmative Action? White Applicant’s Test of Michigan Admissions Could Set National Policy*, WASH. POST, Dec. 5, 1997, at A1 (quoting Lee Bollinger, President of the University of Michigan).

61. See COPI & COHEN, *supra* note 34, at 376.

*necessary* condition for good health, but it surely is not a *sufficient* condition for good health.

Compliance with the principles laid down in *Bakke* indeed requires that race, if taken into account, may be only one of many factors weighed. But that is a necessary, not a sufficient condition of compliance. It is also true that to meet constitutional standards, race, if weighed at all, must be weighed only for *individual* applicants, as a plus factor in some cases, in the same way that other factors may provide a plus for other applicants individually considered. Compliance requires that race *not* be the basis of a systematic classification of applicants; compliance requires that generalized racial preference *not* be accorded; compliance requires that the system *not* be one within which “a line is drawn on the basis of race or ethnic status.” In sum, compliance requires that the system not be one in which people are treated differently solely because of the colors of their skin. It is manifest that the preferential systems now in use, even if they satisfy the one condition that factors other than race be also weighed, do not satisfy the several conditions that compliance would entail.

Do university spokespersons reason so badly as seriously to believe that a list of such factors (sometimes proudly distributed) establishes their compliance with *Bakke*? Or do they think that the public and the courts will be impressed by the list, and are so weak-minded as not to attend to the difference between necessary and sufficient conditions?

In an objection of similar sort, the President of the University of Michigan argues that race is not “determinative” in admissions there; no one is admitted because of race alone.<sup>62</sup> He is entirely correct in that; no applicant is accepted simply because she is black, or simply because her scores are superlative, or for any single reason, of course. But it does not follow that race is not *dispositive* for many applicants. Other things being equal, race often makes all the difference. Skin color is not the “sole” factor, true, and is not the “determinative” factor, of course—it is just the factor that plays a systematically crucial role. *That* is not consistent with our Constitution.

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62. See Lee Bolinger, U. MICH. RECORD 3 (Oct. 15, 1997).

### Objection 2:

The admissions system at the University of California struck down in *Bakke* was a two-track system: slots were reserved for minorities, and minority applicants, being reviewed by a separate committee, did not compete against all other applicants. That was unfair. Today we use a one-track system; all applicants are in a single pool reviewed by the same committee. In short, ours is a permissible system because it is unified.

Again, this argument exhibits the fallacy of affirming the consequent. Much of the description given is technically correct. At the University of Michigan, for example, there is but one pool, one reviewing committee. All compete against all, and the system is, in that sense, unified. These are necessary conditions for compliance—but they are not sufficient to ensure that the constitutional guarantee of equal protection has been satisfied.

For although all compete in a single pool, the standards on which applicants compete within that pool are sharply different by race. We have seen that there are, for example, different cut-off scores for different racial groups, different responses to applicants on first review on the basis of race, and so on. But it is also a necessary condition of a constitutional system that applicants not be treated differently simply because of the color of their skin. Within the current “unified” systems, that condition is not satisfied.

### Objection 3.

Under *Bakke* it is clear that in some cases race may be taken into account, in the interest of diversity. But in view of the very large number of applicants at many universities, there is no feasible way to consider race with this end in view except by doing so systematically. If we are not permitted to classify our applicants by race, we will not be able to use race effectively. Hence we are compelled, as a practical matter, to introduce preferences of the kind currently employed.

This argument is worthless. Its tacit premise is that race must somehow be used to achieve diversity along ethnic lines, and that if the principles for its use laid down by Powell are not feasible, other



principles may justifiably replace them. The reasoning is specious. Nothing obliges or compels universities to take race into account in admissions. There are in fact excellent reasons for them to avoid doing so completely. It may be that there are some special circumstances in which (under *Bakke*) taking account of the race of an applicant would not be forbidden. But if those circumstances cannot be realized in some institutional setting, all that follows is that race may not be used in that setting.

The above argument makes sense only to those who begin with the supposition that racial balance is a constitutionally compelling objective. It is not. The complaint meets a simple answer: if race is to be weighed at all, it must be weighed only in accord with the individualized principles Justice Powell laid down. The “right” to use race in ways inconsistent with the Constitution cannot be defended on the ground that practical circumstances do not accommodate its constitutional use.

#### Objection 4.

Universities give lots of different preferences, often to white males. Preference is given to athletes, to the children of alumni, to in-state students, and so on; some of these advantages are of doubtful wisdom or fairness. Why, if these preferences are allowed, may preferences by race not be allowed as well?

Classifying and giving preference by athletic ability, or by alumni relationships, and the like, is—from a constitutional point of view—utterly different from classifying and giving preference by race. Many classifications are used for which rational foundation might be provided. But race, as a basis for classification and preference, is like no other. The evil and invidious uses of race in hundreds of years of American history, and the long constitutional history of racial classifications, underscores the conclusion, now settled in law, that race is of all categories the most suspect. Regarding favors given to athletes, or to the children of alumni, the U.S. Constitution has nothing to say. But we, to our great sorrow, have learned what deep and terrible damage the use of racial classifications can inflict. And so our federal courts now rightly and wisely insist: only under the very most compelling circumstances may state agencies employ

racial classifications.<sup>63</sup>

This argument often has an *ad hominem* thrust, aiming to embarrass the critics of preference by showing them to be inconsistent. But the critics of race preference are not committed to the defense of any other preference—for athletes, for alumni, or for any other group. Some of those common preferences may be rational and defensible, others not. If they are unfair, or unwise, let us reform or eliminate them. Their retention cannot serve to justify the unconstitutional and immoral use of racial categories.

#### Objection 5.

The elimination of race preference in admission will have the effect of re-segregating the universities, transforming educational institutions into white enclaves, from which blacks and other minorities are effectively excluded. This is intolerable. If we hope to avoid a return to the Jim Crow world of the early twentieth century, we have no choice but to retain preference by race.

This argument is sometimes presented to frighten fair-minded folks who, although opposed to racially preferential devices, detest the thought of society segregated. Sometimes it is presented to suggest (on occasion even explicitly to claim) that those who would eliminate race preferences really are segregationists at heart, closet racists.

Whether or not intended to besmirch opponents of preferences, the argument is without merit. Its fundamental premise—that without race preferences blacks and other minorities will be unable to win places in undergraduate and in professional schools—is false, and has been proven false.

At those professional schools in which past race preferences were very great, as at the Boalt Hall law school at the University of

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63. No one has misunderstood this critical point more thoroughly than General Colin Powell, who wrote: "For those who say preference systems are bad, I would love to take you through all the preference systems which are acceptable: mortgage deductions, veterans benefits, colleges eagerly recruiting students who can throw a football or donate a gym. So we're not against preferences, we're just against any preference that is related to the color of a person's skin." Colin Powell, USA TODAY, at 7 (Nov. 16, 1997).

California, the number of admitted minorities must fall when preferences are ended, of course. Enrollment numbers artificially inflated by race preferences will then deflate, obviously. But a drop in those numbers is not “resegregation,” nor is it fair to suppose that minorities are so incompetent as to be unable to gain a substantial number of places in schools of every sort without racial charity. Fine applicants and scholars from every ethnic group will continue to apply to, and to enroll and to teach in educational institutions nationwide.

That such talk of “resegregation” is no more than a scare is clearly shown by most recent data on applications and admissions at the two great universities (the University of Texas and the University of California) where, as the result of court rulings, referenda, and regental action, racial preferences are no longer permitted.

Item: Most recent figures from the University of California reveal that the number of minorities offered admission in many graduate programs at the University has actually risen or remained essentially level.<sup>64</sup>

Item: After the dissipation of disaffection immediately after the voters’ adoption of Proposition 209, applications to the University of California have risen substantially. At the undergraduate level, the number applying to the University of California from every minority group but one increased markedly in 1997-98: African American applications by three percent, American Indian applications by nine percent, Chicano applications by ten percent.<sup>65</sup>

Item: In Texas a similar pattern is emerging. At the four medical schools of the University of Texas system, the number of Hispanic students offered admission has risen from 108 offered admission in 1997 to 142 offered admission for the fall of 1998. The number of black students admitted to those medical schools has also risen, from

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64. Here is the sum of it:

The new numbers provide the first comprehensive measure of the effect of UC’s 1995 decision to stop considering race and gender in admissions. . . . [T]he racial balance among the 7,040 students who enrolled in UC’s 600-plus graduate academic programs—everything from history and literature to engineering and physics—showed almost no change.

Carol Ness, *UC Business Enrollment off in Blacks and Latinos*, S.F. EXAM., Jan. 9, 1998, at A1.

65. See Report of the American Civil Rights Institute (Jan. 28, 1998).

twenty-nine in the previous year to fifty for the fall of 1998.<sup>66</sup>

Conclusion: It is simply false to assert that eliminating race preferences will result in the re-segregation of American higher education. The fear of re-segregation has little basis in fact. And the premise of the argument based on that fear is shameful, because it patronizes minority scholars most unfairly, assuming an intellectual incompetence that is both mistaken and insulting. But the argument is yet more fundamentally wrong-headed because it presumes that, had its factual assumptions been true, achieving ethnic proportionality would justify even deliberate discrimination by skin color. To the advocates of preference, racial balance is an end so precious that there is hardly any price not worth paying to promote it.

#### Objection 6.

The refusal to allow the consideration of race or ethnicity would turn the admissions process into a mechanical, wholly quantitative process. But selecting an appropriate entering class cannot be reduced to numerical algorithms. Critics of race preference do not comprehend the complexity of the admissions process; they do not understand that it is as much an art as a science. They would have us rely entirely upon test scores and grade point averages, which would result in the loss of many very desirable students whose scores may not be distinguished but whose talents are great. Eliminating race preference would, thus, do great damage both to talented applicants and to the universities.

This argument is silly; it assumes without warrant that opponents are simple-minded. But in rejecting race preference critics do not deny the complexity of the admissions process. That many considerations beyond the quantitative are properly weighed is well understood. That admissions should be reduced to a mechanical sorting of test scores and grades is a foolish claim; no serious critic would defend or seek that objective. Intellectual attainments are a very important set of criteria, all agree, and perhaps the most

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66. See *Texas Sees Turnaround in Medical Admissions*, CHRON. HIGHER. EDUC. (Feb. 6, 1998).

important. But there are other desiderata—talent and character, acquired skills and work experience, and others—that surely may be relevant and that on occasion may rightly result in the admission of some students with academic records less impressive than those of their competitors. No sensible person denies any of this.

The rejection of race preference is *not* to be equated with a reduction of the bases for admissions to the sole criteria of test scores and grades. On the contrary, once preferences are precluded, there are no rational considerations that admissions officers would be properly barred from considering. Precisely which considerations are most useful in the appraisal of applicants is a matter for professional admissions officers to determine, acting lawfully. As a matter of constitutional principle and of morality, however, there are some principles, those giving preference by race, that must *not* be generally employed. Once admissions have been cleansed of these and returned to race-neutrality, universities are free to conduct their own academic business, selecting from among all applicants entering classes appropriate for them.

Whatever considerations universities do choose to weigh, however, must be weighed without regard to ethnicity. Agents of the state are not entitled to consider character or talent or experience in appraising applicants from one ethnic group, while systematically giving little or no attention to such factors when they are manifest in other ethnic groups. The remarkable disparities in rates of admission by race cannot be explained by reference to alleged special virtues of applicants individually considered, because no race or nationality exhibits a disproportionate share of human virtue. The consideration of non-quantitative factors must not be a device with which to obscure what is in reality a quest for racial balance; in such consideration, as in all aspects of the admissions process, justice requires race neutrality.

#### Objection 7.

Current litigation against university admissions systems supposes that the white plaintiffs had some right to be admitted that was denied them by the institution to which they applied. But they had no such right. Admission to a university, even a public university, is not a right but a privilege, granted to some

persons under some circumstances, on grounds that the university has authority to determine. Rejected applicants whose academic credentials are superior to many who were admitted have no justifiable complaint because they never had a right to admission in the first place. The contention that their rights were infringed is therefore without merit.

Of course there is no "right" to admission; no sensible person supposes it. Current litigants understand that fully. They do not claim that they know that they would have been admitted had there been no racial preferences given; that is, indeed, very possibly not so. (It is worth noting, however, that had these rejected litigants been black, the probability that they would have been admitted is extremely high.) What rights of these litigants were infringed? They had the right to be evaluated under a set of rules that are not racially discriminatory. In a public university they had a right to what they did not get: a fair, race-neutral evaluation of their credentials.

## VI. CONCLUSION

That is the short of the entire matter: Every applicant to a state university has a right under the U.S. Constitution to the equal protection of the laws. Where goods are in short supply—as are admissions to a fine state university—advantages given to some by race inevitably result in disadvantages imposed upon others by race. To give by color is to take by color. That is a denial of the equal protection of the laws which the quest for diversity, as we have seen at length, cannot justify.