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## Bakke Revisited - What the Court's Decision Means - and Doesn't Mean

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# Ba Rev

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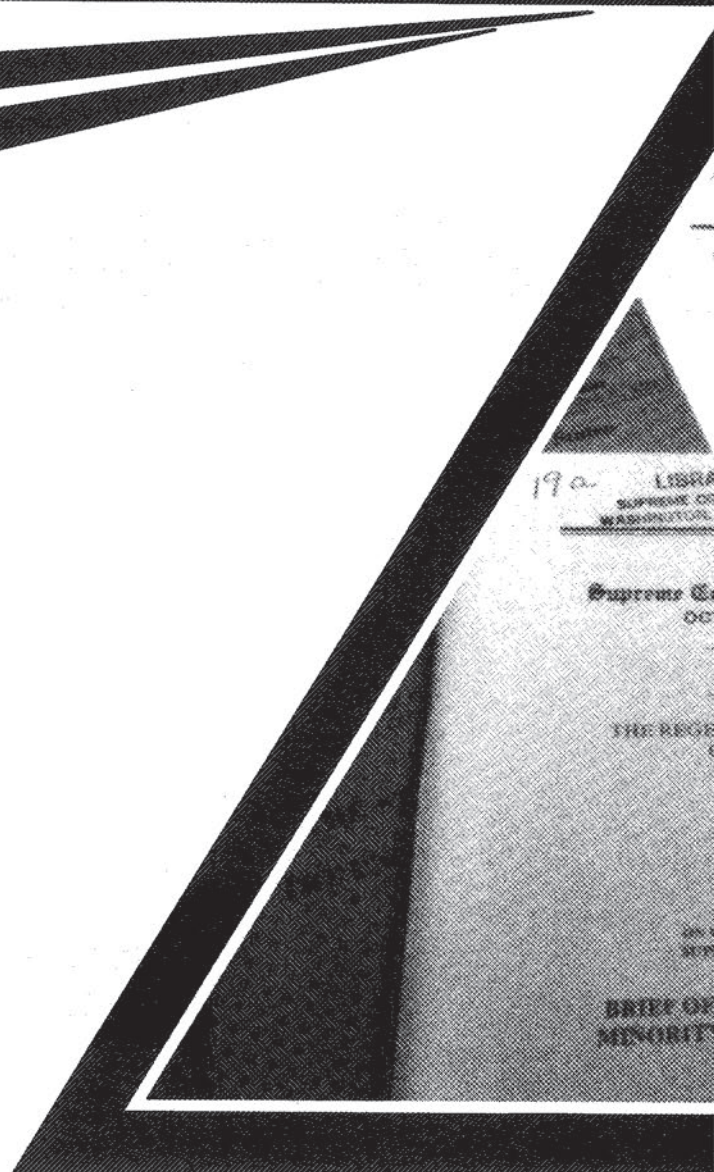
## What the Court's decision means—and doesn't mean

by Douglas Scherer

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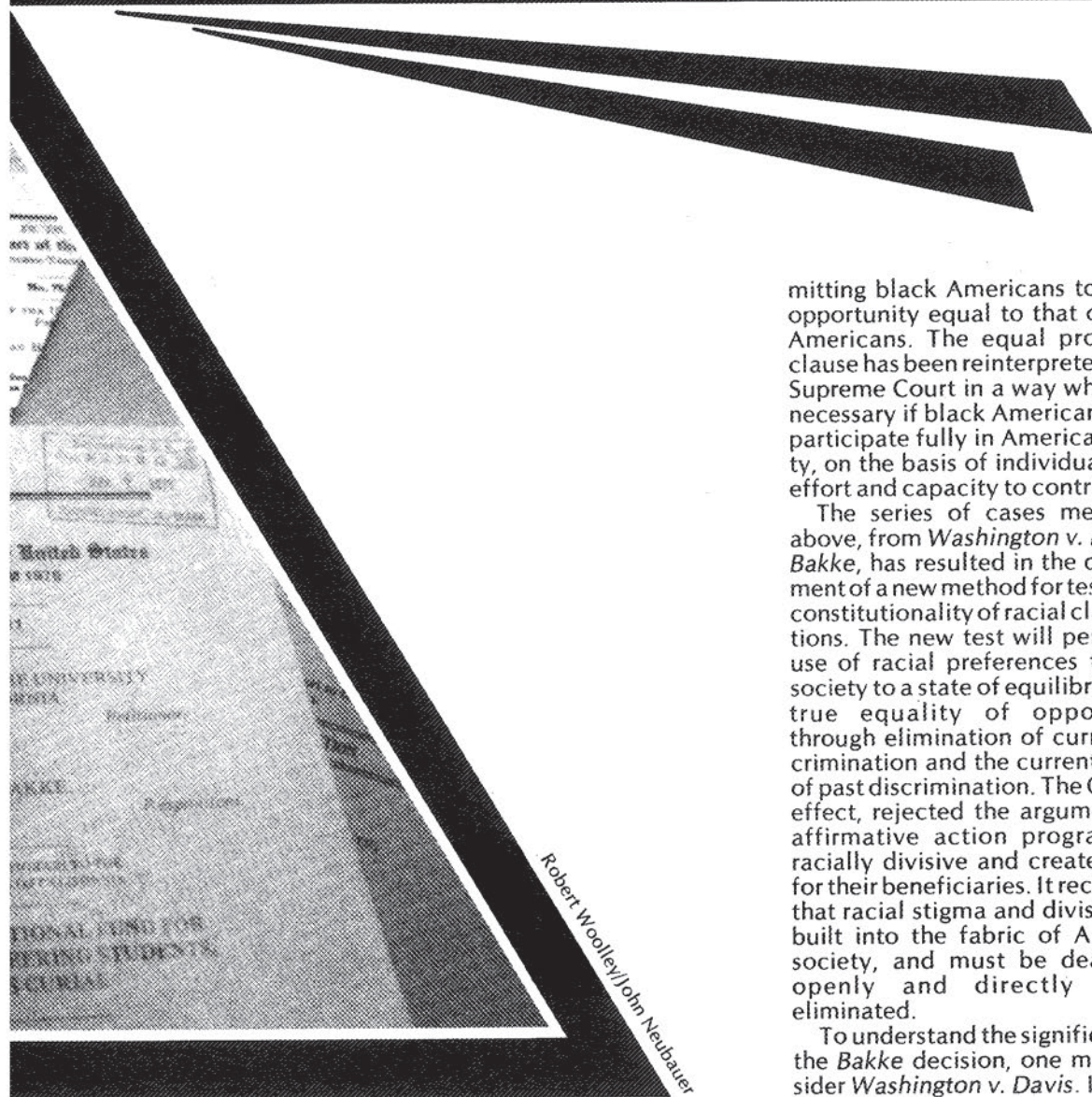
Allan Bakke will be permitted to attend medical school, the affirmative action admissions program of the University of California has been declared unlawful, and the United States Supreme Court has determined that the use of remedial racial classifications and preferences in college and university admissions are constitutional. How can all of this have happened through the same decision?

The *Bakke*<sup>1</sup> case and its three predecessor cases during the 1976 and 1977 Supreme Court terms—*Washington v. Davis*,<sup>2</sup> *Village of Arlington Heights v. Metropolitan Housing Corp.*,<sup>3</sup> and *United Jewish Organizations of Williamsburgh v. Carey*<sup>4</sup>—have confirmed the fundamental purposes of the equal protection clause of removing badges and incidences of slavery and of per-





# Bakke sited



mitting black Americans to obtain opportunity equal to that of white Americans. The equal protection clause has been reinterpreted by the Supreme Court in a way which was necessary if black Americans are to participate fully in American society, on the basis of individual merit, effort and capacity to contribute.

The series of cases mentioned above, from *Washington v. Davis* to *Bakke*, has resulted in the development of a new method for testing the constitutionality of racial classifications. The new test will permit the use of racial preferences to bring society to a state of equilibrium and true equality of opportunity through elimination of current discrimination and the current effects of past discrimination. The Court, in effect, rejected the argument that affirmative action programs are racially divisive and create stigma for their beneficiaries. It recognized that racial stigma and divisions are built into the fabric of American society, and must be dealt with openly and directly to be eliminated.

To understand the significance of the *Bakke* decision, one must consider *Washington v. Davis*. In *Wash-*

Robert Woolley/John Neubauer



ington v. Davis, the Supreme Court considered the lawfulness of a federal civil service examination for the position of police officer with the District of Columbia Metropolitan Police Department. The examination had an impact on black applicants which was disproportionately harsh in comparison with its impact on white applicants. The percentage of white applicants who received passing scores on the examination was four times as great as that of black applicants who received passing scores.<sup>5</sup> A challenge by rejected black applicants was brought under federal civil rights statutes which implement the equal protection clause, among other constitutional guarantees.

In *Washington v. Davis*, the lower courts applied the disparate impact definition of discrimination articulated by Chief Justice Burger in the case of *Griggs v. Duke Power Co.*<sup>6</sup> *Griggs* dealt with alleged violations of the prohibitions against employment discrimination contained in Title VII of the 1964 Civil Rights Act.<sup>7</sup> Under *Griggs*, an employment screening device which has a disproportionately harsh impact on members of a particular racial group violates Title VII unless the employer can justify its use through proof of "business necessity." Under Title VII, the focus is on the effect of employment practices, and there is no need to demonstrate intent to discriminate.

In *Washington v. Davis*, the Supreme Court declined to use the Title VII disparate impact definition of discrimination, and concluded that discrimination under the equal protection clause is different from discrimination under Title VII. A constitutional violation exists, in the view of the Court, only if there has been purposeful discrimination.

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This purposeful discrimination has been required in the past for proof of equal protection violations in school desegregation, jury exclusion and voting rights cases, and is viewed by the Court as an essential element for proof of equal protection violations in other areas.

In his opinion for the Court in *Washington v. Davis*, Justice White stated: "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."<sup>8</sup> Justice Stevens filed a concurring opinion in *Washington v. Davis*, observing: "The requirement of purposeful discrimination is a common thread running through the [equal protection] cases...."<sup>9</sup>

All four Justices who were silent on the constitutional issues in *Bakke* joined in this opinion by Justice White. They also joined in the approval by Justice White of the affirmative recruiting of black applicants by the District of Columbia Metropolitan Police Department. This affirmative recruiting obviously constituted use of a racial classification and preference at the recruiting level.

The reaction to *Washington v. Davis* by many was swift, harsh and vocal, and the rejection of the equal protection claims of the black applicants was viewed as a demonstration of the conservative nature of the Burger/Nixon Court on race issues.<sup>10</sup> However, no one seemed to notice that the "liberal" Justices Marshall and Brennan joined the opinion of the Court with respect to the constitutional issues. Those who criticized the decision ignored the negative implications for effective government if a racially neutral act of the government, having a racially disparate impact, had been held to establish a prima facie case of a constitutional violation. The critics also failed to recognize that the decision was the first clear articulation of the constitutional principle which validates the use of remedial racial classifications and preferences.

Seven months after *Washington v. Davis* was decided, the constitu-

tional principle it confirmed was applied in *Village of Arlington Heights v. Metropolitan Housing Corp.* This decision also confirmed, for critics of the Court, the presumed racial insensitivity of its current members. The village of Arlington Heights had refused to rezone a tract of land from a single-family to a multiple-family classification. As a result, racially integrated low- and moderate-income housing could not be built. Prospective black tenants demonstrated the disparate racial impact of the refusal, but did not demonstrate purposeful racial discrimination. Justice Powell, speaking for the Court, wrote: "Proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause."<sup>11</sup>

The prospective black tenants did not move to Arlington Heights, but the Supreme Court did move towards *Bakke*.

In March of 1977, the Supreme Court decided *United Jewish Organizations of Williamsburgh v. Carey*, a case that was remarkably similar to *Bakke* in the nature of interests and issues it raised. A Hasidic Jewish community had been split into different legislative districts pursuant to a state reapportionment plan. The Hasidic Jews were the innocent victims of attempts by the state of New York to avoid dilution of the voting strength of black and Puerto Rican residents of certain counties. There had been no legislative, judicial or administrative findings of constitutional violations regarding the black and Puerto Rican groups. However, the state did have an obligation to comply with provisions of the Voting Rights Act which required, in this case, the explicit use of racial criteria to avoid dilution of the voting strength of members of minority groups.<sup>12</sup> The state purposely created legislative districts in which at least 65 percent of the voters were black or Puerto Rican.

The Supreme Court noted that the racial criteria had been used in a purposeful manner and had damaged the Hasidic Jews. However, it also noted that the purpose of the state of New York had been to comply with the Voting Rights Act, not to



discriminate against the Hasidic Jews. The fact that damage to these innocent victims was inevitable and foreseeable did not make the discrimination against them intentional, or "purposeful," within the meaning of the equal protection clause.

Justice White, writing for the majority, acknowledged the constitutionality of the discrimination against the Hasidic Jews. He stated: "There is no doubt that in preparing the 1974 legislation, the state deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment. . . ."<sup>13</sup>

Justice Stewart, joined by Justice Powell, wrote a concurring opinion in which he stated: "Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. . . . That the legislature was aware of race when it drew the district lines might . . . suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent. The clear purpose with which the New York Legislature acted [to comply with the Voting Rights Act] forecloses any finding that it acted with the invidious purpose of discriminating against white voters."<sup>14</sup>

Chief Justice Burger filed the only dissent. He described the reapportionment process as being "arbitrary," in that no determination had been made by the state of New York that the numerical requirements were necessary for satisfaction of the state's obligations under the Voting Rights Act. He stated: "The record is devoid of any evidence that the 65 percent figure was a reasoned response to the problem of past discrimination."<sup>15</sup> He also expressed his belief that the electoral process is undermined by the use of racial classifications designed to preserve racially identifiable voting blocks. As his reasoning was based upon his belief that the reapportionment plan was not remedial and that it threatened the electoral process,

his dissent does not indicate his views concerning the use of remedial racial classifications and preferences in other areas.

**The unavoidable implication** of the cases discussed above is that Mr. Bakke, and others similarly situated, have no claim under the equal protection clause simply because they have suffered exclusion through operation of affirmative action programs which utilize remedial racial classifications and preferences. The purpose of these programs is not to stigmatize or damage those excluded, even though damage is inevitable and foreseeable. Rather, the purpose is to provide remedy for others and satisfy the broader societal need for elimination of discrimination. The crucial issue in litigation will be whether or not an affirmative action program actually is remedial.

The long-awaited *Bakke* decision, with its array of individual opinions, dealt with statutory and constitutional challenges to the affirmative action admissions program of the University of California Medical School, Davis campus ("the Davis program"). The Davis program employed the device of a set-aside of 16 places in each entering class for qualified members of minority groups, defined to include "Black/Afro-American or Chicano, Oriental/Asian-American, Puerto Rican (Mainland), Puerto Rican (Commonwealth), Cuban."<sup>16</sup>

Mr. Bakke challenged his exclusion from medical school on statutory grounds by arguing that there was a violation of his rights under Title VI of the 1964 Civil Rights Act.<sup>17</sup> Title VI bars exclusion from federally funded programs of graduate education "on the ground of race, color or national origin." Mr. Bakke also challenged his exclusion on constitutional grounds by arguing that he suffered a violation of his rights under the equal protection clause of the Fourteenth Amendment, which guarantees to all persons the "equal protection of the laws."

Justice Brennan, joined by Justices White, Marshall and Blackmun ("the Brennan four"), wrote an opinion which held that the Davis pro-

gram is constitutional and does not violate Title VI. Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist ("the Stevens four"), wrote an opinion which avoided the constitutional issues, but declared that the Davis program does violate Title VI. Justice Powell wrote a third opinion in which he spoke only for himself on constitutional and statutory issues. Although he disagreed with the Stevens four concerning the meaning of Title VI, he agreed with them that Title VI is violated by the Davis program. Justices White, Marshall and Blackmun, each of whom joined in the Brennan opinion, also wrote separate opinions to clarify their views.

The Court first considered whether the discrimination prohibited by Title VI is the same as the discrimination prohibited by the equal protection clause. Justice Powell and the Brennan four concluded that Title VI does not have an independent statutory meaning, and that Title VI is violated only by actions which also would violate the equal protection clause. The Stevens four, on the other hand, concluded that Title VI has an independent statutory meaning.

Although they used different standards for interpreting Title VI, Justice Powell and the Stevens four concluded that Mr. Bakke's rights under Title VI were violated by the Davis program. As Justice Powell was the only one of the five to equate Title VI standards with equal protection clause standards, the decision in Mr. Bakke's favor gives no guidance as to the views of the Stevens four on the underlying constitutional issues.

**The Brennan four** applied an equal protection standard for interpreting Title VI, and decided that Title VI is not violated by the Davis program. Therefore, their opinion reflects their conclusion that the Davis program is constitutional.

The question of the availability of a private cause of action under Title VI was raised but not answered by the *Bakke* decision.

The Stevens four appeared to conclude that there is a private cause of action. Justice White con-



cluded that there is no private cause of action. The remaining four Justices (Powell, Brennan, Marshall and Blackmun) assumed that there is one, but only for purposes of deciding the *Bakke* case. This somewhat unusual approach to such a threshold issue may reflect an internal compromise by members of the Court, which admitted Mr. Bakke to medical school while validating remedial racial classifications and preferences.

What then is the real position of the current members of the Supreme Court on the underlying constitutional issues?

Justice Brennan began his opinion by setting forth the principle that incorporates the view of the five Justices who addressed the constitutional issues, the Brennan four and Justice Powell. He stated: "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings had been made by judicial, legislative or administrative bodies with competence to act in this area."<sup>18</sup> Therefore, if this exceedingly loose requirement of findings is satisfied and the government action is remedial, the action will conform to the equal protection clause.

In his opinion for the Brennan four, Justice Brennan considered and rejected the traditional two-tier equal protection test. According to this test a suspect classification such as race must be justified by a demonstration of a compelling state interest, while a nonsuspect classification need only be justified by demonstration of a rational governmental basis for the classification. Justice Brennan articulated his new two-pronged test for review of remedial racial classifications as follows: "To justify [an "ostensibly benign"] classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those less well represented in the political process to bear the brunt of a benign program."<sup>19</sup> The need for remedy for victims of discrimina-

tion and the need of society for a general elimination of discrimination provide important purposes which may be articulated as the bases for an affirmative action program. The limitation contained in the Brennan quotation is the same as that expressed in *Washington v. Davis* and *United Jewish Organizations of Williamsburgh v. Carey*, in that purposeful exclusion or stigmatizing of any particular group is prohibited. The fact that other groups may suffer a foreseeable adverse impact is not sufficient to invalidate the classification.

Justice Brennan concluded that the Davis program satisfied his test because its purpose was to remedy "the effects of past societal discrimination [which impede] access of minorities to medical school . . ."<sup>20</sup> and it did not operate "to stigmatize or single out any discrete and insular, or even any identifiable, non-minority group . . ."<sup>21</sup>

**A major objection** to affirmative action programs stems from the ethical dilemma they present. At an individual level, it is unfair for any person's race to result in a denial of opportunity. On the other hand, there is a significant difference between the practical and emotional impact of a racially based exclusion of a black American and a similar exclusion of a white American. To equate the two, and to preserve generalized race discrimination against black Americans to prevent isolated instances of race discrimination against white Americans, is insensitive and inconsistent with the true needs of American society.

Justice Blackmun, in his separate opinion, noted the tension between the concept of "idealistic equality" and the need for affirmative action to accomplish the "original aims" of the Fourteenth Amendment. In his words: "[T]hat tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area."<sup>22</sup> He concluded: "We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy."<sup>23</sup>

Justice Marshall, in his separate opinion, traced the history of slavery and race discrimination in America, and argued with eloquence that failure to bring black Americans into the mainstream of American life will "insure that America will forever remain a divided society."<sup>24</sup>

The opinion of Justice Powell spoke only for Justice Powell on the constitutional issues. He applied a conventional suspect classification/compelling state interest method of analysis, and seemingly rejected the use of a less exacting form of review for "benign racial classifications." However, he acknowledged that it is appropriate for courts to use racial classifications in fashioning remedy for specific statutory and constitutional violations in school desegregation and employment discrimination cases.

Justice Powell then made a rather remarkable jump to the conclusion that the use of remedial racial classifications and preferences is constitutional if there have been "judicial, legislative or administrative findings of constitutional or statutory violations," and noted that this discrimination may be general "in the industry affected" rather than specific to the entity using the affirmative action program. If these findings have been made, there arises a "government interest" in vindicating "the legal rights of the victims" which is "substantial."<sup>25</sup> The loose nature of this findings requirement and his replacement of the normal "compelling state interest" phrase with the "substantial" governmental interest phrase demonstrate how close Justice Powell is to the Brennan four concerning the constitutional issues.

In his consideration of the Title VI issues, Justice Powell seemingly adopted a color-blind approach, stating: "Preferring members of any one group for no reasons other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."<sup>26</sup> His statement concerning forbidden discrimination accurately describes statutory standards developed under other titles of the 1964 Civil Rights Act, including Title VII. It is indisputable



that if race is the only reason for employment discrimination against a person, white or black, there is a violation of Title VII. There also is a subtle, though profound, distinction between the use of racial classifications and preferences to remedy discrimination and the use of racial classifications and preferences, unconnected with past or current constitutional or statutory violations, to facilitate theoretical social planning and allocation of opportunity.

**Of great interest** from a First Amendment standpoint, Justice Powell concluded that the academic freedom of a university, protected by the First Amendment, includes the right to select students in a way which will result in a diverse student body. The First Amendment provides no express protection for academic freedom at the college and university level. However, Supreme Court decisions have indicated that the First Amendment protects a college or university in determining "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."<sup>27</sup> Thus, even in the absence of judicial, legislative or administrative findings of past discrimination, a university has a "compelling" interest of "paramount importance,"<sup>28</sup> protected by the First Amendment, to use race as one factor in attaining a diverse student body. However, Justice Powell concluded that the use of a 16-seat set aside is not a necessary means toward this permissible end.

It is crucial that persons responsible for implementing college and university affirmative action programs recognize that Justice Powell used two separate lines of analysis, and developed a different test for constitutionality through each line of analysis. His perception of an interconnection between the First Amendment and the Fourteenth Amendment equal protection clause resulted in the more stringent test, and would permit use of racial considerations as only one aspect of efforts to attain a diverse student body. A program which places primary emphasis on race would ap-

pear to fail this test. However, such a program would be justified, through his second line of reasoning based upon the remedial nature of such a program. His requirement for satisfaction of the second test is the prior making of judicial, legislative, or administrative findings demonstrating that the program remedies past discrimination. His discussion of this requirement indicates that the discrimination may be general throughout a profession, and need not relate to proven past discrimination by the college or university in question.

The danger is that a college or university may mistakenly take what appears to be a safe route by adopting the more restrictive approach, in the belief that the opinions of Justice Powell and the Brennan four, considered together, protect only this course of action.

This First Amendment approach to the *Bakke* issues was not considered in a significant manner by any other member of the Court. Therefore, the extent of First Amendment/academic freedom protection for colleges and universities in selecting students was raised but not resolved by the *Bakke* decision.

The five Justices who reached the constitutional issues concluded that racial classifications and preferences may be used for remedial purposes. Prior discrimination by the organization providing the remedy is not necessary, though a demonstrable connection with discrimination is necessary.

The point at which Justice Powell departs from the Brennan four is in the method he would require for demonstrating the connection with the discrimination to be remedied. He would require the making of specific judicial, legislative or administrative findings of prior or current discrimination, and presumably would require remedial provisions which are effective means for remedying this discrimination. The Brennan four consider the findings requirement to be artificial and unnecessary, given the pervasive nature of discrimination in American society. They do require that racial classifications and preferences be remedial. However, their

**A major objection to affirmative action programs stems from the ethical dilemma they present**



remedial nature may be proven after-the-fact, at the time of challenge.

Does the avoidance of the constitutional issues by the Stevens four leave us adrift?

The Stevens four, as indicated above, avoided the constitutional issues and concluded that Title VI of the 1964 Civil Rights Act rendered the Davis program unlawful. Although the opinion by Justice Stevens might appear to be an adoption of a "color-blind" approach to the definition of discrimination under Title VI, a close reading of his language reveals that he views Title VI as containing a definition of discrimination similar to the definition of employment discrimination under Title VII. As various forms of racial preferences are permissible under Title VII, including voluntary ones for remedial purposes, it would appear that the same would be true under his interpretation of Title VI.<sup>29</sup>

Justice Stevens concluded that a statutory violation arises under Title VI if a person has been discriminated against "only because of the color of his skin."<sup>30</sup> In footnote 12 of his opinion,<sup>31</sup> Justice Stevens referred to a Title VII case, *McDonald v. Santa Fe Trial*,<sup>32</sup> as an example of discrimination against a white person similar to that which would violate Title VI. In this case, a white person was fired pursuant to disciplinary standards which were not applied to a black person. This constituted a violation of Title VII as the use of different standards was unrelated to remedial efforts on behalf of prior victims of discrimination. Justice Marshall wrote the decision, which confirmed that Title VII protects persons of all races from racial discrimination. The decision does not, however, adopt a color-blind approach to Title VII cases, and does not suggest that a white person excluded by an affirmative action program has a Title VII claim. The references in the Stevens opinion to *McDonald* and other Title VII cases demonstrate the belief of the Stevens four that Title VI should be interpreted in a progressive manner, and that a violation of Title VI should not be found unless the discrimination involved would con-

stitute a violation of Title VII in an employment context.

The significant point is that the four Justices who sat out the constitutional issues in *Bakke* already have demonstrated their agreement with the use of remedial racial classifications and preferences for victims of discrimination, on an individual and group basis, in school desegregation and employment discrimination cases. The developing pressure for affirmative action programs in employment, in fact, stems from the progressive employment discrimination case law developed by the Supreme Court under Chief Justice Warren Burger.

**The foundation case** for modern discrimination law is *Griggs v. Duke Power Co.*, discussed above, which provided workable litigation tools to deal with entrenched employment discrimination. In the 1975 case of *Albemarle Paper Co. v. Moody*,<sup>33</sup> Justice Brennan held for a unanimous Court that the purposes of the remedial sections of Title VII are to make the victims of employment discrimination whole and to eradicate employment discrimination throughout the economy. The Court in this case also required an employer to use the preferential device of differential validation of employment tests. An employer may be required to use different passing scores for different racial groups, following proof that an examination has a different impact on persons of different races. The use of different passing scores on medical and law school aptitude tests is a similar form of differential validation.

In the 1976 case of *Franks v. Bowman Transportation Co.*,<sup>34</sup> the Supreme Court held that victims of discrimination were entitled to retroactive seniority status, which restored them to the positions they would have been in but for unlawful discrimination. This remedy was considered appropriate even though it "diminishes the expectations of other, arguably innocent, employees..."<sup>35</sup> The decision by Justice Brennan in *Franks* was joined by all members of the current Supreme Court, with the exceptions of Justice Stevens who took no part

and Chief Justice Burger who dissented. Chief Justice Burger's dissent reflected his concern over the inequity of taking from an employee a vested employment right such as competitive seniority status, to provide Title VII remedy for another employee, when the entire burden can be placed on the wrongdoing employer. He would have permitted the innocent white employees to retain their competitive seniority status, while providing for a "front-pay award" of money damages to the victims of discrimination sufficient to compensate them for their loss of seniority status. This approach arguably was more progressive than that of the other members of the Court, and there is no reason to assume that he would have extended the same degree of concern to white job applicants or graduate school applicants who have not yet obtained a vested interest in what they seek.

The Stevens four all have endorsed the *Washington v. Davis* principle that a governmental action does not violate the equal protection clause in the absence of purposeful discrimination. As discussed above, they also have endorsed various forms of remedial preferences in other contexts. Therefore, to assess the overall significance of the *Bakke* decision, the question is whether these four justices, had they reached the constitutional issues, would have followed the approach of Justice Powell and required prior judicial, legislative or administrative findings of discrimination, or would have followed the approach of the Brennan four and permitted an after-the-fact demonstration that an affirmative action program is remedial. It is a near certainty that at least one of the Stevens four would have adopted the more flexible and realistic Brennan view, which would have resulted in a majority of five. Therefore, it would be reasonable and prudent to consider the Brennan four opinion as the true position of the Supreme Court.

**The recent employment discrimination decisions** by the Supreme Court reflect a pragmatic approach to the problems of race in America and have provided the legal tools



necessary for elimination of employment discrimination based upon race, national origin, sex, religion, and physical handicap and other unlawful considerations.

In the same way, the *Bakke* decision has legitimized remedial racial classifications and preferences as the essential tools for providing black Americans access to higher education at the undergraduate and graduate levels. The purpose of their use is to include and provide remedy, not to exclude or stigmatize those who must have their expectations diminished.

The *Bakke* case does not require a reduction in the crucial efforts colleges and universities are making to remove the cancer of discrimination from American society. Rather, it authorizes more vigorous and meaningful efforts to achieve this objective.

The practical ramifications of the *Bakke* decision for college and university administrators should be considered. The decision authorizes admissions officers to utilize race as a preferential consideration, in order to attain a diverse student body and to respond to the societal need for ending discrimination.

The decision authorizes admissions officers to broaden the base of admissions criteria, which will offset the undemocratic parcelling out of opportunity on the basis of a person's ability to score well on standardized tests.

**The great majority** of the personal strengths and characteristics necessary for a positive professional contribution are not dealt with at all by standardized tests, and have a tenuous connection with undergraduate grade point averages. Reliance by an admissions officer on aptitude test scores and undergraduate grade point averages is administratively convenient. It is an effective way to predict professional school grades for slightly more than one-half of the applicants. However, this reliance must be balanced by considerations of a more personal nature and by responsiveness to the needs of society to eliminate racial, ethnic and sexual barriers.

If a college or university has a prior history of discrimination, a pri-

vate cause of action may be available *against it* under Title VI. At the very least, such a college or university will be vulnerable to loss of federal funding because of increased focus on Title VI.

A college or university utilizing racial classifications and preferences in its admissions programs may insulate itself from troublesome litigation through the making of findings of past discrimination coupled with a determination that this discrimination results in a current denial of access to the educational services of the college or university. Assuming that these findings have been made by the college or university, by a legislative arm of government, by a court or by an administrative agency having some connection with the college or university, the affirmative action program unquestionably will be viewed as remedial. Consequently, those excluded will not be regarded as the victims of purposeful discrimination, in violation of the equal protection clause. The structure and implementation provisions of the program should reflect its nature as a transitional device, with findings and applicable remedy being subject future modification.

The requirement of findings, and remedy connected to the discrimination which has been found, is artificial in view of the pervasive nature of discrimination throughout American society. However, the use of findings and related remedial provisions will confirm the remedial nature of the programs, and distinguish them from attempts to establish proportional representation for persons of different races based upon general population statistics. The latter is not a constitutionally proper objective, and its equation with affirmative action programs has been a major cause of public antagonism and misunderstanding.

Admissions officers for professional schools have a particular responsibility to use racial classifications and preferences, as the exclusion of black Americans from the professions has impaired the ability of the professions to fulfill their societal responsibilities.

In the field of medical education,

the *Bakke* decision has generated sufficient data to support findings by medical schools and/or legislative or administrative bodies connected with them to support affirmative action programs which go much farther than the Davis program in the number of qualified minority applicants who are accepted.

Although the Davis program did not utilize an absolute exclusion, Justice Powell did view it in that manner. Therefore, it usually would be prudent not to utilize a fixed number. From the standpoint of efficient administration of a sophisticated affirmative action program, a fixed number also will be inappropriate for most schools, as the number of persons admitted should depend in large part upon the nature of the applicant pool.

The great majority of college and university affirmative action programs now utilize race as a preferential consideration without setting aside a fixed number of places for members of minority groups.

For an effective attack to be made on race discrimination in America, it is essential for a push from below to be provided through improvement of public education for children in areas of high minority concentration. A pull from above is necessary to insure that capable minority students are assisted and encouraged to obtain higher education at the college, graduate and professional school levels. Finally, a lateral attack is required through the use of existing litigation tools to eliminate discrimination as quickly as possible in employment, education, housing and other areas of major significance to equality of opportunity.

Our common interest is to make America a true democracy. The racial, ethnic and sexual stratification of American society prevents this from occurring. This stratification can be eliminated, but only through use of the types of programs which have been validated by the *Bakke* decision. These programs will not "lower standards" in professional schools. Rather, they will generate standards which are fair, realistic and responsive to the broader needs of society. hr