

Landmark or Curiosity?

Thomas Sowell

WAS THE LESSON of the Nazi holocaust that we should never again let genocide happen—or that Israel would be justified if it committed genocide against Germans? Most of us have believed the former, all these years, but if we apply the reasoning used by “affirmative action” advocates we have been wrong. Not only would today’s Israelis have such a right; the grandchildren of today’s Israelis would have the same right against the grandchildren of today’s Germans.

The moral bankruptcy of affirmative action is perhaps more important than its many factual misstatements or fallacious reasoning. The great principle of the civil rights movement—that each individual must be judged “without regard” to race, color, creed, et cetera—is now “to be unlearned,” as Alexander Bickel said, and the whole issue reduced to “a matter of whose ox is gored.” No matter what conjunction of political and judicial currents permits such short-run opportunism, in the long run it is madness for leaders of a vastly outnumbered group to proclaim such a principle, or lack of principle. Hubris is added to opportunism when anyone imagines that he can assume the godlike role of retrospective readjustment of history. An element of farce attends any such effort in the United States, where the degree of ethnic and even racial intermixture would make such a task comparable to unscrambling an egg. On the world scene, it would lose all semblance of sanity.

Thomas Sowell is professor of economics, University of California at Los Angeles, and an AEI adjunct scholar.

Probably most of the land on this earth has belonged to too many different tribes and nations for anyone to say to whom it “rightfully” belongs. Even in a country with the comparatively short and relatively uncomplicated history of the United States, the land on which the Supreme Court building stands has belonged to three different nations (not counting pre-Columbian times), Los Angeles to four, and New Orleans to five.

Does the *Bakke* case represent a rejection of the affirmative action ideology? Justice Lewis Powell’s carefully reasoned opinion for the Supreme Court seemed to say so: The Fourteenth Amendment’s equal protection clause applies to *persons*—not groups—and “equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.” There are no “special wards entitled to a degree of protection greater than that accorded others.” To rank or weigh the various injustices suffered at various times and places by the many ethnic groups which make up American society would be a Herculean undertaking in itself. And since any legal remedies allowed as a result would then change the rankings and weights, this would entail a continual readjustment based on “variable sociological and political analysis” which “simply does not lie within the judicial competence.” In short, the Powell opinion rejected both the premises of affirmative action and its illusions as to what human institutions are capable of doing. If that judgment stands up in subsequent cases, *Bakke* can be a landmark, not only on the issues directly involved, but on the whole role of courts as free-wheeling policy-makers.

But although Powell wrote the official majority opinion of the Court, it was in fact solely his own opinion. The four concurring justices (Stevens, Burger, Rehnquist, and Stewart) narrowly limited their concurrence to reaffirming the California Supreme Court’s decision that the Davis medical school had to admit Bakke and change its admissions procedures. The other four justices (Brennan, Marshall, White, and Blackmun) did not, of course, go even that far. The five-to-four vote and the differing sets of individuals constituting the majority for different sections of the opinion are enough to make the *Bakke* decision’s status as a landmark questionable. The reasoning and

tactics of the four concurring justices raise even more serious questions about how much of a precedent this case will prove to be in the future. The legalistic technicalities on which the narrow concurrence was achieved may come to mean far more than the majestic prose of Justice Powell.

Instead of relying on the broad principles of the Fourteenth Amendment—which would have made the case a constitutional precedent—the concurring justices insisted on deciding it on the basis of Section VI of the Civil Rights Act of 1964. This involved considerable straining of the law, not to mention straining of credibility. They depicted their imaginative exegesis of the Civil Rights Act as necessary because Congress had not considered the possibility of “reverse discrimination” when writing the law. This is pure fiction. The legislative history of the Civil Rights Act is full of discussions of reverse discrimination possibilities. In the course of these debates, both supporters and opponents of the act agreed that there should be no quotas, no preferences, no racial balancing, no bans on tests, and no shifting of burdens of proof to the accused employer. All of these forbidden policies emerged out of administrative agencies, with judicial “deference” to the “expertise” of those agencies.

Why the straining to decide this case under the Civil Rights Act? Certainly not because the learned justices did not know any better. Justice White’s dissenting opinion practically rubbed their noses in their own legal inconsistencies. The ominous import of the Civil Rights Act gambit is that a constitutional precedent was being avoided at all cost. Coming after the Supreme Court’s evasion of the same constitutional issues in the “moot” *DeFunis* case, it suggests a desperate attempt to steer between a constitutional ban on affirmative action programs and constitutional approval of their indefinite continuation. The Court was keeping its options open to decide future affirmative action cases ad hoc. The concurring justices agreed with Powell on the *Bakke* case, but not on the broader issue of renouncing judicial policy-making. In short, this has all the earmarks of political jockeying rather than constitutional interpretation—and God knows we do not need nine more politicians in Washington.

The *Bakke* case cannot be a precedent if the Supreme Court does not want it to be a

precedent. Whether it will ultimately become just a passing curiosity—what nine men happened to think about a particular school’s admission program—must await the unfolding of more cases. What needs to be aired in the meantime are the assumptions, beliefs, and consequences of affirmative action.

Affirmative action attempts to measure discrimination numerically, by the extent to which a group—minority or female—is “underrepresented” in an occupation compared to their representation in the population at large. Where a special skill is involved, it is the group’s percentage of those minimally “qualified” in the broadly defined area which forms the baseline for determining underrepresentation. The crucial assumption underlying this reasoning is that each group would be randomly distributed among occupations in the absence of employer discrimination. This assumption is turned into an axiom and the axiom into law by a process that has as little basis in legislation or politics as it does in logic. No legislation authorizes such procedures and the Civil Rights Act attempts to forbid that whole approach. Both congressional intent and public opinion have been flouted. The Gallup poll has found that no matter how it groups the population—by race, sex, income, region, or education—there is not a single group that is in favor of preferential hiring or preferential college admission. Sixty-four percent of blacks are opposed, and so are 80 percent of women. The triumph of a small band of zealots over both the public and the constitutional processes is a disturbing indication of the vulnerability of democratic government.

No evidence has ever been offered—or asked for—to indicate that a random distribution of people occurs when there is no discrimination. Tons of evidence could be assembled to show the opposite. The easiest way to get a sample of nondiscriminatory decision-making is to consider only those decisions made by each individual for himself, wholly at his own discretion—what television programs to watch, what card games to play, how to vote in a secret ballot election, et cetera. None of these decisions shows random behavior. All show patterns that vary by sex, race, age, income, and numerous other variables. The most casual observation of people attending free concerts, of television game show audiences, and of boxing

crowds will show sharp differences in their respective compositions.

Despite a fashionable and mindless personification of "society" as the "cause" of virtually everything, many of the ethnic differences in the United States today reflect historic differences that go back before these groups ever set foot on American soil—for example, the concentration of Jews in the clothing industry or of Germans in the beer industry. Even when the Irish, the Italians, and the Jews were all poverty-stricken immigrants living in the same slums, they spent their money and their time differently, drank different beverages, created different institutions, and advanced through different channels. Within the black population, the antebellum "free persons of color" and their descendants show an entirely different pattern of geographic distribution, urbanization, and even fertility rates from that of the black population at large. So do West Indian blacks living in the United States today—and earning incomes comparable to those of whites. Orientals are as "overrepresented" in the sciences as they are "underrepresented" in sports. Nowhere do we find the random distribution of people which is simply *assumed* as a norm. One of the ways of preserving the illusion of a dominant norm is by comparing each group—seriatim—with a so-called national average, which is nothing more than a statistical amalgamation of all these differences.

Anyone with any knowledge of American social history knows that discrimination has long been a fact of life. How much discrimination for how long with which groups is a much more elusive question. With great care and painstaking analysis, it is possible to make estimates of differences in incomes or occupations among individuals with similar objective characteristics and different group origins, by sex or ethnicity. The representation approach, however, is simply gut feelings garnished with numbers.

The effect of affirmative action is as poorly estimated as the situation which it was supposed to remedy. Many of its supporters compare the economic condition of minorities today with their condition many years ago, intimating that the improvement is due to "goals and timetables" (quotas). This ignores the whole civil rights movement, changes in public

attitudes, and the equal opportunity phase of public policy—hiring *without regard* to race, color, creed, and so on—that preceded the numerical representation approach. All of the increase in black income as a percentage of white income occurred during the equal opportunity phase. Black income as a percentage of white income reached its peak in 1970, the year before goals and timetables (quotas) became mandatory. That percentage has never been as high since. It is unnecessary here to blame affirmative action for the relative decline. It is enough that affirmative action has no positive evidence of its own. There is a special irony in the fact that a program that is so results-oriented should have no overall results of its own to show for all the uproar and bitter divisiveness that have accompanied it.

Why so little tangible result from affirmative action, after the equal opportunity phase showed such substantial gains by blacks? One reason is that the two kinds of policies create different incentives for the employer. Under equal opportunity policy, which requires hiring decisions "without regard" to race, et cetera, an employer could be convicted only after specific proof of discrimination against some individual(s). Under affirmative action, employers have been convicted because they failed to disprove the "rebuttable presumption" established by numbers alone. It might seem at first that affirmative action imposes higher costs on discriminatory employers. But economists measure costs as opportunity cost—the difference between the consequences of making decision A and decision B. Under affirmative action, with many unreachable goals, it often makes no difference whether the employer discriminates or not. The costs fall on the just and the unjust alike, and therefore provide no incentive for employers to change from one of these categories to the other.

Affirmative action also creates incentives *not* to hire minorities and women. Because of the low threshold of purely numerical "evidence" required to produce a rebuttable presumption of discrimination—and the practical difficulties and costs of trying to rebut under the legal ground rules—members of the government-designated groups have the potential for creating substantial additional costs to their employers. In short, hiring from the government-designated groups does not get the gov-

ernment off the employer's back, because the subsequent pay, promotion, or assignment of members of the designated groups provides new grounds for legal charges. While special rights can be viewed legally or politically as special favors, economically they are special costs which often make others reluctant to engage in transactions with those specially favored. The special protections of youths under Soviet law have long caused Soviet managers to try to avoid hiring them. In the United States, the requirement that landlords cannot have lead-based paint in apartments rented to families with children provides another reason for landlords not to rent to families with children in the first place, thereby avoiding repainting costs. Whereas hiring minority applicants lowered employers' costs under equal opportunity laws, it can raise employers' costs under affirmative action. This may be part of the reason for the difference in the effectiveness of the two kinds of policies.

Some highly visible firms with much government money at stake have undoubtedly made dramatic changes in the hiring of minorities and women. But taking the economy as a whole, it is difficult to find the statistical impact, either for minorities or women. Women are not simply another minority, because their income and occupational patterns are unique. Most of the male-female differences in earnings are in fact differences between married women and all other persons. Even before affirmative action, women in their thirties who had worked continuously since high school earned slightly *more* than men in their thirties who had worked continuously since high school. Single women who received their Ph.D.s in the 1930s had by the 1950s become full professors to a slightly greater extent than male Ph.D.s of the same vintage. Why, then, the great male-female differences which are being constantly documented with gross statistics? Married women do much worse than the single individuals of either sex (and married women with children even worse than that) in incomes, occupational promotion, et cetera. Married men do much better than singles of either sex, for reasons that are obvious to anyone familiar with the many ways in which wives make it possible for their husbands to put more time into their careers. In short, married men do so much better than single individuals of either

sex for the same reasons that married women do so much worse.

Historical consideration of women's progress in high-level jobs reinforces these conclusions. Contrary to the prevailing impression that women have come "a long way" under recent political policies and social agitation, the cold fact is that women were far better represented in many high-level positions a generation or more ago than they are today. Women were a higher percentage of doctors, academics, the professions generally, and persons in *Who's Who* in earlier eras. The decline of women in such positions coincided almost exactly with a declining age of marriage among educated women and a rising number of children per marriage. When these demographic trends began to reverse in the 1960s, so did the occupational trends. Tame, nonideological explanations of social phenomena may be no more acceptable for women than for minorities, but reality exists independently of our emotional needs.

To the extent that the *Bakke* decision marks a turning point in judicial acceptance of quotas in general—and time alone will tell—it may also mark a turning point in efforts to advance groups that still lag far behind others in many respects. Locating where and why they lag behind can become a more important and more realistically approached task, once we are past the dogma that statistical differences are *caused* by the institutions at which they are *measured*. We would have to blame hospitals for disease, if we really believed that. Recent studies by Richard Freeman of Harvard indicate that black-white income differences among the younger generation today reflect cultural and educational differences that existed before the members of this generation ever reached the employer. More important—and more startling—there are *no* income differences today among those younger generation blacks and whites who come from homes with similar reading (or nonreading) habits and who have the same formal education. This has been true only in recent times, and it represents a social revolution. It has also been generally ignored.

With all the concentration of attention on minorities, why would people ignore evidence that far more dramatic gains are possible by changing certain background variables than

by stamping out residual discrimination? It is inexplicable if the overriding purpose is to advance minorities, rather than to advance ideologies or individuals. This brings us to the crux of the problem with affirmative action. Has the drive to create and preserve affirmative action been due to any demonstrated benefits to minorities, or to its role as a full-employment program for civil rights activists?

Questions for the Court

Michael Novak

NO SUBJECT breeds as much dishonesty in American life as race. Racists by definition do not see honestly, and many who are not racists do not speak honestly, for fear of McCarthyite labeling. Good souls touched by guilt and compassion use special standards. Activists gear their agenda to political gain and agency fund-raising. Few in our society are concerned, institutionally, to understand with accuracy. It would be unrealistic to expect the Supreme Court to carry this burden alone, for the justices are human too. And there are glaring gaps in the reasonings of the several justices in the opinions accompanying *Bakke*.

The shortest form of the logic governing the opinion of Justices Brennan, White, Marshall, and Blackmun in their dissent from one part of the decision runs as follows: Blacks, at present, perform at inferior levels; this inferiority results from past societal discrimination; therefore, a societal remedy is in order.

The "racism of our society has been so pervasive," wrote Justice Marshall, "that none, regardless of wealth or position, has managed to escape its impact. . . . It is not only the history of slavery alone but also that a whole

people were *marked as inferior* by law. And that *mark* has endured." (Italics added.) He was joined by Brennan and the two other justices in a further opinion (the Brennan opinion): "The generation of minority students applying to Davis Medical School since it opened in 1968—most of whom were born before or about the time *Brown I* was decided—clearly have been victims of this discrimination." These justices cited *Brown I* for the finding that separation of school children by race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." These propositions—especially the one on the "empirical" base of *Brown I*—have been widely discredited, yet purport to describe the actual state of American blacks. Consider some alternatives.

How would the justices diagnose that "mark of inferiority"? When they spoke of effects of societal discrimination, precisely which effects did they have in mind? Were they effects upon the individual's psychology or level of skills? In his important study, *Race and Economics*, Thomas Sowell points out that descendants of those American blacks who were not slaves ("free persons of color") and blacks from the West Indies (who underwent a version of slavery different from that on the mainland) now perform in ways significantly different from other American blacks. He identifies the precise "damage" done to American blacks by attitudes of dependency and second-rateness inculcated in American slaves (but not in West Indian slaves). These attitudes, he points out, are subject to rather rapid change. They do not form a permanent "mark." Regrettably, however, many seemingly compassionate social programs aimed at "improving" the situation of American blacks have exactly the same effects as slavery: they inculcate attitudes of dependency and second-rateness. If Sowell is right, far from supplying a remedy, the Court may be compounding the "disadvantage" that American blacks suffer.

It does not appear, for example, that black athletes have been affected in "hearts and minds" so as to be marked forever by inferiority. Nor have blacks in other fields. It is not evident, even given the deplorable facts of past history, that the quite substantial black middle class must *necessarily* be producing lower than

Michael Novak is Ledden-Watson distinguished professor of religion at Syracuse University and an AEI resident scholar.

proportionate numbers of qualified students. This middle class now numbers almost as many persons as there are Jews in this country, and more than the Chinese, Japanese, Greeks, and other recently "deprived" ethnic or racial groups. Members of other groups have endured bitter discrimination and in some cases generations of slavery or peonage (for example, West Indian blacks, descendants of "free persons of color," Chinese, Japanese), and yet are performing in academic matters not only up to but even beyond proportionate levels of excellence. Neither discrimination nor feelings of inferiority seem to provide adequate explanations for lower performance.

The Brennan justices pointed out in a footnote that "over 40% of American born Negro males aged 20 to 24 residing in California were born in the South and the same statistic for females was over 48%." Here is evidence of one characteristic shared disproportionately by the American black population, in comparison with other cultural or racial groups: its very recent rural—premodern—heritage. On this score alone, independent of skin color and the sad tradition of discrimination, one would expect disproportionately low levels of academic performance. In addition, as Sowell points out in *Race and Economics*, the median age of the black population is far lower than that of almost all other groups. This, too, explains part of the disproportion. Fewer than half of all blacks are age twenty-one or older.

Moreover, *the time of entry* into "the American mainstream" affects migrating groups in special ways. For the poor, rural, premodern minorities of two generations ago, the harsh Calvinist ethic of hard work and self-reliance then dominant in the national ethos was, despite its inadequacies in other respects, a blessing in disguise. Young blacks born since *Brown I* come to maturity under a national ethos of considerably greater hedonism, slackness, and dependence. Jesse Jackson, in particular, has pointed out the devastating consequences of this for their morale. The new national ethos may disproportionately affect these disadvantaged in a novel way.

Another distinguishing feature of today's mainstream—as distinct from that of the 1920s and 1930s—is the presence of television in virtually every home, with its stress on experiences without consequence, its excitement of

envy, its false but powerful images of easy and (as it seems) universal affluence. No earlier cultural or racial group migrating into the mainstream had to face the as yet undetermined effects of television upon its young. On the average, black youngsters watch television—so widely cited figures assert—up to one-and-a-half hours per day longer than white youngsters. It is certain that television plays a significant role in the psychology of black youngsters and probable that that role might approach in significance the factor of societal discrimination. The illusory images and passive habits induced by heavy television viewing may have a disproportionate effect on members of migrant, premodern cultures. This current effect may outweigh, in its power, effects that have their roots in historical experience, or even "societal discrimination." One must note as well the (apparently) lower-than-average time that significant numbers of young blacks spend under parental supervision. It would not be fair to expect the two-thirds of all blacks under sixteen who lack the presence of at least one parent to do as well academically as youngsters (of whatever race) under parental supervision. So long as reading, quiet, and homework are not part of the daily home pattern for a majority of black teenagers, successful competition with other children—advantaged or disadvantaged, of whatever race—cannot be anticipated. It is a maxim of educational theory that the home is as important to education as the school. The great strides taken by blacks during the last twenty years are in large measure family successes.

The Court placed great weight on alleged "marks of inferiority" felt by all blacks "regardless of wealth or position." Is it empirically ascertainable (1) that such marks affect all and (2) that these marks affect academic performance? Why should they so greatly affect the life of the intellect?

The four Brennan justices asserted that "the conclusion is inescapable that [American black] applicants to medical school must be very few indeed who endured the effects of de jure segregation, the resistance to *Brown I*, or the equally debilitating private discrimination fostered by our long history of official discrimination . . . and yet come to the starting line with an education equal to whites." But consider this metaphor closely. At a track meet

black athletes, despite a long history of discrimination, do in fact "come to the starting line" equal. So the Court must hold that there are substantial differences between a physical contest and a mental contest. What are these differences?

Is it the case that in the mental contest a long period of acculturation is required? Since the Court held that black students, once admitted to medical school on a lower standard, "must satisfy the same degree requirements as regularly admitted students," the Court must have believed that the time required is short. Now if the time required is as short as the Court seems to have said, it is difficult to explain why there are not, say, 500 black youngsters in the state of California who might have mastered such an acculturation in an equally short period of time, outside the two-track lower-standard system. (In another footnote, Justice Powell noted the shockingly large gap between the test scores on the regular and the affirmative action tracks.)

Characteristically, intellectual talents are scattered among the poor and disadvantaged quite broadly. Many of the world's greatest geniuses and millions of yeomen laborers in intellectual fields have been born "disadvantaged." Intellectual development seems to be even more subject to personal application than physical prowess in sports. It does not require much money to develop a highly trained mind. Paperback books are cheap, libraries available. Why should the blackness of their skins inhibit young black students but not young black athletes?

The Brennan justices pointed out frankly that race is not the issue—that Asian students succeed on the regular track at Davis. The justices might also have noted that West Indian blacks and descendants of "free persons of color" are not similarly held back. So color alone cannot be the issue. Then these justices clearly stated that "economically disadvantaged whites do not score less well than economically advantaged whites, while economically advantaged blacks score less well than do disadvantaged whites." From this, they concluded that the problem must be blackness, and asserted that past societal discrimination is the explanatory factor. But such an assertion has not been proved. It represents a great leap over many unconsidered possibilities.

If the justices are in error about the source of the disappointing academic performance of American blacks, they are not likely to escape error about its remedy.

Programs of affirmative action have been in effect since 1968. The Court should request an empirical study of the results of these massive social efforts—for they may rest on an erroneous diagnosis and represent an erroneous remedy. The chances are great that the Court may have compounded past evils with a new one. If so, a future Court might discern in the present Court an error of the heart, which brought about a policy of "integrated but unequal" as racist in effect as an earlier Court's policy of "separate but equal."

A Murky Future

Robert H. Bork

IF THE Supreme Court's *Bakke* decision told us little about the legal rules that will ultimately govern the subject of reverse discrimination, it may tell us some things we would rather not hear about the long-term prospects for a politics of race and ethnicity in this country.

The primary legal rule announced is that colleges and universities subject to Title VI of the Civil Rights Act of 1964—and almost all of them are—may use race as *one* factor in deciding to admit students so long as other factors are also used in an effort to achieve diversity in the student body. They may not, however, use race as the only factor entitling applicants to preferential treatment.

The meaning of that rule will be litigated for years to come and, in application, seems certain to change. *Bakke* announced law that is

Robert H. Bork, Chancellor Kent professor of law at Yale University and an AEI adjunct scholar, was solicitor general of the United States from 1973 to 1977.

inherently unstable. For one thing, the rule was actually endorsed by only one member of the Court. Mr. Justice Powell's position became the law because of the accident that the other eight justices split evenly for and against racial quotas. A change in the composition of the Court or a swing of one vote could relegate *Bakke's* rule to the status of a historical curiosity. The rule as it now stands, moreover, will prove difficult to enforce and is therefore all the more likely to be modified. Finally, as I have noted elsewhere (*Wall Street Journal*, July 21, 1978), the rule rests upon inadequate constitutional grounds. The opinion necessarily reached the constitutional issue because Justice Powell, like the four justices who approved racial quotas, regarded Title VI and the equal protection clause of the Fourteenth Amendment as coterminous.

Justice Powell's position, midway between the opposing blocs of four, nevertheless embodies the law from which litigation and political activity will now begin. It is worth analyzing the probable meaning of his rule for affirmative action programs.

He began by espousing a colorblind view of the Fourteenth Amendment, rejecting the notion that it permits discrimination against whites in favor of blacks but not the reverse. "The guarantee of equal protection," he wrote, "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." Differential treatment by race, being inherently suspect, is said to require the strictest judicial scrutiny, and can be justified only by the most compelling governmental interests.

Davis's medical school had advanced a number of interests allegedly served by its racial quota. Justice Powell found only one relevant: "the attainment of a diverse student body." That, he said, was clearly "a constitutionally permissible goal for an institution of higher education" because it is an aspect of "academic freedom" and so a "special concern of the First Amendment." He explicitly disapproved, as not reflecting a sufficiently compelling interest, any admission policy that strives to produce only simple racial or ethnic diversity in the student body.

The diversity that furthers a compelling state interest encompasses a far broader

array of qualifications and characteristics of which racial and ethnic origin is but a single though important element. [Davis's] . . . special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity. [Emphasis in original.]

To illustrate his point, Justice Powell quoted approvingly from an *amicus curiae* brief recounting Harvard's version of its college admissions program. Harvard said that being black is a factor considered favorably, just as might be the fact of being an Idaho farm boy, a musician, or a football player.

This version of a permissible "genuine diversity" is undoubtedly causing a good deal of trouble for colleges and universities that are now examining their admissions procedures to determine whether they are in compliance with *Bakke*. The Harvard model (which may not be the Harvard actuality) will be difficult to match for many colleges, graduate schools, and professional schools. Since many of these institutions will wish, nonetheless, to continue de facto quota programs, it is to be feared that much "compliance" will be disingenuous.

Harvard and a few other highly prestigious institutions have so large a pool of qualified applicants that they can easily afford to use criteria in addition to test scores, grades, and race to produce "genuine diversity." Most colleges, however, are struggling to attract applicants of the quality they desire. As the absolute number of students seeking admission declines because of demographic changes, that struggle will become increasingly desperate for many of them. For these colleges to follow Justice Powell's guidelines in good faith would mean producing "genuine diversity" at the cost of a significant decline in the quality of their students.

Graduate and professional schools face an additional problem. They have not, even the most prestigious of them, placed any particular value upon diversity, other than racial and ethnic. Many of them have used quotas, but few admissions committees at the graduate level place much value upon farm boys from Idaho, violinists, or the ability to run the off-tackle slant.

Faculties and educational administrators, however, tend to be much more redistributionist than the general public, and it is unlikely

they will abandon their quota systems easily. If they do not, if they use disguised quotas, if rejected white applicants prove litigious, then, so long as *Bakke* remains the law, colleges and universities will be vulnerable to lawsuits. Academicians generally do not understand how thoroughly a camouflaged quota can be exposed by skillfully conducted litigation. Professors now unfamiliar with the intrusiveness and petty indignities of pretrial discovery may learn the unhappy lot of involuntary witnesses in an adversary legal system. Sworn oral depositions will force them to reveal committee deliberations and even more casual conversations about admissions. Subpoenas will reach records, test scores, memoranda, and comments on applicants' files. Actual, rather than putative, admissions criteria are likely to become known. Embarrassment may run high, and beyond embarrassment, there is the possibility not merely of injunctive relief (requiring that rejected applicants be admitted, as *Bakke* was) but also of personal monetary liability for trustees, administrators, and faculty members.

It is too soon to know whether these things will come to pass, but educators would do well to keep their possibility in mind.

It is also too soon to say what *Bakke* may mean for other areas of reverse discrimination, such as employment. Justice Powell's first amendment rationale has no obvious application there, and we do not know whether he and other members of the Court will perceive a comparable compelling state interest in such areas. There is the possibility, raised by his opinion, that he would defer to legislative or administrative findings of past constitutional or statutory violations which are said to justify the remedy of racial preferences.

The Supreme Court's *Bakke* decision does not, of course, require the use of racial or ethnic preferences; but it permits them, in higher education at least. The decision is left to the political process. Yet it would be wrong not to admit that a constitutional ratification of the principle of preferences is widely viewed as a moral and political recommendation. The chances that the wisdom and propriety of such policies will be addressed openly and candidly are, for that reason, perhaps less after *Bakke* than before.

It is also important to remember that public policy is rarely made by the public; it is

made by policy-making elites in the federal bureaucracy and in other centers such as universities. Our policy-making elites tend to be more leftist and more egalitarian than the public at large. For that reason, even though a majority of the general public (including blacks) is against quotas and racial preferences, quotas and racial preferences persist, and *Bakke* will be taken to mean that they are wise and desirable as well as constitutional.

The result will be to confirm a social policy that not only is unpopular but may be reckless in the chances it takes with the future of this society. The policy of affirmative action or reverse discrimination assumes that, if there is no societal discrimination, every race and ethnic group would achieve proportional representation in every field. There is no reason to suppose any such thing to be true. The world does not work that way. Group cultures differ and that leads to differing interests and differing talents. Moreover, affirmative action also assumes that the era of quotas or preferences will be transitional. After historic wrongs are rectified, the argument runs, we can stop paying attention to the individual's race or ethnic background. But if the world does not naturally produce proportional representation everywhere, we will never arrive at the condition desired, and the transitional period will become permanent.

The existence of quotas or preferences encourages new groups to organize and demand special rewards on the grounds that they are disadvantaged. That process is already well under way. The Sunday *New York Times* of July 30, 1978, reports, for example, that government agencies have been redefining "minority" to include such groups as women and veterans, to the dismay of blacks and Hispanics. The Reverend Andrew Greeley is quoted as saying, "You can make a powerful case of underrepresentation of Eastern and Southern European ethnic groups in positions of responsibility. They are victims of prejudice in the past—I wonder why the Government is not collecting data on their unemployment." As it becomes clear that "disadvantage" is the road to advantage in this society, various ethnic groups will see that the government treats them separately.

The thrust of *Bakke*, therefore, is toward proportional representation as social morality. This will be a major change in American so-

ciety and in what Americans have traditionally viewed as social justice. The merit of the individual and the efficiency with which society accomplishes its work will be ideals submerged in a new ethos of group entitlement. It is a thoroughly bad idea, and one wishes it had not been encouraged by *Bakke*.

Conversation with a Dean of Admissions

Burke Marshall

THE FOLLOWING conversation happens to have taken place between the dean of admissions of a graduate professional school and his learned counsel. As an informal sampling shows, similar conversations are taking place in many government offices, businesses, and other institutions that have the task of setting the policies by which scarce places (jobs, admissions) are allocated among the people who want them.

Dean of Admissions: Among the qualified, how does one choose, now that the *Bakke* case has been decided?

Learned Counsel: That is not the question, of course, even though you stole it directly from Justice Blackmun's refreshing and personal "general observations." The question is, Who decides how one chooses? And the answer, after *Bakke*, is that *you* do not, and probably you would not be able to even were you working for a private university—so long as it received federal funds—unless you and your employers were willing to run a "racially neutral" admissions policy. If you were not willing to do that, the institution that would—and will—decide how you choose is the federal court system, because any program you would put into practice would be subject to the risks of litigation. I regret also to have to note that you *personally*

will be, at the very least, subject to having to explain as a witness under oath exactly what goes on in the admissions process and, especially, how it came about (if indeed it did) that you accepted a disproportionately large group of minority applicants with relatively low test scores and lower predicted performances than white applicants. And you will, I fear, have to do that no matter how cleverly you write your policy statements.

Dean of Admissions: Even if I worked for Harvard?

Learned Counsel: Perhaps especially if you worked for Harvard, despite the endorsement of its policies in the opinions of a majority of the justices. The question in the end must be, What *are* you doing?—and not, What do you *say* you are doing? Alan Dershowitz, who is a perceptive and learned professor at the Harvard Law School, has publicly expressed skepticism that Harvard could pass that test.

Dean of Admissions: Why did you say "probably" when you spoke of the effect of *Bakke* on private universities?

Learned Counsel: Because one of the strange consequences of the split among the justices is that we do not know what Title VI of the Civil Rights Act of 1964 requires with respect to the *Bakke* issue. Title VI, you recall, says that "no person . . . shall, on the ground of race, color, or national origin, be excluded from participation" in any federally funded program. That must affect Harvard, for example, although we can assume that the constitutional provision involved—the equal protection clause of the Fourteenth Amendment—does not. You have noted, I am sure, that four justices thought the *Bakke* case was simple, because of Title VI. The University of California conceded that Mr. Bakke would have been admitted but for the racially preferential admissions program for sixteen students, and Justices Stevens, Burger, Stewart, and Rehnquist would have decided the case on the basis that the literal language of Title VI applied: Bakke was excluded from participation in the medical school's program on the ground of race and that was the end of the matter, whatever the impact of the equal protection clause—an issue those justices did not reach.

The majority of the Court, however, did not agree that the Stevens opinion properly construed Title VI. The majority held that the

Burke Marshall is John Thomas Smith professor of law at the Yale Law School.

legislative history and consistent administration of Title VI showed it was intended to prohibit *in federally funded programs* whatever the equal protection clause prohibited *in state institutions*—no more and no less, at least so far as discrimination based on race, color, or national origin is concerned.

The difficulty is that we do not know from the *Bakke* decisions what a majority of the Court thinks the equal protection clause means, and therefore (accepting as authoritative the majority conclusion that Title VI means what the equal protection clause means) we do not know what Title VI means as applied to a program like that at Cal-Davis. Most commentary on the *Bakke* case proceeds on the premise that Justice Powell's opinion is equal protection law, at least for the present. But you, as a sophisticated dean of admissions, know that no other member of the Court has expressed agreement with Justice Powell's opinion on the effect of the equal protection clause. Suppose that in a future case a justice who joined in Justice Stevens's opinion on Title VI (Justice Stevens himself, say, or Justice Stewart) believed that he was bound by the *Bakke* majority's view of the meaning of Title VI—believed that he now had to accept (despite his disagreement with it) the interpretation that Title VI was coextensive with the equal protection clause. Then this justice's decision on the Title VI question in the future *Bakke*-like case would turn on his view of the effect on the equal protection clause. But we do not know what that view is. It may be that he would agree with Justice Powell's position, but it is at least possible—perhaps equally plausible—for him to adopt the constitutional construction made by Justices Brennan, White, Marshall, and Blackmun. And in that event *Bakke*, Jr., whoever he may be, would lose, not win, on the Title VI issue.

Dean of Admissions: If I follow your logic, should you not also qualify—with the word “probably” or something similar—your first statement about the effect of *Bakke* on state universities, which the equal protection clause reaches directly and not just through Title VI?

Learned Counsel: I have said all along that the constitutional doctrine of *Bakke*, whatever it is, is unstable.

Dean of Admissions: This conversation so far makes me even more exasperated than I was

before—exasperated with being constantly told by lawyers that I am asking the wrong question. I asked, Among the qualified, how does one choose, after *Bakke*? This time, since counsel will not answer the question, I am going to answer it myself. The answer is that one chooses on the basis of test scores, grade-point averages, predicted academic performance in the first year or so, reliable letters of recommendation, and possibly interviews, on a colorblind basis. In other words, one lets the chips fall where they may on tested merit (except, perhaps, for some nonracial special groups, like alumni children). That course is clearly legal. It is morally right because it is racially neutral, giving no advantage or disadvantage because of race. It is safe. It does not require me to be a witness. It is what I am going to do.

Learned Counsel: I am authorized to give you a tentative opinion that the policy you propose is lawful, at least under the equal protection clause and probably under Title VI—depending, of course, on future constructions of Title VI, not only by the courts, but also by the Department of Health, Education, and Welfare and other government agencies such as the Department of Justice, *and* on all the facts and circumstances over the years, including the impact of such a deliberate change in policy on minority candidates for admission, proof of validation of all tests used, and similar factors. But I should point out to you that what you suggest is not racially neutral except in the narrowest sense of the word.

Dean of Admissions: Why do you say that? My policy would not discriminate against anyone on grounds of race.

Learned Counsel: I have agreed, tentatively and conditionally, that your policy would be legally nondiscriminatory. But that does not mean it is neutral, or that it is not going to disadvantage anyone because of race. The starting point is that we are talking about applicants who are qualified to go to your school. We are talking about choosing among them. If you and your counterparts in other universities choose among them on the basis that you describe, the results, I am told, would be about a 75 percent reduction in the admission of black applicants by the law schools surveyed by the Educational Testing Service for a brief in the *Bakke* case, and a dramatic reduction in admission of such applicants by the medical

schools surveyed by the Association of Medical Colleges for the same purpose. Remember that we are not talking about large percentages to start with. By the fall of 1977, with significant affirmative action programs in place in most important educational institutions and considerable pressure for them from HEW, black enrollment (according to a Civil Rights Commission report) reached 6 percent in medical colleges, including the considerable numbers at Howard and Meharry, and 4.7 percent in law schools, including predominantly black schools. Comparable ratios in 1970, when the effect of the programs was first being felt, were 3.8 and 2.6 percent respectively. You will find similar comparisons for other racial minorities. Now it may be that because of general social, educational, and economic developments of the past decade, use of the statistical measurements admissions policy you describe would not mean going back to the ratios that existed before affirmative action. Perhaps, although I doubt it, the consequence would be only a return to the situation in 1970. One would have to take into account, in making an estimate, possible adverse effects on expectations and therefore on numbers of applicants, as a result of the change in policy you propose. In any event, the change would predictably—inevitably—cause a significant reduction in the percentages and numbers of minority applicants accepted, *from among those qualified*, with the heaviest effect falling on the schools generally considered most desirable. While that result may be legal, and safe, and even moral, it seems to me quite a stretch to say that it is racially neutral or that it would not disadvantage anyone on the grounds of race.

Dean of Admissions: But how could I avoid that result, if I wanted to?

Learned Counsel: If we just count the *Bakke* votes and disregard the ambiguities that flow from the Stevens position, the answer has to be that you must do something that Justice Powell would say the equal protection clause permitted. In trying to describe what that is, I stick to my view that the issue must turn on what you do, and not on what you say you do. There are passages in the opinion—particularly the discussion of a presumption of good faith and the prolonged references to the Harvard program—that some lawyers believe suggest an opposite emphasis.

But I do not believe Justice Powell meant to imply that important constitutional distinctions should turn on the mechanics of an admissions policy—such as the existence of a specific number target rather than a more general goal, or a separate and special process for consideration of minority applications. What his opinion plainly permits is an admissions policy designed to achieve diversity (including racial diversity) in a student body, and the use of race as a factor in admissions decisions in achieving that end. Davis was not trying to achieve that end at all: the “quota” issue and separate track process were, in part, the proof of that particular pudding. I would say, as a working hypothesis, that if you really want to achieve diversity of backgrounds of all sorts, you can probably do it without significant departures from normal predicted grade-average indicators (test scores and otherwise) for all purposes *except* racial diversity. If that is so, I should think it permissible, under Justice Powell’s semi-colorblind construction of the equal protection clause, to use special criteria to achieve significant racial diversity. At least, you could examine the data on applications and admissions to see if my working hypothesis is true. Of course, your institution would have to decide on a *general* policy of diversity: I am not suggesting a hidden agenda to deal with the problem of race alone. And that general policy would have to fit with your institution’s goals, perhaps even be necessary to achieving those goals—something it would not seem to be if you were running a business or even a fire department rather than an educational institution. Otherwise, as matters stand, and in the absence of the need to remedy past racial discrimination favoring whites, I am afraid Powell’s opinion requires the kind of admissions policy you described, with all its attendant racial disadvantages for minorities.

Unless—this occurs to me just now—you want to follow the advice of the National Advisory Commission on Selective Service in 1967.

Dean of Admissions: What was that?

Learned Counsel: Faced with more or less the obverse situation, that of the military services’ being unable to use all draftable men, the advisory commission entitled its report *Who Serves When Not All Serve?* and recommended random selection.