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PREFERENTIAL ADMISSIONS AND THE *BROWN* HERITAGE

ALBERT BRODERICK*

On September 16, 1976, the California Supreme Court held that the special minority admissions program at a state university medical school was invalid as a violation of the equal protection clause of the fourteenth amendment.¹ On February 22, 1977, the United States Supreme Court agreed to grant review to the California Board of Regents.² So, once again, the Court intimates that it will pass on the constitutionality of the voluntary affirmative action programs that have been undertaken in recent years by medical, law and other professional schools, as a means of inviting more black and other minority persons into significant fields in which their participation has been numerically low.³

The Constitution, especially in its broad clauses, does not give a clear answer to the complex problems which come before the courts for decision. Often history does not disclose an obvious answer either. Still, unless the United States Supreme Court is to be viewed as answering these difficult questions in an *ad hoc* manner, it must attend to history, to precedent (how it has interpreted that history) and to the constitutional principles behind its precedents. The Court has been conscious of this responsibility, and of being responsive to the place of policy in the "development" of constitutional doctrine. Its respect for continuity, and its awareness of the public and professional disfavor that would accompany perception that its decisions were predominantly *ad hoc*, have often led it to devise a methodology that would bridge the development, and rationalize the emergence, of new rules of constitutional decision. This pattern characterizes the Court's interpretation of the equal protection clause.

Lawyers, and the lower courts answerable to the United States Supreme Court, have often treated woodenly both emerging precedents and the court-

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

2. 430 U.S. —, 97 S.Ct. 996 (1977). On November 15, 1976 the Supreme Court granted the Regents "Application to stay execution and enforcement of mandate of the Supreme Court of California (S.F. 23311) presented to Mr. Justice Rehnquist and by him referred to the Court . . . for a period of thirty days." The Court's order added that "If a petition for a writ of certiorari is filed within thirty days, this stay is to remain in effect pending disposition of the case in this Court." 97 S. Ct. 373-374 (1976).

3. The Supreme Court's review, of course, only applies to public education. Minority preference programs have extended beyond professional schools. The principles involved in resolving the minority preference issues may be sufficiently broad for the result in *Bakke* to envelop them all.

approved methodology. When a tension develops between two lines of constitutional doctrine, the tendency of many courts and lawyers is to see one line alone as applicable, to the exclusion of the other. That this should be done by lawyers is understandable. Counsel is given the result that his client seeks to achieve and uses whatever constitutional resources are available to support this position. The motivation of the lower courts is more complicated. Their chief aim, we may assume, is to formulate an opinion that embodies the latest indications of the Supreme Court as to the applicable constitutional rule. In the apparently fresh case, where the Court's indications are not clear, the courts may take refuge in the illusory "certainties" of an approved methodology. A lower court's opinion is unpersuasive when it does not openly recognize that the case requires a choice, or a reconciliation, between lines of competing constitutional principles.

Both these chronic shortcomings of lower court decisions—mechanical use of constitutional formulas and dullness to competing policy lines—are evident in the California courts' handling of the *Bakke* preferential admissions case. Although its result was diametrically opposite to *Bakke*, the Washington courts fell into the same trap in *DeFunis*⁴—the 1974 preferential admissions case which the Supreme Court dismissed on the ground of mootness, without arriving at the merits.⁵

The United States Supreme Court, on the one hand, does consider the apparently conflicting constitutional principles in the fresh case. However, it does not always articulate its choice, in the context of the specific case, of one constitutional principle over the other. In fact, it often masks the choice by stating its result in the deceptively neutral framework of its approved methodology.

I. THE OUTLINE

I will suggest that in the preferential admissions case now before the Court:

A. *There are Competing Constitutional Principles in Apparent Conflict*

There was never any question that the thirteenth⁶ and fifteenth⁷ amend-

4. *DeFunis v. Odegaard*, 82 Wash. 11, 507 P.2d 1169 (1973). The facts in *DeFunis* are not on "all fours" with *Bakke*. In *DeFunis*, a state law school was involved; in *Bakke*, a medical school. In *DeFunis*, it appeared that plaintiff could have gotten his legal education elsewhere; in *Bakke*, the California courts specifically found that plaintiff was "deprived" of medical education by California's nonadmission—he was not accepted elsewhere. Nevertheless, for purposes of full analysis it seems useful, and fair, to consider the two cases together.

5. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

6. U.S. CONST. amend. XIII:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

7. U.S. CONST. amend. XV:

ments were directed to the relief of the freed blacks; the thirteenth abolished slavery, and the fifteenth prohibited racial discrimination in voting. There should, perhaps, have been no question that the fourteenth amendment,⁸ which specified that "no state shall deny to any person" "equal protection of the law," "due process of law" or "privileges and immunities of citizens of the United States," was also conceived as affording protection primarily to black citizens. The first decisions of the United States Supreme Court interpreting this amendment took this position, in part perhaps, to avoid enlarging national power at the expense of the states through an expansive interpretation of the fourteenth amendment.⁹ From the beginning it was

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

8. U.S. CONST. amend. XIV:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

9. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). With reference to the thirteenth, and fourteenth amendments, and the specific clauses "involuntary servitude", "privileges and immunities of citizens of the United States", "equal protection of the laws", and "due process of law", the Court said:

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history

The institution of African slavery, as it existed in about half the states of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the states in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the War of the Rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle, slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict Hence the thirteenth article of amendment of that instrument.

With reference to the 1st section of the fourteenth amendment, defining citizenship, the Court said: "That its main purpose was to establish the citizenship of the negro can admit of no doubt."

With reference to the "due process" clause, the Court was content to recall that a comparable clause had existed from the beginning, in the fifth amendment, and to state that the addition of the clause to the fourteenth amendment places "the restraining power over the states in this matter in the hands of the Federal government."

The Court then considered the applicability of the "equal protection" clause in these words:

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

The Court then considered the scope of the fifth section of the fourteenth amendment:

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

The Court then explained the fifteenth amendment as similarly motivated, on the conviction that blacks "living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage."

Finally, the Court considered all three amendments as an entirety:

... [N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

The Court then concedes the overflow of the protections of the amendments to others than blacks, at the same time keeping a special eye on the purposes it had just discussed:

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

In *Ex parte Virginia*, 100 U.S. 339 (1880), with reference to the thirteenth and fourteenth amendments, the Court said:

One great purpose of these Amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color.

With reference to the "due process" and "equal protection" clauses of the fourteenth amendment, the court recognized applicability to "all persons":

But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to *enforce* its provisions by appropriate legislation.

In *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court adhered to its dual position concerning the Civil War Amendments—that they were designed primarily for the black race, but that they had coverage for all. After repeating the above assertions from *Slaughter-House*, the Court said:

It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers.

The Court concedes the applicability of the fourteenth amendment to non-blacks (in a passage quoted *supra*). But it stresses the racial discrimination at which the amendment is principally directed, and suggests limitations on its extension beyond concerns of protecting and aiding the emancipated black citizens, in full enjoyment of that citizenship:

[Among the guarantees of the amendment are] the right to exemption from unfriendly legislation against them distinctively as colored, —exemption from legal discriminations,

clear, of course, that “any person” came within the protection of the amendment. But the first cases foresaw a greater ambit of protection when the “person” in question was complaining of discrimination based on race. The waning, and subsequent revival, of the protection given racial claims will be discussed further. For the moment, it is sufficient to identify this “race” principle, or line, of fourteenth amendment interpretation.

I suggest a competing line of interpretation, which concerns coverage by the fourteenth amendment of nonracial matters, that I shall call the “any person” principle. After the limited scope given this principle at first, there was an extensive use made of it, particularly in economic matters, from about 1890 to 1937; it largely centered on what came to be called “substantive” or “economic” “due process.” This phase was terminated with the coming of the Roosevelt Court, in 1938-40. But in the ensuing three decades, the “any person” line took on new importance—in matters of “procedural due process,” in a new “substantive due process” concerning the first amendment¹⁰ and other “fundamental” personal rights, and in an expanded use of the “equal protection” clause.

The “preferential minority admissions” question is not rooted in the fourteenth amendment; it concerns voluntary, not compelled, ameliorative action by a state. But because it is remedial, it is suggestive of the “race line,” particularly close to the expansive “race line” that has been prevalent since *Brown v. Board of Education* was decided in 1954.¹¹ The challenge of plaintiff Bakke is, of course, clearly in the “any person” line.¹² The apparent conflict of the two lines emerges here, because in

implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race. . . . The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others. . . .

[Still] . . . a State may . . . prescribe the qualifications of its jurors, and in so doing make [nonracial] discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. . . .

It must not be intimidated that, overall, Slaughter-House was favorable to blacks. In fact, it laid the groundwork for the repressive Civil Rights Cases, ten years later. One of the measuring rods of the Court's backsliding, in the 1873-1883 decade, is the shift in views of Justice Bradley. Compare his dissent in Slaughter-House with his opinion for the Court in the *Civil Rights Cases*.

10. The first amendment's development commenced in 1925, with *Gitlow v. New York*, 268 U.S. 652 (1925). The succeeding first amendment cases are cited at note 115 *infra*.

11. 347 U.S. 483 (1954). It is a theme of this study that this case launched an “era”—one of the proudest in the history of the Court.

12. I am suggesting that the long debate as to the “meaning” of fourteenth amendment due process was more basically a question of the extensiveness of the “any person”, nonracial category, as I am calling it. The privileges and immunities clause was long nullified, and the

pursuing his "any person" claim Bakke seeks the benefit of the race-as-a-"suspect class" doctrine.¹³ Despite earlier antecedents, "suspect class" was first forged into a powerful weapon in the hospitable-to-the-race-line era of *Brown*.

B. *The Conflict is Apparent, Rather Than Real*

The suggestion under this heading is that since *Brown*, the "suspect class" doctrine, with occasional exceptions, has developed as an integral part of the Court's consistent espousal of the "race line," almost as a "preferred position" in fourteenth amendment interpretation. Comparably strong support for the "any person" line has generally been limited to rights that the Court has specifically designated as "fundamental." As to these

equal protection clause had not yet come into its own when the "due process" debate raged in the years between *Adamson v. California*, 332 U.S. 46 (1947), and *Duncan v. Louisiana*, 391 U.S. 145 (1968). So the debate on the practical extensiveness of the fourteenth amendment was cast in terms of due process. The subsequent expansive coverage of the equal protection clause now makes it appropriate to recast the question in terms of "any person," meaning the fourteenth amendment's extensiveness in nonracial matters. The spark to the 1947-1968 debate was Justice Black's dissent in *Adamson*, in which he insisted that the fourteenth amendment had been designed to reverse *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) and make the first eight amendments applicable to the states. He relied heavily on FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908), and received some academic and historical support for his position. But there was strong opposition, which included Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding* 2 STAN. L. REV. 5 (1949), and Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Judicial Interpretation* 2 STAN. L. REV. 140 (1949). His strong supporter was Crosskey, *Charles Fairman, "Legislative History" and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954). The historical debate was never settled, but the Court, without accepting Black's position, gradually recognized almost the entire Bill of Rights as applicable to the states through the fourteenth amendment—thus expanding the protection given "any person". See note 118 *infra* for the key cases in the "rights explosion."

Another fourteenth amendment historical debate of long-standing concerned the "race line", and brought about the second hearing of the crucial set of segregation cases that have come down to us under the name of *Brown v. Board of Educ.*, 347 U.S. 483 (1954). It is worth recalling Chief Justice Warren's account of this occurrence, in *Brown*:

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty. 347 U.S. at 489.

What can be determined with remarkable certainty is what the Court has done with respect to these two distinct lines of constitutional policy. Considering each line in relation to the other, as well as in its own development, I turn to this task in this study. I shall also stress the remarkable growth for each line—the "any person" line, and the "race line"—in the years since *Brown*.

13. Under the "suspect class" doctrine (a central element in this study), the Court refuses to defer to legislation, or other state action, with an "invidious" racial purpose. As the basis for such a legislative classification, race is "suspect" and, the Court will subject such a classification to "strict judicial scrutiny." See text at notes 78-81 *infra*.

“fundamental rights” (which I will discuss later), and as to the “suspect class,” the Court has required “strict scrutiny” of the challenged state action, and a showing of a “compelling state interest” to justify that action.¹⁴ In all other challenges, the Court views state action with greater deference.¹⁵ The history of the development of “suspect class” in the era of *Brown* makes the conflict between the two lines of constitutional development apparent rather than real.¹⁶ *Bakke*, I suggest, does not relate to “suspect class” and the strict constitutional requirements that it entails.

C. A Decision That Preferential Minority Admissions Are Unconstitutional Would Constitute a Rejection of Constitutional History and Policy on Race Matters Since BROWN

So directly related to race offenses is the “suspect class” doctrine, that nothing less than a conscious termination of the *Brown* era of favor for the “race line” could lead to a decision that preferential minority admissions are unconstitutional.

D. Such a Reversal of Direction by the Court, While Possible, Is Not Justified by Policy Considerations That Have Been Offered

Policy concerns, pro and con, are fully explored (*See Part VI. infra*) and overwhelmingly recommend reversal of the California court’s decision that preferential minority admissions, voluntarily adopted by a state’s educational institutions, violate the equal protection clause of the fourteenth amendment.

E. Other Concerns

Two other concerns emerge in the course of this study: (1) the role of methodology (or formulas) in constitutional decision. The perhaps obvious lesson to be learned is that equal protection formulas are instruments for the expression of constitutional policy that is arrived at independently. Formulas themselves do not determine, mechanically or otherwise, a new constitutional result;¹⁷ (2) the standing specter. There is need to face up to, and argue against, possible application of the Supreme Court’s new standing doctrine to deny respondent, *Bakke*, judicial access to test his claim.¹⁸ This question, somewhat removed from our main subject, is reserved for a postscript.

14. This terminology is discussed throughout this study. The Supreme Court grouped together the precedents, so far as the equal protection clause is concerned, in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), discussed in text at note 128 *infra*.

15. This deferential formula is generally known as the “rational basis” test. *But see* notes 132 and 133 *infra* for the warnings of Justice Marshall and Professor Gunther against easy generalization that “rational basis” has a uniform application.

16. *See* text at notes 131-136 *infra*.

17. *See* note 15 *supra*.

18. Proposed notably in *Warth v. Seldin*, 422 U.S. 490 (1975), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), which are discussed in the Post-

II. PREFERENTIAL ADMISSIONS IN CALIFORNIA'S COURTS

A. *The Race Preference Problem*

The problem of minority preferential admissions, like affirmative action of any kind, has exposed deep cleavages in American society, even dividing citizens and groups that were previously united behind the achievement of the civil rights of minorities.¹⁹ To the extent that preference is given to some, whether of job seniority (under Title VII of the Civil Rights Act of 1964)²⁰ or of scarce seats in professional schools, these benefits are unavailable to others. On what analysis can the proposition be defended that exclusion on a basis of race is "invidious" when blacks or other minorities are excluded, and constitutionally permissible when the exclusion is of non-minority or white applicants?²¹ In *DeFunis* and *Bakke* this question was answered in different ways.²²

script, Part VII. *infra*.

These cases seem to require allegations of fact that assure that plaintiff would actually receive the relief sought, if standing to sue was granted (and his well-pleaded contentions proved). The California trial court found that Bakke would not have been admitted in the two years in question "even if there had been no special admissions program." 18 Cal.3d at 63, 553 P.2d at 1172, 132 Cal. Rptr. at 700. I argue below (in Part VII.) that, whatever the constitutional outcome on the equal protection issue, it is a strained conception of standing that would deny Bakke access to the courts, to challenge this program on federal constitutional grounds.

19. Among the twenty-eight amici filing briefs in the Supreme Court in *DeFunis*, the following organizations supported minority preference admissions: American Bar Association, Association of American Law Schools, American Medical Colleges Association, Lawyers' Committee for Civil Rights Under Law, National Conference of Black Lawyers, President and Fellows of Harvard College, Center for Law and Education, Harvard University, Board of Governors of Rutgers University, Student Bar Association of Rutgers Law School, American Indian Law Students Association, American Indian Lawyers Association, Law School Admission Council, NAACP Legal Defense and Educational Fund, Council on Legal Education Opportunity, NAACP, Legal Aid Society of Alameda City, Mexican American Legal Defense and Educational Fund, National Organization for Women, Legal Defense and Organization Fund, Inc., and eleven other organizations. The states of Ohio and (of course) Washington, and the city of Seattle, also filed briefs seeking affirmance. On the other side, seeking reversal of the state court decision favorable to minority preference, were the following: the AFL-CIO, Committee on Academic Nondiscrimination and Integrity, Jewish Rights Council, Advocate Society, American Jewish Committee, Joint Civic Committee of Italian Americans, Unico National, Anti-Defamation League of B'nai B'rith, American Jewish Congress, and National Association of Manufacturers.

20. 42 U.S.C. § 2000e et seq. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), where black applicants who had been denied employment because of race were awarded seniority status retroactive to employment application date.

21. With respect to discrimination suits under Title VII, and actions under 42 U.S.C. § 1981 ("right . . . to make and enforce contracts"), the Court spoke clearly in the 1975 term. Both statutes were held to proscribe racial discrimination in private employment against whites and blacks alike. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (opinion for Court, per Marshall, J.)

Consider the racial goals in affirmative action programs ordered under Executive Order 11246, *as amended* (1965), administered by the Secretary of Labor, Office of Contract Compliance. *Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971). See also *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974) and *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971).

22. See text at notes 36-49 *infra*.

B. *The California Special Admissions Plan*

The California plan in *Bakke* is well-designed for resolving the constitutional issue. In each of the relevant years, sixteen of the 100 available seats at the University of California Medical School at Davis were set aside for minority applicants. There were two distinct admissions committees. One evaluated general applicants according to specified factors that excluded race. The second, a minority admissions committee,²³ considered only applicants who qualified by reason of race or membership in an identified minority group and selected sixteen minority applicants by using separate procedures and factors.²⁴ Allan Bakke, a non-minority applicant, was denied admission for two successive years, although it is argued his qualifications were superior to the sixteen specially admitted minority members once race factors were not considered. Although Bakke did not show that he would have been among those admitted even in the absence of the minority preference plan (and this is his infirmity on the standing issue), he sought injunctive and declaratory relief in the California courts on the ground that the admissions plan was a violation of fourteenth amendment equal protection, as an invidious discrimination against him on the impermissible basis of race.²⁵

C. *In the California Courts*

The trial court ruled the plan unconstitutional, but refused to order Bakke's admission on the ground that he had not shown his right to admission even in absence of the minority plan. On appeal,²⁶ the California Supreme Court agreed that the special minority admissions plan was an unconstitutional violation of the fourteenth amendment's equal protection clause.²⁷ The court labels "invidious" any discrimination by the majority based on race, whether the discrimination is practiced against minority or

23. This "special admission committee" consists of minority students and medical school faculty members "who are predominantly but not entirely minorities." The "regular admission committee" is composed of a volunteer group of faculty members and an equal number of students. *Bakke v. The Regents of the Univ. of California*, 18 Cal.3d at 41, 553 P.2d 1157, 132 Cal. Rptr. at 685.

24. For example, whereas general admission applicants with college grade point averages below 2.5 are automatically screened out, such minority applicants are not disqualified. For them, factors such as motivation are given special weight.

25. The university's cross-complaint sought a declaratory determination that the special admission program was valid.

26. The appeal was heard directly by the state's highest court "prior to a decision by the Court of Appeals because of the importance of the issues involved (CAL. CONST., art. VI, 712; rule 20, Cal. Rules of Court)." *Bakke v. The Regents of the Univ. of California*, 18 Cal.3d at 39, 553 P.2d at 1156, 132 Cal. Rptr. at 684.

27. The court, however, reversed the trial court's denial of specific relief to Bakke, directing it, on remand, to consider "the burden of proof shifted to the University to demonstrate that he would not have been admitted even without the special admission program." *Id.* at 63, 553 P.2d at 1172, 132 Cal. Rptr. at 700.

majority applicants,²⁸ whether it is designed to impose the stigma of inferiority or not.

The court's controlling premise is simple, and its conclusion flows in a straight-line analysis from that premise. The origins and prime purpose of the equal protection clause (and the rest of the Civil War amendments),²⁹ *Brown*,³⁰ and the constitutional history of the "invidious," racially-suspect classification are constitutionally irrelevant. For, under the fourteenth amendment, rights are personal; and, where government action is involved, it is the supreme right of the individual to be rated on individual merit. Frustration of enjoyment of this right by a "suspect racial classification" invokes the strictest test of equal protection. This test stipulates strict judicial scrutiny and the requirement that the state show a "compelling governmental interest."

Although the California Supreme Court affirmed the trial court's decision that the admissions program was unconstitutional, it also went a step further. It directed the trial court to order Bakke's admission, unless the university affirmatively proved that he would *not* have been admitted in the two years in question, if there had been no minority admissions program.

The court reasoned, as follows, that the admissions program violated the equal protection clause because:

- (1) Classification by race is not *per se* unconstitutional.³¹
- (2) Cases permitting classification by race are limited to situations where "the purpose of the classification was to benefit rather than to disable minority groups."³² However, they have never extended to situations having "the effect of depriving persons who were not members of a minority group of benefits which they would otherwise have enjoyed."³³
- (3) "It is plain that the special admission program denies admission to some white applicants solely because of their race."³⁴

28. The court specifically rejects Professor Ely's suggestion (Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727-735 (1964)), "that classification by race is not suspect if a member of the majority race discriminates against others of the same race because the majority is not likely to underestimate the needs and qualifications of persons of the same race and because the discrimination would not be motivated by racial prejudice." *Id.* at 516, 553 P.2d at 1164, 132 Cal. Rptr. at 692.

29. "Regardless of its historical origin, the equal protection clause by its literal terms applies to 'any person,' and its lofty purpose, to secure equality of treatment to all, is incompatible with the premise that some races may be afforded a higher degree of protection against unequal treatment than others." *Id.* at 51, 553 P.2d at 1163, 132 Cal. Rptr. at 691.

30. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Of the three references to *Brown* in the opinion, two simply reject its relevance. *Bakke v. The Regents of the Univ. of California*, 18 Cal. 3d at 50, 58, 553 P.2d at 1163, 1169, 132 Cal. Rptr. at 691, 697. The third recalls that "since *Brown*", the Court has often said "there is no right to a segregated education." *Id.* at 47, 553 P.2d at 1161, 132 Cal. Rptr. at 689.

31. *Id.* at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 688. See note 43 *infra*.

32. *Id.*

33. *Id.*

34. *Id.* at 47, 553 P.2d at 1161, 132 Cal. Rptr. at 689.

(4) "Classification by race is subject to strict scrutiny, at least where the classification results in detriment to a person because of his race." The government must also prove that "the purpose of the classification serve[s] a 'compelling state interest'. . . [and] that there are no reasonable ways to achieve the state's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification."³⁵

D. The DeFunis Experience

The Washington Supreme Court in *DeFunis v. Odegaard* had also held that the preferential minority admissions test required "strict judicial scrutiny." However, it concluded that the state had demonstrated a "compelling state interest," and sustained the test, against equal protection objection, by using the following analysis:

(1) The state goals were to obtain "reasonable representation from minorities within its [law school] classes," and "to increase participation within the legal profession by persons from racial and ethnic groups which have been historically denied access to the profession and which, consequently, are grossly underrepresented within the legal system. . . ."³⁶

(2) "The goal of this policy was not to separate the races, but to bring them together—and [it does] not represent a covert attempt to stigmatize the majority race as inferior; nor is it reasonable to expect that [this will be] a possible effect. . . ."³⁷

(3) *Brown*,³⁸ read with *Swann*³⁹ and *Green*,⁴⁰ established that school authorities, at least, "may consider race as a valid criterion when considering admissions and producing a student body. . . ."⁴¹

(4) Plaintiff DeFunis attempted to distinguish these segregation cases on the ground that none of them denied any non-minority students an education. The court said this distinction was irrelevant because "the denial of a 'benefit' on the basis of race is not necessarily a *per se* violation of the fourteenth amendment, if the racial classification is used in a compensatory way to promote integration."⁴²

(5) Having held that use of race as a factor in the admissions policy of a state law school is not *per se* a violation of the equal protection clause, the Washington court asked what the appropriate standard of review should be when attempting "to determine the constitutionality of such a classification." It surprisingly opted for the strict test:

35. *Id.* at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690.

36. *DeFunis v. Odegaard*, 82 Wash. at 20, 507 P.2d at 1175.

37. *Id.* at 27, 507 P.2d at 1179.

38. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

39. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

40. *Green v. New Kent County School Bd.*, 391 U.S. 430 (1968).

41. *DeFunis v. Odegaard*, 82 Wash. at 29, 507 P.2d at 1180.

42. *Id.* at 30, 507 P.2d at 1181.

"The burden is upon the law school to show that its consideration of race in admitting students is necessary to the accomplishment of a compelling state interest." The state had contended that since "consideration of race here" was benign, the "less strict 'rational basis' test" was appropriate. The court said, however, that the "less strict" test was not appropriate because "the minority admissions policy is certainly not benign with respect to non-minority students who are displaced by it."⁴³

(6) The court then concluded that the minority admissions policy satisfied the "compelling state interest" test on three separate grounds.⁴⁴ Accordingly, the Washington Supreme Court dismissed DeFunis' complaint.

Thus, the Washington court in *DeFunis* found permissible only those racial classifications which were used "in a compensatory way to promote integration."⁴⁵ This "compensatory" view depended upon *Brown*, *Green*, *Swann* and the employment cases.⁴⁶ The Washington court's restriction was without case support. In fact, the desegregation cases merely illustrate the more general principle that racial classifications are "suspect" only when they purposefully exclude. The Washington court erred again when it held, without analysis, that "benign" racial classifications trigger the strict test. As we shall see, whether or not benign racial classifications do require strict scrutiny is the main question in contest.

The United States Supreme Court, after granting DeFunis' petition for certiorari, mooted the case (by a 5-4 vote) on grounds of his forthcoming

43. *Id.* at 32, 507 P.2d at 1182. To this point, there is no difference between the California and Washington courts. Clearly no affirmative action is "benign" to those not included. The Washington court assumed, without analysis, that their deprivation furnished the trigger to the strict test of equal protection. This was odd, in view of its over strenuous efforts (using *Brown*, *Swann* and *Green*) to refute the hypothesis that a racial classification was unconstitutional *per se*. To its credit, the California court, in *Bakke*, never pressed the argument that a racial classification was a *per se* violation: "Classification by race has been upheld in a number of cases in which the purpose of the classification was to benefit rather than to disable minority groups." *Bakke v. The Regents of the Univ. of California*, 18 Cal. 3d at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 688.

44. *DeFunis v. Odegaard*, 82 Wash. at 35-36, 507 P.2d at 1184:

The state interest in eliminating racial imbalance within public legal education as a whole, "the educational interest of the state in producing a racially balanced student body at the law school," and the state's interest in overcoming "the shortage of minority attorneys—and, consequently minority prosecutors, judges and public officials." Further, the program met "the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived. . . . If the law school is forbidden from taking affirmative action, this underrepresentation may be perpetuated indefinitely. No less restrictive means would serve the governmental interest here. . . .

45. *Id.* at 30, 507 P.2d at 1181.

46. The California court rejected the applicability of these cases, arguing that such cases presupposed a finding of past discrimination, which was absent from the record in both *DeFunis* and *Bakke*. *Bakke v. The Regents of the Univ. of California*, 18 Cal.3d at 57, 553 P.2d at 1168, 132 Cal. Rptr. at 696.

graduation.⁴⁷ Justice Douglas wrote a lengthy dissent. It bears notice, both because it is the only intimation from the Court on the merits, and because it was faithfully echoed by the California Supreme Court in *Bakke*. Justice Douglas reached the merits, and, while avowing sympathy for the announced state objectives, would have vacated the judgment of the Washington Supreme Court and remanded the case for a new trial—with firm admonitions.⁴⁸

Having dwelt upon the similarities and divergences in the two state supreme courts' handling of preferential admissions, I will hereafter focus upon the California decision in *Bakke*.

E. *Why the California Court Should Be Reversed*

The California court's opinion may be summarized in four steps. I list them below, followed by the arguable positions I develop later as to how it went wrong, if United States Supreme Court decisions are to be taken as the guide.

1. California Court: The preferential admissions standards, by using race as a factor, constitute a "suspect classification."

The answer: This is wrong on two grounds—(1) there is no showing of an "invidious" purpose; (2) the "suspect class" doctrine is concerned with protecting "discrete, insular minorities," and not members of the racial majority who are discontent with governmental policy.

2. California Court: The equal protection clause protects not merely minorities, but "any person" who can establish infringement of a constitutional right.

The answer: Clearly this is true. But the right in question, unless it has been designated as "fundamental," must be tested against the state's presumptive right to implement its public policy. Although *Bakke* has no right to be admitted to state medical school—unless he complies with established admission requirements, including space availabilities—he has the right not to be excluded "arbitrarily," or on "invidious" grounds; and, he may ask the state to prove that the excluding requirement has a reasonable basis in light of a permissible state purpose.

There is no argument that *Bakke* was treated arbitrarily; there is no

47. *DeFunis v. Odegaard*, 416 U.S. 312 (1974). After *DeFunis* filed his petition for certiorari, Justice Douglas stayed the judgment of the Washington Supreme Court, pending "final disposition of the case by this Court." *DeFunis* was in the last quarter of his third year in law school at the time of oral argument. *Id.* at 315.

48. The key to the problem is consideration of such applications *in a racially neutral way* A finding that the state school employed a racial classification in selecting its students subjects it to the strictest scrutiny under the Equal Protection Clause. . . . A *DeFunis* who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner. . . . If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordionlike quality. . . .
Id. at 333, 334, 337, 343.

showing of "invidious" purpose (*See* (1), above). It remains only for the state to furnish a "rational basis" for its program. This is hardly in doubt, and will be dealt with below.

3. California Court: The correct formula, triggered by a "suspect classification" of race, is the strict test of "compelling state interest," and includes the requirement that the state show that its objective cannot be achieved by nonracial means.

The answer: Because there is no "suspect class" (*See* (1), above), the strict "compelling state interest" test is not applicable, and the standard of review is as stated in (2), above.

4. California Court: The preferential admission standards must be held unconstitutional, because however laudable they may appear to some, the state's reasons for employing them are not "compelling," and the state's goals may be achieved in other non-racial ways.

The answer: While it is clear from answers (1)-(3) above that the strict "compelling state interest" test is not applicable, the state must furnish at least a "rational basis" (*See* (2), above) for its program. Assuming that is done, and if the Court follows its previous decisions in the *Brown* era, it should reverse the California court. However, two reasons remain which justify an extended discussion of policy grounds in light of the interests in contest: (1) the possibility that the Court would consider reversing the whole direction of decisionmaking in racial cases in the era of *Brown*; (2) the warning of Justices Marshall and White that the justices in fact carefully examine the varieties of interests and impacts, even when the Court is ostensibly using a deferential formula of review such as "rational basis." Accordingly, the competing policy arguments will be fully addressed.

At the outset, I suggested that we could usefully consider the preferential admissions problem in terms of two distinct lines of constitutional policy relating to the fourteenth amendment—the "race" line, and the "any person," nonracial line. In the next section, I concentrate upon the "race" line in the *Brown* era, with special attention to the "suspect classification" doctrine. In a later section I shall deal particularly with the "any person" line.

III. THE SPIRIT OF BROWN: "SUSPECT CLASSES" AND THE "RACE LINE"

United States Supreme Court decisions following closely upon their enactment, stressed that the thirteenth, fourteenth and fifteenth amendments were principally concerned with eliminating the vestiges of slavery and bringing the new black citizens into full participation in American life. At the same time, these decisions recognized that the amendments extended protection to "any person."⁴⁹ But a reactive period in the race line commenced with the *Civil Rights Cases*⁵⁰ in 1883, reached a new low point in

49. *See* note 9 *supra*.

50. 109 U.S. 3 (1883).

*Plessy v. Ferguson*⁵¹ in 1896, and continued to *Brown v. Board of Education*⁵² in 1954. In this period, the emphasis changed. Forgotten was the principle that the central target of the Civil War Amendments was race. The *Civil Rights Cases* limited the reach of the fourteenth amendment to situations in which discriminatory state action was involved, and made the thirteenth amendment a dead letter beyond slavery itself. *Plessy* likewise damaged "equal protection," as far as race was concerned. The fifteenth amendment's command against abridging voting rights because of race was sidestepped by practical state control of registration and other voting requirements, and by social pressures, which effectively limited participation by blacks in the elective process. In the 1940's, some decisional stirrings hinted that the reactive period might be nearing its end.⁵³ But not until 1954, with the Court's unanimous decision in *Brown*, was it clear a new era had begun.

This *Brown* era brought a new commitment to the forgotten pledges to blacks of full membership, and full personhood.⁵⁴ At the same time, the

51. 163 U.S. 537 (1896).

52. 347 U.S. 483 (1954).

53. Notable examples were *Shelley v. Kraemer*, 334 U.S. 1 (1948), and the cases cited in note 62 *infra*.

54. Since *Brown* (1954), the Court has identified again the original design of the Civil War Amendments and attuned itself, and the nation, to the consequences of the 1883-1954 reactive period. A few examples will suffice:

a. *McLaughlin v. Florida*, 379 U.S. 184 (1964). The Court struck down an anti-cohabitation statute making race the crucial factor in a criminal offense. Justice Harlan (concurring) stressed that the "proper test" to justify such a racial classification is "necessity, not mere reasonable relationship", and continued:

[This] test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination—prohibition of which lies at the very heart of the Fourteenth Amendment. (emphasis added).

b. *Loving v. Virginia*, 388 U.S. 1 (1967). Striking down the Virginia statute barring interracial marriage, the Court said:

The clear and central purpose of the Fourteenth Amendment was to eliminate all official sources of invidious racial discrimination in the States.

c. *Hunter v. Erickson*, 393 U.S. 385 (1969). A city charter required that ordinances regulating property interests "on the basis of race, color, religion, national origin or ancestry" must first be approved by the electorate. Declaring that the charter provision violated equal protection, the Court explained:

Here . . . there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters. . . . *Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, . . . racial classifications are "constitutionally suspect"*.

d. *Palmer v. Thompson*, 403 U.S. 217 (1971). In this case the Court upheld, against an equal protection challenge, the municipality's decision to close its public swimming pools, but Justice Black's majority opinion squarely stated: "The Equal Protection Clause was principally designed to protect Negroes against discriminatory action by the States." (emphasis added)

e. *Jones v. Mayer*, 392 U.S. 409 (1968). In this epoch-making decision, the Court explicitly overruled the restrictive interpretation given the thirteenth amendment in the *Civil Rights Cases*. It held that 42 U.S.C. § 1982 and the thirteenth amendment were enacted to eliminate restraints on "those fundamental rights which are the essence of civil freedom," and went on:

Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination

Court was engaged in broadly expanding the general ("any person") coverage of the "equal protection" and "due process" clauses of the fourteenth amendment.⁵⁵ On occasion the Court specifically recalled the special position of race, vis-a-vis the fourteenth, as well as the other Civil War Amendments.⁵⁶ In the course of the development of the *Brown* era, the Court also developed a methodology, almost *ad hoc*, that blurred the distinction between the race and the "any person" lines of development. The methodology is not the message, but its development reinforces the view that with *Brown*, the Court set its course towards implementing the original position of the Civil War Amendments with respect to race.

A. The "Race" Line: Up to *BROWN*

Some tension has existed between the "race" line and the "any person" line from the beginning of the judicial interpretation of the Civil War Amendments. The comparatively favorable emphasis given the "race" line in the *Slaughter-House Cases*⁵⁷ (a suit to establish national constitutional control over a local monopoly) was at the expense of the "any person" line. In the *Civil Rights Cases*⁵⁸ ten years later, the confinement of the fourteenth

herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. . . .

There is no suggestion that state (or private) action is presently excluding blacks from professional schools because of their race. But the relevance of Jones, and the other reavowals of the pro-black design of the Civil War Amendments to preferential admissions may be readily seen. In the *Brown* era, there has been recognition of the consonance of preferential admissions to professional schools and the advance of black citizens to full citizenship. Admission to law schools is not indispensable to full participation in the political and governmental process. Obviously, legislators and administrators need not be lawyers; but, judges do. No statistical compilation is required to convince one that a high percentage of legislators, and of top-ranking governmental administrators, are lawyers. A group that does not participate in significant numbers in law school education will hardly be fairly equipped for its share in government, and for its role in helping safeguard "those fundamental rights which are the essence of civil freedom." (Jones v. Mayer, *supra*). No extended argument is required to verify, in this of all ages, that a race or national group that lacks opportunity for significant participation in the medical profession is excluded from the mainstream of social leadership and human development.

The question is, concededly, not only what the equal protection clause was seen to be at the outset, but what it has become in the crucible of judicial interpretation and attitudes, across history. I suggested above (note 9 *supra*) that three such attitudes can be identified: (1) (1873-1883). The first wave of decisions, (quoted in note 9 *supra*) noted stressed full black participation in the society, by virtue of his new citizenship. (2) (1883-1954). In this period, the spirit of the Civil Rights Cases (1883) and of Plessy prevailed. By the turn of the century, in matters of race, equal protection has been all but emasculated. The spirit of the Civil Rights Cases and Plessy made it easier to sustain the racial classification in *Korematsu* (see note 76 *infra*). (3) (1954- —) The spirit of *Brown* makes less likely another *Korematsu*. Likewise, I shall argue that it makes judicial intervention unacceptable, on equal protection grounds, to overturn preferential racial admissions.

55. As to due process, see note 12 *supra* and text at notes 114-126 *infra*; as to equal protection, see text at notes 104-113 *infra*.

56. See notes 6-8 *supra*.

57. 83 U.S. (16 Wall.) 36 (1873). The ruling was only comparatively favorable, because the whole tenor of the decision was restricting all extensiveness of the fourteenth amendment.

58. 109 U.S. 3 (1883).

amendment to correct state action that had already offended, and the restriction of congressional power under the enforcement clause (section five), were certainly blows to the "race" line. But this decision was also designed to confine national power under the fourteenth amendment for all purposes, and so to limit the "any person" line as well.⁵⁹ The *Civil Rights Cases*' tortuous construction of the thirteenth amendment, rejecting its applicability to racial discrimination as a "badge of slavery," dealt its most telling blow to the hopes that the Civil War Amendments had held out to the new citizens as racial remedies. With *Plessy v. Ferguson*,⁶⁰ in 1896, the other shoe fell when the Court specifically denied that the equal protection clause constituted a bar to segregated public facilities. Over Justice Harlan's eloquent protest, the Court resonated the *Civil Rights Cases*' philosophy that racial discrimination was largely a private, perhaps imagined fault, and not actionable as a "badge of slavery," and that enforced separation of the races, publicly sanctioned, was not a denial of equal protection. *Plessy* effectively arrested development of the race line for four decades, at a time when (as we shall see) the nonracial, "any person" line was beginning to extend national protection to "any person" in areas of property and contract.

B. The Spirit of BROWN

From the time of *Plessy v. Ferguson*, race was a permissible classification for denying citizens' use of public facilities. Alleged availability of comparable "separate" facilities saved the racial classification from being "unequal." The explicit racial formula accepted in *Plessy* was justified until *Brown*;⁶¹ and "separate" public facilities were allowed to whites unless the Court expressly found that the facilities set aside for blacks were, in fact, not equal.⁶² In *Plessy* the first Justice Harlan had warned in dissent that the constitutional question was *not* whether "material" equality was achieved, but whether the fourteenth amendment wiped out separation in public facilities, since such enforced segregation reinforced a perceived stigma of inferiority.⁶³

59. This is in no way to blunt the racist design of these cases, in the spirit of the so-called "compromise of 1877" — with respect to what was euphemistically called the "Southern question." See Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases*, 25 *RUTGERS L. REV.* 552 (1971).

60. 163 U.S. 537 (1896).

61. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

62. For example, *McLaurin v. Oklahoma*, 339 U.S. 637 (1950), *Sweatt v. Painter*, 339 U.S. 629 (1950), *Sipuel v. Oklahoma*, 332 U.S. 631 (1948), and *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938).

63. "We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done." *Plessy v. Ferguson*, 163 U.S. at 562.

Finally, in 1954, *Brown* stated that in public education, enforced racial separation was "inherently" unequal; that is, totally and *per se*.⁶⁴ The decision was unanimous, but the underlying analysis was peculiar and unsatisfying. The opinion seemed to argue that, in education, the perception of the stigma of separation by black students made equal education *psychologically* impossible.⁶⁵ The point was made later that the psychological data relied on in *Brown* was not compelling, or even convincing.⁶⁶ But by this time the Court had gone well beyond the precise facts of *Brown* and ruled out any enforced segregation in use of public facilities on equal protection grounds.⁶⁷ The inference is inescapable that, without saying so as a Court,⁶⁸ the United States Supreme Court had in fact and in law accepted the first Justice Harlan's analysis in *Plessy*. Chief Justice Burger's 1971 opinion for a still unanimous Court, in *Swann*,⁶⁹ contains a fair suggestion of the Court's continuing institutional understanding of *Brown*'s design:

Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to

64. "Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown v. Board of Educ.*, 347 U.S. at 495.

65. The Court adopted, as its own, the finding of the trial court in the Kansas case (*Brown*) which had decided against the plaintiffs: "[t]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." *Id.* at 494. In the celebrated "footnote 11", the Court then cited psychological studies as "modern authority", amply supporting this finding.

66. See, e.g., Van den Haag, *Social Science Testimony in the Desegregation Cases. A Reply to Kenneth Clark*, 6 VILL. L. REV. 69 (1960); Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955).

67. *Gayle v. Browder*, 352 U.S. 903 (1956); *Holmes v. Atlanta*, 350 U.S. 879 (1955); and *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955). These were in the first wave of per curiam orders. They reached well beyond education; to beaches, golf courses and buses. By 1963, the Court said outright: "it is no longer open to question that a State may not constitutionally require segregation of public facilities." *Johnson v. Virginia*, 373 U.S. 61 (1963).

68. But see Justice Black's comment in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966): "In *Brown v. Board of Education*, the Court today purports to find precedent for using the Equal Protection Clause to keep the Constitution up to date. I did not vote to hold segregation in public schools unconstitutional on any such theory. I thought when *Brown* was written, and I think now, that Mr. Justice Harlan was correct in 1896 when he dissented from *Plessy v. Ferguson* . . ." *Id.* at 677.

69. *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971). The Court had maintained a united front in major school segregation cases from *Brown* to *Swann*; thereafter it broke ranks. The Chief Justice's opinion, in *Swann*, contained sweeping dicta: "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." 402 U.S. at 16.

transfer to other schools in order to lessen the impact on them of the state-imposed *stigma of segregation*. (emphasis added)⁷⁰

Whatever else it may mean, the equal protection clause in *Brown*, *Green*,⁷¹ *Swann* and the other segregation cases stands for the proposition that governmental racial classifications that connote a stigma of inferiority are *per se* bad and must be eliminated "root and branch."⁷² The only continuing debate on this point concerns the mode and pace of their termination. However, the segregation cases are the beginning and not the end of the inquiry into the case law applicable to the racial preference admissions problem. The *Brown* period, beyond the segregation cases, has seen an expanded hospitality to claims of racial discrimination through the thirteenth and fifteenth amendments and the equal protection, due process and enforcement clauses of the fourteenth amendment. Our next specific concern is to examine the development of equal protection against racial discrimination in the "suspect class" doctrine. While such protection has been available to other races, nationalities and ethnic groups, cases pressed by black citizens in the *Brown* era have brought the "suspect classification" doctrine to maturity.

C. "Suspect Classifications" and the "Race Line"

Offensive discrimination under the fourteenth amendment's equal protection clause was never conceived to be restricted to the black race.⁷³ As early

70. *Id.* at 26.

71. *Green v. New Kent County School Bd.*, 391 U.S. 430 (1968). In this crucial case, the Court expressed impatience at the slowness of the conversion from dual racial schools to a unified integrated system, directed the elimination of dual systems "root and branch", and warned that "delays are no longer tolerable".

72. "School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this" *Id.* at 437-38. Racially inspired school board actions in Denver were the basis for a sweeping order in *Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. 189 (1973). But the opinion of Justice Brennan, for the Court, stressed that the remedy was rooted in findings of *de jure* segregation by governmental action: "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose or intent to segregate*." *Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. at 208.

73. See *Strauder v. West Virginia*, 100 U.S. 303 (1880). In this case a state law barring blacks from a jury was denounced by the Court as violating the fourteenth amendment. The equal protection clause was explained as "declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them because of their color." Then the Court affirmed the statement in the text: "Nor would it be [anything but discrimination] if the persons excluded by it [the statute] were white men . . . nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment." *Id.* at 308. Anticipating Justice Harlan in *Plessy*, the opinion then stressed again the special relationship of the amendment to blacks:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though

as 1887, in *Yick Wo v. Hopkins*,⁷⁴ the equal protection clause was invoked to brand administrative action unconstitutional, where it resulted in racial discrimination against Chinese subjects under a racially neutral statute. For "no reason . . . except hostility to the race and nationality to which petitioners belong," the petitioners were denied participation in "their harmless and useful occupation."⁷⁵

The 1944 Japanese-American detention case, *Korematsu v. United States*,⁷⁶ was an appeal from a criminal conviction for violation of the military order in World War II confining all persons of Japanese ancestry, citizens and noncitizens alike, in prescribed military areas in California. Justice Black, speaking for a 6-3 Court affirming the conviction against a claim of invidious racial discrimination, endeavored to label this ruling a war power, and not a racial decision.⁷⁷ Justices Roberts, Murphy and Jackson dissented vigorously. The case has been subjected to strong criticism.⁷⁸

In *Oyama v. California*⁷⁹ in 1948, the Court struck down application of the California Alien Land Law to Oyama, an American citizen, insofar as it discriminated against him on the basis of his parents' country of origin. The Court found that "there is absent the compelling justification which would be needed to sustain discrimination of that nature."⁸⁰

No explicitly racial classification has been upheld by the Court since *Korematsu*, writes one author.⁸¹ The focus is more precise if we rephrase this to say that no invidious racial classification has been upheld since *Brown*. With the *Brown* era cases of the 1960's—*McLaughlin*, *Loving* and

they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others. *Id.* at 308.

74. 118 U.S. 356 (1886).

75. *Id.* at 374.

76. 323 U.S. 214 (1944). In the previous year the Court had already upheld curfew orders under the same military order, in a unanimous decision. *Hirabayashi v. United States*, 320 U.S. 81 (1943). However, in a decision handed down with *Korematsu*, the Court found a lack of authority for continued detention under the order. *Ex parte Endo*, 323 U.S. 283 (1944).

77. "To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu* was not excluded from the Military area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . ." *Id.* at 223.

In the course, one might say, of protesting too much, Justice Black gratuitously and uncritically gave birth to what was to become a constitutional formula: "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonisms never can." *Id.* at 216. See note 192 *infra*.

78. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

79. 332 U.S. 633 (1948).

80. *Id.* at 640.

81. P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 485 (1975). *Accord*, Douglas J. in *DeFunis*, 416 U.S. at 337.

*Hunter*⁸²—it became apparent that the “suspect class” category was deeply imbued with the “race line” interpretation of the fourteenth amendment, and that a conscious methodology to implement this policy was hardening.

In *McLaughlin v. Florida*⁸³ the Court invalidated, on equal protection grounds, a statute that made racial cohabitation a special and separate offense. The Court rejected the argument that the requirement of equal protection of the laws is satisfied so long as white and black participants in the offense were similarly punished.⁸⁴ In the same year, the Court declared unconstitutional a state statute that required the race of every candidate for elective office to be placed on the ballot because “. . . placing of the power of the State behind a racial classification induces racial prejudice at the polls.”⁸⁵

Three years later the Court struck down a Virginia statute framed “to prevent marriages between persons solely on the basis of racial classifications.”⁸⁶ Relying on *McLaughlin*, the Court said: “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”⁸⁷ The ground for overturning the statutes there, as in the desegregation cases, was plainly that the statutes were designed to perpetuate the stigma of inferiority. These two cases left the incidental legacy that racial classifications were not *per se* bad, but that

At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the ‘most rigid scrutiny’ and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.⁸⁸

The Court concluded, in *Loving*, that “there is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification” (against mixed racial marriages) and described the classification as simply a measure “designed to maintain White Supremacy.”⁸⁹

Like *Brown*, then, these anti-racial classification cases were tied to “(t)he clear and central purpose of the Fourteenth Amendment. . . to eliminate all official state sources of invidious racial discrimination in the States.”⁹⁰

82. See note 54 *supra*.

83. 379 U.S. 184 (1964).

84. *Id.* at 189-91. The relevant question was whether “there is an arbitrary or invidious discrimination between those classes covered . . . and those excluded.” *Id.* at 191.

85. *Anderson v. Martin*, 375 U.S. 399 (1964).

86. *Loving v. Virginia*, 388 U.S. 1 (1967).

87. *Id.* at 12.

88. *Id.* at 11.

89. *Id.*

90. *Id.* at 10. Justice Douglas, writing in 1959, left the door ajar to racial classification for other (“noninvidious”?) purposes:

We have just discussed "suspect classification"—a prime example of, and agency for, the Court's favoring of the "racial line". In the *Brown* era, there have been many other illustrations of this favoring. I merely note them here, and will return to some of them later. The school segregation cases, of course, are the most widely known. But the Court has also repudiated the *Civil Rights Cases*⁹¹ refusal to extend the thirteenth amendment to discrimination as a "badge of slavery." *Jones v. Mayer*.⁹² It has ended the long-standing slumber of the enforcement clause of the fourteenth amendment (section five), and done so in a racial context. *cf. Katzenbach v. Morgan*⁹³ and *Oregon v. Mitchell*.⁹⁴ And the Court has found special equal protection clause powers to reach racially-motivated redistricting arrangements. *White v. Regester*.⁹⁵ In addition, the *Brown* era has seen unprecedented congressional favor, sanctioned by the Court—legislation against racial discrimination in use of public facilities, in commerce, in housing, in employment and legislation making possible effective minority exercise of the franchise.

During this same period, there has been a somewhat comparable expansion of the "any person," nonracial line of fourteenth amendment protection, which I shall now consider.

IV. THE OTHER LINE—THE "ANY PERSON" OR NONRACIAL LINE

I turn now to the other main line of fourteenth amendment interpretation, which I have called the "any person" or nonracial line. Two other concerns of the Court have overlapped this expanded protection against racial discrimination in the *Brown* era: (1) an unprecedented expanded development of the protection of "any person," both an enlarged recognition of due process "fundamental" rights, and an expanded coverage by the equal protection clause; and (2) an increased recognition of inchoate rights, or interests, formerly dismissed as mere privileges. Even in absence of a right ordinarily to participate in a public benefit save on terms arranged by the state, there has been insistence that the state's terms not be fixed so as to harm a potential participant in an "invidious" or "arbitrary" way.

Experience shows that liquor has a devastating effect on the North American Indian and Eskimo. It is, therefore, commonly provided in the United States and Canada that no liquor should be sold to those races. Other regulations based on race may likewise be justified by reason of the special traits of those races, such, for example, as their susceptibility to particular diseases. What at first blush may seem to be an invidious discrimination may on analysis be found to have plausible grounds justifying it. *W. DOUGLAS, WE THE JUDGES*, 399 (1956).

91. 109 U.S. 3 (1883).

92. 392 U.S. 409 (1968).

93. 384 U.S. 641 (1966).

94. 400 U.S. 112 (1970).

95. 412 U.S. 755 (1973).

First, I shall recall the historical antecedents of the “any person” line of fourteenth amendment interpretation. Then I shall consider, in order, the expanded equal protection coverage in non-racial matters, the “fundamental rights” due process explosion, and the demise of the mere “privilege” doctrine where state violation of the Constitution is asserted. In addition, I shall note the development of a methodology of “strict scrutiny” that parallels the “strict scrutiny”-“compelling state interest” test we just noted in the “race line” section.

A. *Historical Antecedents*

Consideration of the development of the “any person” line can be pursued most advantageously in the context of the “due process” clause of the fourteenth amendment. The “privileges and immunities” clause has been practically a dead letter since *Slaughter-House*⁹⁶ and, as we shall see, the “equal protection” clause aroused slight interest outside of racial cases until the 1960’s. A restrictive interpretation of the “due process” clause, even in nonracial matters, persisted after *Slaughter-House* and the *Civil Rights Cases*.⁹⁷ Over Justice Field’s vigorous dissents,⁹⁸ the Court hesitated to interfere with any state action. But, beginning in 1890, with *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*⁹⁹ the Field dissents became majority doctrine, cf. *Allgeyer v. Louisiana*.¹⁰⁰ A new chapter of fourteenth amendment relief for “any person” was written—substantive due process aimed at state economic legislation. The next significant development was the Court’s recognition that certain rights, denominated as “fundamental,” were protected against state action by the due process clause of the fourteenth amendment. At first, these were rights specified in the first amendment.¹⁰¹ In the years just prior to *Brown*, the Court considered other rights specified in the first eight amendments.¹⁰² During the 1960s, this due process development would continue at an accelerated pace. And, surprisingly, equal protection for “any person” would assume importance for the first time.

96. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See note 9 *supra*.

97. 109 U.S. 3 (1883).

98. Cf. *Barbier v. Connolly*, 113 U.S. 27 (1885), *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1883) and *Ex parte Wall*, 107 U.S. 265 (1882).

99. 134 U.S. 418 (1890).

100. 165 U.S. 578 (1897). See *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adamson v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905).

101. The “fundamental right” framework was inspired by *Twining v. New Jersey*, 211 U.S. 78 (1908). A more remote antecedent is *Hurtado v. California*, 110 U.S. 516 (1884) (“fundamental principles of liberty and justice.” *Id.* at 535).

The pioneer first amendment cases are listed in note 115 *infra*.

102. See, e.g., *Wolf v. Colorado*, 338 U.S. 25 (1949). As early as 1932, the right to counsel in a capital case had been held to be a “fundamental right”, enforceable against a state through the fourteenth amendment. *Powell v. Alabama*, 287 U.S. 45 (1932).

B. *Equal Protection in Non-Racial Contexts*

Before the 1960s, the corpus of equal protection decisions in the United States Supreme Court was slender. Challenges to state action on equal protection grounds were rare and, outside of the race cases, were usually disposed of after very deferential review. A statute was upheld if there were some "rational basis" for the state's classification, and this was ordinarily detected.¹⁰³ In the landmark legislative apportionment decision, *Baker v. Carr*,¹⁰⁴ in 1962, the Court upheld on equal protection grounds a state voter's "any person" claim that state malapportionment of legislative districts had diluted his personal vote. After *Baker*, equal protection litigation has assumed an increasingly larger part of the Court's time.

In the pre-1960s period, when deferential review of equal protection challenges was the rule, an exception, of course, occurred in the race cases.¹⁰⁵ A second exception was the somewhat lonely precedent of *Skinner v. Oklahoma*¹⁰⁶ (discussed below), where "basic civil rights" were infringed by a state classification. Here too, the Court called for "strict scrutiny." When the burgeoning "fundamental rights" were involved in a constitutional challenge, either of equal protection or of due process, the Court came, almost *ad hoc*, to require a strict test be applied to the statute. This happened in both the equal protection race cases and in *Skinner*, which heads everyone's list of cases that laid the groundwork for non-deferential equal protection review outside the race area. *Skinner* involved a state law authorizing sterilization of persons convicted of certain felonies. Noting that the penalty, loss of procreative powers, "involves one of the basic civil rights of man. . . a basic liberty," the Court held that "strict scrutiny" was required of the classification of inclusion and exclusion. Justice Douglas' majority opinion insisted that such cases required "strict scrutiny"—"lest unwittingly, or otherwise, invidious discriminations are made."¹⁰⁷ *Skinner* is a forerunner to the personal rights and substantive due process cases, such as *Loving*,¹⁰⁸ *Griswold*¹⁰⁹ and *Roe v. Wade*,¹¹⁰ which we meet later.

103. The paradigm cases are *Railway Express Agency v. New York*, 336 U.S. 106 (1949) and *Goesaert v. Cleary*, 335 U.S. 464 (1948).

104. 369 U.S. 186 (1962).

105. See text at notes 64-90 *supra*.

106. 316 U.S. 535 (1942).

107. *Id.* at 541. The *Skinner* opinion was a brilliant tour de force that overturned a sterilization statute on equal protection grounds, in face of a decision by the Court that had upheld a comparable state sterilization statute against a due process challenge. *Buck v. Bell*, 274 U.S. 200 (1927). This was Justice Holmes' opinion, arguing in support of the statute, that "three generations of imbeciles are enough." *Id.* at 207.

108. *Loving v. Virginia*, 388 U.S. 1 (1967). The Court added a second basis to the equal protection ground for overturning the anti-interracial marriage statute: "These statutes also deprive the Lovings of liberty without due process of law Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942)). *Id.* at 12.

109. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

110. 410 U.S. 113 (1973).

That the more stringent review standard is ordinarily less available in “any person” (nonracial equal protection) cases than in the “race line” of cases may be illustrated in the contrast between two look-alike cases that had different outcomes. In *Hunter v. Erickson*,¹¹¹ in 1969, the Court held that Akron’s amendment of its city charter to prevent the city council from implementing any ordinance dealing with racial, religious or ancestral discrimination in housing, until it had been specifically approved by the electorate, violated equal protection. The amendment denied a black citizen equal protection of the laws, because it treated “racial housing matters differently than other racial and housing matters.” Two terms later, in *James v. Valtierra*,¹¹² the Court considered a California constitutional requirement to submit low-rent public housing decisions to a special community election. Low-cost housing clients claimed that they had thereby been denied equal protection. The district court granted plaintiffs relief, relying on *Hunter*. The Supreme Court reversed, and explained:

The present case could be affirmed only by extending *Hunter*, and this we decline to do. . . . *Hunter* rested on the conclusion that Akron’s referendum law denied equal protection by placing “special burdens on racial minorities within the governmental process.” Unlike the Akron referendum position, it cannot be said that California’s Article XXXIV rests on “distinctions based on race. . . .”¹¹³

After *Hunter-James*, it was clearer that the “strict scrutiny” in “any person” cases was restricted to situations where state action impinged upon a “fundamental right.”

C. Due Process and “Fundamental Rights”

At the same time that the *Brown* sequelae¹¹⁴ were unfolding, the Court commenced to use a new formulation with respect to first amendment rights, which had been identified as “fundamental” in a familiar earlier series of cases.¹¹⁵ Rejecting Justices Black and Douglas’ position that the first

111. 393 U.S. 385 (1969).

112. 402 U.S. 137 (1971).

113. *Id.* at 140-41.

114. See the per curiams cited in note 67 *supra*. The significance of these cases is that they made clear that the letter as well as the spirit of *Brown* extended beyond the education area, with its psychological limitations, to all public facilities. The *McLaughlin-Loving* development in equal protection was also in the spirit of *Brown*. Recall that those cases rejected an earlier case that had decided the interracial issue the other way. *Pace v. Alabama*, 106 U.S. 583 (1883). As late as 1955 and 1956, the Supreme Court twice resorted to obscure procedural grounds to avoid considering a Virginia decision that upheld the statute later overturned in *Loving*. *Naim v. Naim*, 350 U.S. 891 (1955), 350 U.S. 985 (1956). The Court’s use of technicalities in the *Naim* appeals are discussed in G. GUNTHER, *CONSTITUTIONAL LAW: CASES AND MATERIALS*, 1601-03 (9th ed. 1975) [hereinafter cited as GUNTHER].

115. This development commenced with a dictum in *Gitlow v. New York*, 268 U.S. 652 (1925), and continued by identifying first amendment rights as “fundamental” and “protected by the due process clause of the Fourteenth Amendment” (*Id.* at 666) in the following cases: *NAACP v. Alabama*, 357 U.S. 449 (1958) (association); *Everson v. Bd. of Educ.*, 330 U.S. 1

amendment rights were absolute, the Court first experimented with the notion that the first amendment rights had a "preferred position" that required special judicial deference.¹¹⁶ In the late 1950s, the Court held that for such rights to be overridden, the "subordinating governmental interest must be compelling,"¹¹⁷ or, in the more enduring formulation, there must be a "compelling state interest."¹¹⁸

By the mid-1960s, in *Griswold v. Connecticut*,¹¹⁹ the Court revived the notion of substantive due process (which had been discarded for over 20 years in economic matters) in the area of personal rights, identifying an undefined, but "fundamental" right of privacy. Building there on *Skinner*,¹²⁰ a non-racial equal protection case, and on *McLaughlin*¹²¹ and *Loving*,¹²² cases with predominantly racial dimensions, the Court in *Griswold*¹²³ again invoked "compelling state interest" as the constitutional test.

The wave of apportionment cases launched in *Baker v. Carr*¹²⁴ sounded in equal protection, but they signalled a new attention by the Court to a

(1947) (religion—establishment); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religion); *Hague v. CIO*, 307 U.S. 496 (1939) (assembly); *Herndon v. Lowry*, 301 U.S. 242 (1937) (speech); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (assembly); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (press); *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934) (religion); *Near v. Minnesota*, 283 U.S. 647 (1931) (press); *Whitney v. California*, 274 U.S. 357 (1927) (speech).

116. The classic source of this short-lived view was the celebrated "Footnote 4" of Justice Stone's opinion in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See also *Kovacs v. Cooper*, 336 U.S. 77, 88, 90 (1949); *Jones v. Opelika*, 316 U.S. 584, 600 (1942); *Schneider v. Irvington*, 308 U.S. 147, 161 (1939).

"Footnote 4" has had great influence. It raised the possibility of less judicial deference "when legislation appears on its face to be within a specific prohibition of the Constitution, such as the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth," and when a statute "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." More squarely in the focus of this article, Justice Stone queried whether "more exacting judicial scrutiny" was needed of statutes "directed at particular religions . . . or racial minorities." Pursuing the racial inquiry, in a much-cited passage, he asked, "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities . . ." 304 U.S. at 153.

117. The genesis may be traced from a concurring opinion of Justice Frankfurter in *Sweezy v. New Hampshire*, 354 U.S. 234, (1957), to majority acceptance in *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Bates v. Little Rock*, 361 U.S. 516 (1960).

118. This definitive formulation first appeared in *NAACP v. Button*, 371 U.S. 415 (1963). The aspect of "less drastic means," which became an essential part of the compelling governmental interest test, derives in this context from *Shelton v. Tucker*, 364 U.S. 479 (1960). Cf. "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests," used in a commerce clause context. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). See Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967). Consider also the expansion of "procedural due process" (applying most of the first eight amendments to the states), notably in the cases from *Mapp v. Ohio*, 367 U.S. 643 (1961) (4th amendment—exclusionary rule, extending *Wolf v. Colorado*, 338 U.S. 25 (1949)), to *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy).

119. 381 U.S. 479 (1965).

120. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

121. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

122. *Loving v. Virginia*, 388 U.S. 1 (1967).

123. From *Griswold* followed *Roe v. Wade*, 410 U.S. 113 (1973), the paradigm of the Court's mechanical use of the formula.

124. 369 U.S. 186 (1962).

“fundamental right” to participate in the voting process.¹²⁵ These cases were also brought under the “compelling state interest” test, which by now governed the expanded list of “fundamental rights” in both equal protection and due process cases, as well as those other equal protection cases involving a “suspect” class, race or nationality. All these categories were subject to “strict judicial scrutiny,” and could be justified only by showing of the “compelling governmental interest.”

For a time, all analysis ended when this strict standard was invoked. Subsequently, the Court began to inquire whether there actually was, in the circumstances presented, a “compelling state interest”. But the answer was so invariably “no” that Chief Justice Burger commented, in an aggravated dissent: “So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard and I doubt one ever will, for it demands nothing less than perfection.”¹²⁶

D. *Decline of the “Privilege” Doctrine*

A further significant development in the “any person,” nonracial line of fourteenth amendment decision-making by the Supreme Court, was the decline and fall of the privilege doctrine, and the recognition by the Court of a measure of constitutional protection for “entitlements,” or inchoate rights to access to governmental benefits, that had earlier been regarded as mere “privileges.” This protection encompasses claims such as are now asserted by *Bakke* with respect to admission to a state medical school. Although the state may fix terms for enjoyment of government benefits, they may not be “invidious” or “arbitrary” with respect to a particular claimant, such as *Bakke*.¹²⁷

125. *Reynolds v. Sims*, 377 U.S. 533 (1964) (the “one man, one vote” case), and *Harper v. Bd. of Elections*, 383 U.S. 663 (1966) (striking down the Virginia poll tax) both sounded in equal protection, at the same time identifying exercise of the franchise as a “fundamental right.” *Williams v. Rhodes*, 393 U.S. 23 (1968), which led off a series of candidates'-access-to-the-ballot cases, was rested on associational (first amendment) and equal protection grounds. Durational residence requirements for voting—*Dunn v. Blumstein*, 405 U.S. 330 (1972) and property and other conditions limiting exercise of the franchise—*Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) used equal protection framework for their close-scrutiny-compelling-state-interest requirements. So did *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), in striking down durational residence requirements as impinging on the “fundamental right” to travel.

126. *Dunn v. Blumstein*, 405 U.S. 330, 363-64 (1972). As a historian he was accurate. The Chief Justice's credentials as a prophet were damaged the next term, when two statutes were upheld on grounds that the strict standard had been satisfied. *Burns v. Fortson*, 410 U.S. 686 (1973) and *Marston v. Lewis*, 410 U.S. 679 (1973). Like *Dunn*, they involved residential requirements for voting.

127. *Perry v. Sinderman*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Roth*, it was noted that the Court has “rejected the wooden distinction between ‘rights’ and ‘privileges’ that once seemed to govern the applicability of procedural due process rights.” 408 U.S. at 571. These cases, however, were confined to establishing rights to a hearing, and did not adjudicate a substantive right to a benefit.

The development of the “any person” line, which we have just considered, and the “race” line which we saw earlier, partook of comparable methodological ingredients. Both “fundamental right” and “suspect classifications” triggered a stricter measure of review than other constitutional challenges to state action. These independent developments were considered by the Court in its famous two-tier formula in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which I discuss in the next section.

V. RECONCILIATION OR PREFERENCE: THE QUESTIONABLE IMPACT OF CONSTITUTIONAL FORMULAS

A. *RODRIGUEZ and the Two-Tier Formula*

In *Rodriguez*, the problem arose because Texas’ system of financing public education, as in many states, depended significantly on local property taxes. The amount spent for public education thus varied greatly, depending on whether taxable property values in a given district were high or low. Mexican-American parents of children attending public school in districts having a low property tax base sued on behalf of children of poor families residing in such districts. The district court held that plaintiffs had been denied equal protection of the laws. The United States Supreme Court reversed, with a 5-4 decision, in an opinion by Justice Powell.

The Court focused its inquiry into a rigid methodological framework. When there was a “fundamental right” judicially declared to be recognized by the Constitution, or a “suspect class,” the compelling state interest test would govern. Otherwise, the challenged state action would be measured by the rational basis standard. This was the so-called “two-tier” formula.¹²⁸

Despite the central place of education, which the Court had recognized in *Brown*, it declined here to find that education was a “fundamental right.” And *James v. Valtierra*¹²⁹ had sufficiently determined that a “class of

128. “We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.” *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

129. 402 U.S. 137 (1971). Indications that wealth/poverty might be such a basis were in *Harper v. Board of Elections*, 383 U.S. 663 (1966). Some encouragement was derived from a dictum in *McDonald v. Board of Election Comm’rs*, 394 U.S. 802 (1969) (“lines . . . drawn on the basis of wealth or race . . . render a classification highly suspect and thereby demand a more exacting judicial scrutiny,” *Id.* at 807. Warren, C.J.). But, *James v. Valtierra*, 402 U.S. 137 (1971), and *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), made clear that wealth/poverty triggered no strict test of equal protection. The poor-as-poor were left with a few special concessions in the appellate criminal process (*Griffin v. Illinois*, 351 U.S. 12

disadvantaged poor" did not qualify for the "suspect classification" category. Accordingly, the rational basis test applied. The Court had no difficulty in finding that this test was met by Texas in this case.

Since *Rodriguez*, the ranks of "suspect classes" to trigger "strict scrutiny" and "compelling governmental interest" have remained closed—limited as before to race (including nationality) and alienage.¹³⁰

More important to our concerns here, the *Rodriguez* two-tier formula has tended to make more mechanical the lawyers' argumentation and lower-court decisions. It may have contributed to the wooden and error-laden approach of the California and Washington courts in the *Bakke* and *DeFunis* cases. These courts, and others like them, simply ask: "Is race involved?" If it is, they assume there is a "suspect classification." Since the classification is "suspect," then "strict judicial scrutiny" (demanding a "compelling state interest" and a less drastic, non-racial alternative) follows. Both courts, as we have seen, got to this last step; however, they came to opposite conclusions in the face of similar suggestions of what should be "compelling" state concerns. The litigants' assumption in *Bakke*, it is fair to suspect, is that the Supreme Court will also reach this ultimate question. The Court's disposition of *Bakke*, according to this expectation, will depend on whether or not it views the interests advanced by the Regents to be "compelling." That expectation, however, is not reinforced by the above review of equal protection development in the last three decades. That review suggests that the Court should find there is no "suspect classification" which can be relied on by *Bakke*, if the spirit of *Brown* still survives. As Justice Marshall shrewdly pointed out in his *Rodriguez* dissent,¹³¹ and

(1956), *Douglas v. California*, 372 U.S. 353 (1963)), with the sixth amendment right to counsel (*Gideon v. Wainwright*, 372 U.S. 335 (1963)) and with the due process right to "meaningful opportunity to be heard" when they are forced to settle basic claims in the judicial process. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

130. *Graham v. Richardson*, 403 U.S. 365 (1971), qualified aliens within the "suspect classification" category. See *Nyquist v. Mauclet*, 432 U.S. —, 97 S.Ct. 2120 (1977). Attempts to elevate sex (or gender), and illegitimacy, to "suspect class" have failed, although clearly classifications grounded in sex and illegitimacy are examined carefully.

In *Frontiero v. Richardson*, 411 U.S. 677 (1973), a plurality seemed to have promoted "sex", or "gender" (as some opinions prefer), to a "suspect class" requiring the strict test. But later decisions made clear that this is not so. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), *Schlesinger v. Ballard*, 419 U.S. 498 (1975), and *Kahn v. Shevin*, 416 U.S. 351 (1974). See also two cases from 1976 Term: *Califano v. Goldfarb*, 430 U.S. —, 97 S.Ct. 1021 (1977) and *Califano v. Webster*, 430 U.S. —, 97 S.Ct. 1192 (1977).

As to illegitimacy, *Mathews v. Lucas*, 427 U.S. 495 (1976) dashed the expectations that had been raised by the Court in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), but they were somewhat revived in *Trimble v. Gordon*, 430 U.S. —, 97 S.Ct. 1459 (1977).

But see note 133 *infra*.

131. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But the Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adverse-

continues to remind us,¹³² others—both lawyers and lower courts—may be beguiled by the apparently mechanical two-tier equal protection formula uttered in *Rodriguez*; but the Court itself has not been.¹³³

B. Preference for the Racial Line?

The fact remains that in the *Brown* era, the Court has given its most extraordinary "equal protection" when the interests affected are racial discrimination claims, and comparable stigmas that the Civil War Amendments were basically designed to eliminate. Such cases as the *Hunter-James*¹³⁴ coupling, and *Rodriguez*¹³⁵ itself, recognize more expansive coverage where racial discrimination is concerned than otherwise. I shall consider below some other illustrations of what may, in this sense, fairly be called a preference for the "racial" over the "any person" line.

This "preference" does not, of course, flatly rule out an "any person" claim such as proffered in *Bakke*. But, it does ordinarily deny to nonracial plaintiffs the preferred status that derives from "suspect classification," and requires them to establish "arbitrary" or "invidious" treatment in order to trigger any constitutional equal protection relief.

ly affected and the recognized invidiousness of the basis upon which the particular characterization is drawn. . . . [I]t will not do to suggest that the 'answer' to whether an interest is fundamental for purposes of equal protection analysis is *always* determined by whether that interest 'is a right . . . explicitly or implicitly guaranteed by the Constitution.' *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 98-100.

132. See, e.g., his subsequent dissent in the 1975 term in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). Professor Gunther discerns that "[A] number of Justices, from all segments of the Court, have sought formulations that would blur the sharp distinctions of the two-tiered approach or that would narrow the gap between the levels of scrutiny." GUNTHER, *supra* note 114, at 661. Gunther concedes that "Justice Marshall's 'sliding scale' approach may explain many of the Burger Court's decisions", but he simply dismisses it as "a formulation that the majority has refused to embrace." *Id.* There is a non-sequitur here. The majority may continue to profess the two-tier formula, perhaps to minimize concern with too much discretion, but Justice Marshall is trying to teach us what the justices really do in deciding equal protection cases. We would do well to take the lesson, in which Justice White, at least, concurs: *See Vlandis v. Kline*, 412 U.S. 441, 458 (1973) (concurring opinion). Earlier, in *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court had ruled that

"In the area of economics and social welfare . . . [i]t is enough that the State's action be rationally based and free from invidious discrimination." 397 U.S. at 485. In dissent Justice Marshall argued: ". . . [E]qual protection analysis of this case is not appreciably advanced by the a priori definition of a 'right' fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification" *Id.* at 520-21.

133. See the incisive analysis of Professor Gunther, in his *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972), and his updated version of that article. GUNTHER, *supra* note 114, at 657-67:

"[F]or the first time in years, old equal protection standards occasionally mean something other than perfunctory opinions sustaining the law under attack. Increasingly, too, formulations of 'mere rationality' standards by some of the Justices have hinted at increased bite to the scrutiny."

Id. at 661.

134. *Supra* notes 111 and 112.

135. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

Three further examples of preference for the "race" line are: (1) the limited revival of the enforcement clause of the fourteenth amendment,¹³⁶ (2) the enlarged interpretation given "statutory equal protection" of 42 U.S.C. § 1985 (3),¹³⁷ and (3) the exceptional equal protection relief concerning multimember voting districts,¹³⁸ when racial discrimination is present and effective. A short treatment of these matters below is enough to suggest continuing judicial concern to correct, where feasible, the costly rigidities of the pre-*Brown* period.

1. *Oregon v. Mitchell* and Section 5 of the 14th Amendment

In upholding the Voting Rights Act of 1965,¹³⁹ which made extensive intrusions on state provisions for voting, the Supreme Court relied on Congress' enforcement power in section 2 of the *fifteenth* amendment,¹⁴⁰ which was expressly directed to racial discrimination in voting. *Katzenbach v. Morgan*¹⁴¹ was thought to have revived Congress' enforcement power under section 5 of the fourteenth amendment (a section which had been a dead letter since the *Civil Rights Cases*).¹⁴² In *Morgan*, the Court upheld congressional legislation that abolished the literacy test as applied to certain Puerto Rican citizens of New York. Impelled by the apparent new life breathed in section 5 by *Morgan*, Congress enacted a statute giving eighteen-year-olds the right to vote in national and state elections. In *Oregon v. Mitchell*,¹⁴³ by a 5-4 vote, the national election provision was upheld. However, the Court denied, by the same margin, Congress' power under section 5 to provide eighteen-year-old voting in state elections. Faced with the *Morgan* precedent, Justice Black (casting the controlling vote on both

136. Congress' power under section five of the fourteenth amendment, the "enforcement" clause (see note 8 *supra*), had been effectively stifled since the *Civil Rights Cases*, 109 U.S. 3 (1883).

137. This civil rights statute, by its terms, secured "statutory" equal protection against deprivation of rights by private conspiracies (the enacting Congress, in 1870, had the Ku Klux Klan in view). However, the Court had construed the statute restrictively to avoid conceived constitutional problems. These, too, derived from the *Civil Rights Cases*—the requirement of "state action." *Collins v. Hardyman*, 341 U.S. 651 (1955).

138. Despite *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 337 U.S. 533 (1964), and their progeny (see text at notes 124-25 *supra*), the Supreme Court had shown no disposition to insist on elimination of multimember districts for voting. See *Whitcomb v. Chavis*, 403 U.S. 124 (1971). However, the Court intervened when race factors were added to the political decision, and the consequences were to cancel out effective minority participation in the electoral process. *White v. Regester*, 412 U.S. 755 (1973).

139. This significant statute, enacted pursuant to section 2 of the *fifteenth* amendment (see note 7 *supra*), among other things, authorized use of federal voting examiners in recalcitrant states, and thus made possible large scale minority registration and voting. The statute [79 Stat. 437, 42 U.S.C. § 1973 (Supp. 1970)] was upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

140. See note 7 *supra*.

141. 384 U.S. 641 (1966).

142. 109 U.S. 3 (1883).

143. 400 U.S. 112 (1970).

state and national questions)¹⁴⁴ denied its applicability because *Morgan* involved rectification of racial discrimination:

Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments.¹⁴⁵

While the authority of this sentence is diminished by the fact that Justice Black was speaking for himself and not for a majority of the Court, the result in *Oregon v. Mitchell* remains the controlling pronouncement of the Court with respect to Congress' power under section 5—and it is a fair illustration of the preferred place that has been given race in the fourteenth amendment scheme in the *Brown* era.

2. *Griffin v. Breckinridge* and Statutory "Equal Protection"

After the Civil War, one of the civil rights statutes, (now 42 U.S.C. § 1985(3)),¹⁴⁶ provided remedies for conspiracies to deprive "any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." In *Collins v. Hardyman*,¹⁴⁷ members of a political club sought damages against American Legionnaires, who had allegedly conspired to forcibly break up their meeting held in opposition to the Marshall Plan. In affirming dismissal of the complaint, the Supreme Court stated that section 1985(3) only reached those private conspiracies that dominated or displaced state government. In fact, the Court said, if this complaint did state a claim that met "the requirements of this Act, it raised constitutional problems of the first magnitude." The Court assumed that this Act of April 20, 1871, was subject to the requirement imposed by the *Civil Rights Cases*;¹⁴⁸ and, that congressional action under the fourteenth amendment was limited to remedying defects resulting from state involvement and did not reach ordinary private conspiracies.

By 1971, the Court was no longer troubled with the constitutional authority for interpreting this same statute to reach private conspiracies. In *Griffin v. Breckinridge*,¹⁴⁹ plaintiffs were black citizens of Mississippi who alleged that defendants, white Mississippians, had on racial grounds privately conspired to deprive them of "the equal protection of the laws" in violation of section 1985(3). The lower courts dismissed the complaint on the authority

144. The peculiar alignment of the justices in *Oregon v. Mitchell* found four justices supporting the legislation as applied to both federal and state elections, on various grounds, and four justices rejecting the legislation as applied to federal and state elections. Justice Black supported the eighteen-year old vote in federal elections, but found it unconstitutional as applied to state elections. Within a year the twenty-sixth amendment had been passed and ratified, applicable to both federal and state elections.

145. 400 U.S. at 129.

146. See note 137 *supra*.

147. 341 U.S. 651 (1951).

148. 109 U.S. 3 (1883).

149. 403 U.S. 88 (1971).

of *Collins v. Hardyman*. The United States Supreme Court reversed. It found constitutional ground to invoke the statute, despite the absence of state involvement, in the thirteenth amendment (following the *Jones v. Mayer*¹⁵⁰ analysis), and in the constitutional right to travel.¹⁵¹ But the Court put a curious caveat upon its now enlarged interpretation of this statute, which was clearly phrased in the terminology of the fourteenth amendment ("equal protection of the laws or of equal privileges and immunities under the laws"). The Court seemed determined to reach its result without setting a precedent that would make section 1985(3) an anchor point for the development of an extensive federal tort law. It did so by specifying that

the language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.¹⁵²

The Court, in a footnote, made its race point even clearer, in the robes of a "We need not decide. . . ."¹⁵³

It is true that *Griffin* was concerned with statutory interpretation, and not direct construction of the equal protection clause of the fourteenth amendment. Nevertheless, this case is a further graphic illustration of the special racial emphasis that has been given to "equal protection" as a constitutional concept in the *Brown* era.

3. *Voting Rights and "Invidious Discrimination"*

The reapportionment-voting rights line of cases, starting with *Baker v. Carr*,¹⁵⁴ initiated a marked increase in "any person" equal protection litigation. But it did not at first have special interest in matters of race. However, the problem of multimember districts eventually led the Court to recognize, here too, the special significance of racial factors.

The concept that dilution of the "any person" vote by malapportioned districts is not justifiable was first recognized in *Baker v. Carr*. Then, the Court swiftly established "one person, one vote" as the constitutional standard of equal protection.¹⁵⁵ The reapportionment cases, thereafter, were concerned mainly with the percentage of permissible deviation from the norm of equality, or with the kind of political subdivisions subjected to the constitutional rule.¹⁵⁶ Ultimately, the question arose as to the permissibility

150. 392 U.S. 409 (1968). See note 54 *supra*.

151. The "right to travel" had been noted as a "fundamental right" in several cases; see, e.g., *United States v. Guest*, 383 U.S. 745 (1966).

152. *Griffin v. Breckinridge*, 403 U.S. at 102.

153. "We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of Section 1985(3) before us." *Id.* at 102, n.9.

154. 369 U.S. 186 (1962).

155. *Wesberry v. Sanders*, 376 U.S. 1 (1963) and *Reynolds v. Sims*, 377 U.S. 533 (1964).

156. More recent reapportionment cases have permitted a greater percentage deviation from the "one-person-one-vote" ideal. *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cum-*

of multimember districts. Assume geographical area X is entitled to five representatives in the state legislature. In X, group A has a 60% majority of voters, but most of the 40% minority are concentrated in two localities within X. With five members elected at large (multimember district), the majority group will presumably elect all five. Whereas, if the area is divided into five geographical units, the minority would ordinarily be able to elect one or two representatives. When the Court was asked to declare multimember districts a *per se* violation of equal protection, it declined.¹⁵⁷ However, the Court inserted dicta that was later to support a square holding: that a multimember district would constitute an "invidious discrimination" provided it could be shown that "designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."¹⁵⁸

In *Whitcomb v. Chavis*,¹⁵⁹ the Court reversed a decision that upheld a black voters' challenge to a multimember district. But, in *White v. Regester*,¹⁶⁰ the Court unanimously struck down multimember districts in Texas on findings that "the black community has been effectively excluded from participation in the Democratic primary selection process," and that (in another county) Mexican-Americans had been "invidiously excluded. . . from effective participation in political life." However, the *Dorsey-Burns*¹⁶¹ dicta seems to have been vindicated only in part. The Court has been resistant to using equal protection to police *political* gerrymandering.¹⁶² And intonations in *White v. Regester* suggest that the "designedly or otherwise" in *Dorsey* needs careful handling. Without expressly stipulating that more than "impact" was required, the Court's opinion relies heavily on the background of "history of official racial discrimination in Texas" as a ["purposeful?"] ingredient of the "invidious discrimination."¹⁶³

In this line of fourteenth amendment cases, the Court has again responded more readily to alleged discrimination grounded in minority racial exclusion than to complaints relying on nonracial grounds.

mings, 412 U.S. 735 (1973). On the problem of political subdivisions, see *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970); *Avery v. Midland County*, 390 U.S. 474 (1968).

157. *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Burns v. Richardson*, 384 U.S. 73 (1966). However, in *Chapman v. Meier*, 420 U.S. 1 (1975), the Court expressed more misgivings about multimember districts than it had before, and directed that federal district courts not use them in reapportionment plans which they fashion.

158. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). See also *Burns v. Wilson*, 384 U.S. 73, 88 (1966).

159. 403 U.S. 124 (1971).

160. 412 U.S. 755 (1973).

161. See note 158 *supra*.

162. But racial gerrymandering of political districts is something else. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), where the Court used the fifteenth amendment as the striking tool.

163. *White v. Regester*, 412 U.S. at 765-68.

C. *The Proper Focus for Decision in BAKKE*

I have been suggesting that an assumption of the Civil War Amendments, particularly the fourteenth amendment, involves two distinct lines of constitutional development that can illuminate the preferential minority admissions problem. Each line—the “race line” and what I have called the “any person,” nonracial line—has had its ups and downs, and these have not always been interrelated. Where tension has occurred between the two lines, particularly in the equal protection area, a preference has been accorded the “race line.” By that, I mean the Court has recognized a deeper commitment to the racial line. This has been notably the case in the *Brown* era.

While the *Brown* era has coincided with a spawning of “fundamental rights,”¹⁶⁴ the Court seems to have drawn a halt on this agency of “any person” development in *Rodriguez*.¹⁶⁵ Did the *Rodriguez* two-tier formula in some way draw these two lines together for the first time? Even accepting the Court’s opinion at face value, this is hardly arguable. In *Rodriguez* the Court takes the development in each line as it finds it, notes the applicability of “strict scrutiny” to “suspect classifications” and to “fundamental rights,” and refuses to find a place for plaintiffs’ claims in either category.¹⁶⁶ Thus, it leaves them with a deferential, “rational basis,” review of the challenged state action. But, as Justice Marshall’s dissent points out, the Court has invariably, at least in recent years, made its equal protection decisions only after evaluating the particular interests involved—private and governmental—and then evaluating the impact of the challenged state action upon these interests.¹⁶⁷ There is always a range of less close and closer evaluation of these interests, even where plaintiff’s claim does not fit within a “suspect classification,” or a “fundamental rights,” envelope. Justice White has expressly agreed with Justice Marshall that this is the way the Court, in fact, acts.¹⁶⁸ Examination of the illegitimacy and gender-classification cases verifies their comments.¹⁶⁹

The California court states that “the extension of a right or benefit to a minority [has] the effect of depriving persons who were not members of a minority group of benefits which they would otherwise have enjoyed.”¹⁷⁰

The proper inquiry is whether the state’s program, and action thereunder, is “invidious” with regard to Bakke. Clearly there was no design or purpose to exclude him, either because he was white (racial), or because of his

164. See pp. 147-49 *supra*.

165. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

166. *Supra* note 128.

167. *Supra* note 131.

168. *Supra* note 132.

169. *Supra* note 130.

170. Bakke v. The Regents of the Univ. of California, 18 Cal. 3d at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 688.

particular ethnic background (national origin), whatever that may be. His disadvantaged position is a by-product of an affirmative program of the state, to admit a certain number of applicants from minority populations that state decision-makers determined should have a certain place in the professional school.¹⁷¹

The meaning accorded "invidious" in this context is surely the same as that involved in discriminatory racial classifications, and this is directly tied to the need to show more than discriminatory impact, or effect. It requires showing of a purpose to stigmatize or demean. The following section examines the Court's conclusive pronouncements to this effect.

1. "Invidious" Discrimination: the Requirement of Racial Purpose

While discriminatory racial effect or impact is sufficient to make out a violation of certain civil rights statutes, the Court has now established beyond question that a discriminatory racial purpose is an essential ingredient of an equal protection violation grounded on race. Whatever uncertainty previously existed has been removed by *Washington v. Davis*¹⁷² in 1976, and *United Jewish Organizations of Williamsburgh, Inc. v. Carey*¹⁷³ in this past term.

171. The California court seems to accept the legitimacy of the state program's objective—increased admission of minority applicants—and quarrel only with the preference given by frank and open racial classification. Thus, the University "is entitled to consider, as it does now with respect to applicants in the special program, that low grades and test scores may not accurately reflect the abilities of some disadvantaged students." *Id.* at 54, 553 P.2d at 1166, 132 Cal. Rptr. at 694. It may properly consider other factors than tests and grades, "such as the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as the applicant's professional goals." *Id.* (emphasis added) Further, said the court, "the University might increase minority enrollment by instituting aggressive programs to identify, recruit, and provide remedial schooling for disadvantaged students of all races." *Id.* Clearly the court's quarrel is not with the university's objectives to increase minority enrollment for such educational, professional, and societal advantages as it urges but, solely with the means used. "None of the foregoing measures can be related to race, but they will provide for consideration and assistance to individual applicants who have suffered previous disabilities, regardless of their surname or color." *Id.* The court's apparently mechanical, but resolute, methodology thus becomes evident. By insisting that race used in this affirmative way is still a "suspect class", it triggers the strict test, and forces the state to show that it can achieve its objectives in no other way. This burden, says the court, has not even been addressed: "So far as the record discloses, the University has not considered the adoption of these or other nonracial alternatives to the special admission program." *Id.*

The court's insistence is also puzzling in light of its earlier statement that "although it is clear that the special admission program classifies applicants by race, this fact alone does not render it unconstitutional. Classification by race has been upheld in a number of cases in which the purpose of the classification was to benefit rather than to disable minority groups." *Id.* at 46, 553 P.2d at 1160, 132 Cal. Rptr. at 688. California's effort to distinguish such cases as *Swann v. Board of Education*, 402 U.S. 1 (1971), and *Lau v. Nichols*, 414 U.S. 563 (1974), was discussed *supra* text at notes 32-33.

172. 426 U.S. 229 (1976).

173. 430 U.S. —, 97 S.Ct. 996 (1977).

a. *Washington v. Davis*

In *Washington v. Davis* the Court grouped various disparate equal protection precedents on racial issues—from jury discrimination to school segregation and voting rights—around one unifying theme. That theme was the requirement of a racially discriminatory purpose for an equal protection racial violation. In *Davis*, unsuccessful black applicants for training as police officers in the District of Columbia police department contended that the test given applicants for entry into the training program was a racially biased violation of equal protection. There was no allegation of discriminatory purpose. In fact, the test in question was a Civil Service Commission test given throughout the government to measure verbal aptitude. The district court denied relief, but the court of appeals reversed the lower court, finding that the test violated equal protection, as well as Title VII of the Civil Rights Act of 1964. The Supreme Court reversed the appellate court, on both constitutional and statutory grounds.

The court of appeals, counsel on both sides, and the several *amici curiae*, assumed, without discussion, that the equal protection standard was identical to the standard under Title VII, and the case was briefed and argued on that basis. Justice White's opinion for six members of a 7-2 Court pointed out that the assumption was wrong, and that a disproportionate racial impact was insufficient to ground an equal protection violation. Even the dissenters—Justices Brennan and Marshall who disagreed with the Court's statutory conclusion concerning Title VII—and Justice Stevens, concurring, expressed no disagreement with the Court's insistence upon a showing of discriminatory purpose.

While conceding that an "invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact. . . that the law bears more heavily on one race than another," the Court emphasized that "disproportionate impact. . . standing alone" does not "trigger the ['strictest scrutiny'] rule," according to which challenged government action is made "justifiable only by the weightiest of considerations."¹⁷⁴ Underscoring this point, Justice White listed in a footnote, and commented on, several cases in the lower courts that had taken a different view:

To the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.¹⁷⁵

But is not the *Bakke* case distinguishable from *Davis*? In *Davis*, there was no contention of any racial purpose at all in using the challenged general test. In *Bakke*, the admission standards were explicitly fixed by consciously selected racial factors. Does that not constitute the required racial purpose?

174. *Washington v. Davis*, 426 U.S. at 242.

175. *Id.* at 245.

Whatever the previous uncertainty, these questions clearly have been answered in the negative by a case decided one week after the grant of certiorari in *Bakke*. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.¹⁷⁶

b. *United Jewish Organizations of Williamsburgh v. Carey*

In the *UJO* case, New York State sought to satisfy the Attorney General that its planned redistricting complied with section 5 of the Voting Rights Act of 1965.¹⁷⁷ In order to do so, the state allegedly used racial criteria to establish substantial non-white majorities in two particular assembly districts and two senate districts. To achieve the desired sixty-five percent minority voters in these districts, the state's 1974 redistricting legislation split a closely-knit community of 30,000 Hasidic Jews (previously voting together in one senate district and one assembly district) into two senate and two assembly districts. The Jewish community sought a declaratory judgment that the legislation "would dilute the value of each plaintiff's franchise by halving its effectiveness solely for the purpose of achieving a racial quota and therefore [was] in violation of the Fourteenth Amendment."¹⁷⁸ The Supreme Court affirmed, in a 7-1 decision (Justice Marshall not participating), the district court's decision denying relief.

The Court considered both constitutional and statutory bases for the challenged legislation. The dominant opinion of Justice White denied plaintiffs relief, both because the New York statute was permissible under section 5 of the Voting Rights Act, and because it was permissible under the equal protection clause (without considering any support from the statute). Our interest here is the equal protection aspect.¹⁷⁹ The Court recognized that "the State deliberately used race in a purposeful manner" in its redistricting plan. However, the opinion distinguished between purposeful use of a racial criterion and what the Court called "discriminatory purpose." Since the state's plan "represented no racial slur or stigma with respect to white or any other race. . . we discern no discrimination violative of the Fourteenth Amendment."¹⁸⁰

176. 430 U.S. —, 97 S.Ct. 996 (1977). The grant of certiorari in *Bakke* is at 430 U.S. —, 97 S.Ct. 1098 (1977).

177. 42 U.S.C. § 1973(c) (1965), as amended by Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 5, 84 Stat. 315. A state subject to its provisions (as New York was, because of having used a "discriminatory test or device" in counties where fewer than fifty percent had voted) that wished to change its voting arrangements had to secure approval either from the district court of the District of Columbia, or from the Attorney General. New York had taken the latter route.

178. *United Jewish Org'ns of Williamsburgh, Inc. v. Carey*, 97 S.Ct. at 1003.

179. Section 5 had been interpreted only the previous term, in *Beer v. United States*, 425 U.S. 130 (1976). That case had held that a voting procedure change would be valid so long as it would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141. Justice White's inability to command a majority in support of the section 5 part of his opinion apparently derived from some concern he was undercutting *Beer* (in which he had dissented).

180. *United Jewish Org'ns of Williamsburgh, Inc. v. Carey*, 97 S.Ct. at 1009-1010.

It is hard to put the matter more clearly. Interestingly, while a majority of the Court subscribed to the above equal protection position, only four justices accepted that portion of the opinion which upheld the New York statute because of power derived from the Voting Rights Act. Justices White, Stevens and Rehnquist expressly joined in the equal protection part of the opinion. Justices Stewart and Powell, in a separate concurrence, indicated agreement with the equal protection views set out above:

Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. *Washington v. Davis*, 426 U.S. 229 (1976). . . . That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent. The clear purpose with which the New York Legislature acted. . . forecloses any finding that it acted with the invidious purpose of discriminating against white voters.¹⁸¹

These decisions of the Court leave little doubt that the California Supreme Court asked the wrong questions in *Bakke*. The Supreme Court would ask: "Did the University's use of race as an explicit factor in admissions invidiously—that is, purposely and demeaningly—discriminate against Bakke?" The California court, I shall now recall, was more mechanically inclined.

2. *The Supreme Court's Touchstone Applied*

The California court's conclusion in *Bakke* is the simple addition of two factors: (1) racial classification, plus (2) "the effect of depriving persons. . . of benefits which they otherwise would have enjoyed."¹⁸² The opinion states flatly that "where the [racial] classification results in detriment to a person because of his race,"¹⁸³ the product is "suspect classification." This in turn entails "strict scrutiny" and the "compelling state interest"—"no less drastic means" test.¹⁸⁴

181. *Id.* at 1017.

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

183. *Id.* at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690. In resolving the question of "compelling state interest", the California court was following mechanically the analytical model indicated by the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). But in contrast to *Roe*, where the Court described the woman's abortion decision as an aspect of the "fundamental right" of privacy, there is here no basis for triggering the strict test at all. In *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court specified that the strict test applied only when state action "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." 411 U.S. at 17. The California court felt that the mere existence of a "racial classification" was the necessary trigger. I have argued that this premise is wrong, and, therefore, that the strict test is not applicable. Consequently, there is no need to take sides on the conflict of views between the California and Washington courts over whether the state-offered reasons to justify minority preference admissions are constitutionally "compelling."

184. The Washington court had committed the same error. It too allowed the effect,

Why did DeFunis or Bakke fail to secure a valued seat in professional school? Was it:

- (1) because there was no room after admitting those ranked ahead of them in the general admissions line, and admitting those specially admitted in the minority preference line?

Or was it:

- (2) because some restrictive quota had been set to exclude, or invidiously limit, the admissions of a group of which they were members (say exclusion of Central Europeans as a result of a Western European-Hispanic-American-black coalition, which for the moment dominated admissions policy in Washington or California)?

Should it make a difference in equal protection analysis if the reason for their nonadmission was (2) rather than (1)? The California court says "no." In either case the effect, and therefore the constitutional result, is the same.

I argue "yes." In (2) there is a clear "racial," "national" or "ethnic" *exclusion*. There is true "invidious" discrimination in the original, and only useful, constitutional use of the word.¹⁸⁵ In (2) they are *excluded*, not as a by-product (effect) of a governmental decision that was neutral *as to them* among all non-minority citizens, as in (1), but because they or their group were affirmatively singled out for *exclusion*. And this distinction is constitutionally crucial.¹⁸⁶

D. Some Controlling Certainties

From the above developmental history, of which it is only too aware, the Court will isolate some controlling certainties.

1. The paradigm of the "suspect class" is race, and "the main purpose of the Equal Protection Clause [is] the protection against racial discrimination. . . ."¹⁸⁷ That is, principally, but not exclusively, the black race.
2. No classification by race whose purpose is "invidious" dis-

chargeable to a well-intentioned racial classification, to force the university to prove that the racially classified admissions program furthered a "compelling state interest."

185. A significant reason for confusion with respect to "suspect" classifications, is the occasional departure from the original, and authentic use of "invidious", as demeaning.

186. This distinction in no way relies on such vulnerable arguments as the following, which have been made to support preferential admissions: that race is "suspect" *only* when it disadvantages blacks (historical background of fourteenth amendment (see note 12 *supra*)); that a classification is "suspect" *only* when it is fashioned by a majority with respect to a "discrete insular minority" (see note 115 (par. 3) *supra*), translated to mean, in this connection, by whites with respect to blacks (see Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 729 (1974) [hereinafter cited as Ely]), and never by whites to the deprivation of whites.

187. While "invidious" was used in this context, at the outset, in the sense of demeaning, disparaging, stigmatic—it has been used frequently in a blander, almost conclusory sense, simply to signify that conduct is constitutionally objectionable. I use "invidious" here in the earlier and purer sense. It seems that the Court has of late done likewise. See *United Jewish Org'ns of Williamsburgh, Inc. v. Carey*, 430 U.S. —, 97 S.Ct. at 1009-1010.

crimination against the black race has been upheld since *Brown v. Board of Education*; and presumably, none will be.¹⁸⁸

3. The qualifying clauses (admitted in *McLaughlin*¹⁸⁹ and *Loving*¹⁹⁰) opened the door, after "strict scrutiny," to a showing of "compelling governmental interest." But they left no place for any statute that invidiously discriminated against the black race, or any other race or nationality. Presumably, perhaps regrettably, these qualifiers were designed to leave the door open for another *Korematsu*, which Justice Black had been insistent to label a special war power decision—not a racial one.¹⁹¹

4. The notion of "suspect class" originated in the context of race, and for many years race was alone in the class. It has been joined only by "alienage,"¹⁹² and recent cases make it clear that the protection afforded aliens is of a lower rank.¹⁹³

5. The root of the concept, "suspect class," is purposeful damage to members of the class singled out for discriminatory state action, whether the damage be economic, psychological or social. With regard to the blacks whom the fourteenth amendment was especially designed to protect, "suspect class" resonates, above all, stigma and deprivation of civil rights¹⁹⁴—in addition to loss of economic opportunity. In *Rodriguez*,¹⁹⁵ the Court, through Justice Powell, identified "the traditional indicia of suspectness:"

188. "At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subject to the 'most rigid scrutiny', . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." *Loving v. Virginia*, 388 U.S. at 11. (emphasis added).

189. A law "which trenches upon the constitutionally protected freedom from invidious official discrimination based on race . . . though enacted pursuant to a valid state interest, bears a heavy burden of justification . . . and will be upheld only if necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. at 196.

190. See note 188 *supra*.

191. Of course, despite Justice Black's protestations (*supra* note 77), *Korematsu* did uphold a racial classification. It remains a precedent that might again justify a classification invidious on racial grounds. In his *DeFunis* dissent, Justice Douglas recalled that "We were advised on oral argument that if the Japanese landed troops on our west coast nothing could stop them west of the Rockies. The military judgment was that, to aid in the prospective defense of the West Coast, the enclaves of Americans of Japanese ancestry should be moved inland, lest the invaders by donning civilian clothes would wreck even more serious havoc on our western ports. The decisions were extreme and went to the verge of war time power; and they have been seriously criticized. It is, however, easy in retrospect to denounce what was done, as there actually was no attempted Japanese invasion of our country." *DeFunis v. Odegaard*, 416 U.S. at 339.

192. *Graham v. Richardson*, 403 U.S. 365 (1971).

193. See, e.g., *Mathews v. Diaz*, 425 U.S. 67 (1976); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). But cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), *In re Griffiths*, 413 U.S. 717 (1973), *Sugarman v. Dougall*, 413 U.S. 634 (1973), and *Nyquist v. Mauclet*, 432 U.S. —, 97 S.Ct. 2120 (1977).

194. *United Jewish Org'ns of Williamsburgh, Inc. v. Carey*, 430 U.S. —, 97 S.Ct. 996 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). See also *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 452 (1977).

195. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

a class. . .saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.¹⁹⁶

6. The "suspect class" category is clearly available to races and nationalities other than blacks upon a showing of *purposeful* discrimination. However, there is no suggestion in the annals of the Court that the notion of "suspect class" is available to non-minority group members to trigger the overwhelming advantage of strict scrutiny-compelling state interest, and to set aside majoritarian policy enacted in behalf of the minority. (Surely this would be another species of what Justice Powell fairly identified as "extraordinary protection"¹⁹⁷). Yet the contrary view is the nub of the ruling of the California court in *Bakke*. It does not wash with history, or with the decisions of the United States Supreme Court.

VI. WHY NOT AFFIRM?

While the decisional indications strongly suggest that *Bakke* will be reversed, and possibly by a unanimous Court, it is of course conceivable that the Supreme Court will affirm. To do so, however, it must formulate a constitutional principle that has been unarticulated to date. Such a step would require a hard look at policy considerations, at large constitutional principles and at the practical implications of setting sail on a new constitutional course. Why not affirm the California court? Which major policy concerns may be urged for affirmance, and which for reversal?

Clearly the Court *can* find the preferential admissions program "invidious," and therefore rule it a constitutionally impermissible governmental purpose for a state university to use race as an element in its decision not to include an otherwise qualified individual on its lists of admittees.

This determination of constitutional policy should be made by the Court only after consideration of the factual context and previous decisional materials. For purposes of the analysis in this section, I assume that previous decisions *do not* point to a conclusion that this program is "invidious," but rather point to quite the opposite.¹⁹⁸ Therefore, the reconsideration of constitutional policy must be conducted in light of analogies to other influential constitutional positions that arguably have been accepted. Further, it must be reconsidered in light of demonstrable or predictable consequences that make one conclusion constitutionally preferable (*e.g.* to brand the program constitutionally "invidious") to its opposite.

We now turn to constitutional policy arguments that may be tendered in favor of affirmance of *Bakke* and that support the position that preferential admissions should be ruled "invidious."

196. *Id.* at 28.

197. *Supra* note 196.

198. *Supra* text at notes 172-181.

1. The constitutional postulate that the fourteenth amendment applies to "*any person*" entails that each individual must be judged on his own merits and ability, and not on the basis of any preferential category fixed by the state.¹⁹⁹
2. The Constitution is "color blind." The aim of the state universities should not be to produce black lawyers or black doctors for blacks, but to produce good lawyers and doctors for Americans.²⁰⁰
3. The preferential admissions program is "invidious" because non-racial means were available and untried—i.e. adoption of more flexible admissions standards with non-racial factors, and more aggressive recruiting of minority students.²⁰¹
4. Although a racial classification is considered permissible *per se*, race is no more relevant to the purpose of medical or legal education than wealth was relevant to voting in *Harper*.²⁰²
5. "The divisive effect of such preferences. . ." raises serious doubts about whether the advantages obtained by the preferred few are worth the inevitable cost to racial harmony.²⁰³

Without making detailed refutation of these contentions, some comments are in order.²⁰⁴ Despite the "*any person*" scope of the fourteenth amendment, the individual's right to hold a public job or to be admitted to a profession (and analogically to be admitted to qualify for either) are not absolute. They are subject to some public (state) limitations that may bear hard on certain persons.²⁰⁵ Since the "color-blind" approach was rejected when proposed in 1896, by Justice Harlan,²⁰⁶ it becomes a species of "Catch 22" when it is now raised in opposition to state efforts to remedy the effects of its earlier rejection. The "alternatives" (No. 3) inferentially suggest that admissions officials should come up with sophisticated non-racial formulae to achieve the same result; further, they should be more competitive in obtaining a fair share of the small minority pool of applicants that can qualify in open competition. The last two suggestions must be faced

199. Cf. *Bakke v. The Regents of the Univ. of California*, 18 Cal.3d at 50, 553 P.2d at 1163, 132 Cal. Rptr. at 691.

200. Cf. *Id.* at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693, quoting from Justice Douglas' dissent in *DeFunis*.

201. Cf. *Id.* at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

202. *Harper v. Board of Elections*, 383 U.S. 663 (1966).

203. Cf. *Bakke v. The Regents of the Univ. of California*, 18 Cal.3d at 62, 553 P.2d at 1171, 132 Cal. Rptr. at 699.

204. The California court cited the *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) statement: "The rights created by the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." It might well have quoted *Reynolds v. Sims*, (*supra* note 125), or many other cases for the incontestable proposition. But the argument begs the question at issue: do *Bakke's* personal constitutional rights have the amplitude he claims for them?

205. For a recent example, see *Massachusetts State Bd. v. Murgia*, 427 U.S. 307 (1976), where a state law compelling retirement at sixty, from a public job, was upheld against the equal protection challenge of a "person" physically and mentally capable of satisfactory job performance.

206. *Plessy v. Ferguson*, 163 U.S. at 559.

squarely in the context of the entire situation. Throughout this catalog of reasons runs a current of desirability (choice on individual merit, color-blindness, minimization of diversity and divisive effect) that does not compel constitutional decision one way or the other. Bakke argues that equality requires that his credentials now be fully honored across-the-board. The state preferential admissions program opts for preference now (for sixteen per cent of the vacancies) to some disadvantaged minorities, so that after the program has borne fruit, there may be a realistic equality of opportunity for all. The choice of "now," as plaintiff urges, or "later," as the university counters, is preeminently a question within the permissible bounds of local and state determination.

After the first draft of this article had been prepared, Justice Brennan sensitively raised some additional questions concerning "benign" discrimination in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,²⁰⁷ which demand attention in the present context.

6. Apparently "benign" treatment may in fact have illicit, rather than truly benign purposes.²⁰⁸ For example, some disadvantaged groups might be preferred at the expense of others—as where a program in Texas might favor Mexican-Americans at the expense of blacks or Indians, and a program in Ohio might favor blacks at the expense of Puerto Ricans.

The possibility of illicit discriminatory purpose is present once a preferential minority program is permitted; that must be conceded. But this should not be taken as a ground for eliminating benefits to all minorities. The difficult problem of line-drawing could well be left to the states, saving the federal equal protection right to complain when a demonstration of illicit purpose, as well as effect, can be made. *Washington v. Davis*.²⁰⁹

7. "Preferential treatment may act to stigmatize its recipient groups [and] imply to some the recipients' inferiority and especial need of protection."²¹⁰

One must deal with this objection with great care. The words "stigmatize" and "inferiority," as used in this context, are in particular need of clarification in lieu of the legal history of race relations in the United States. After the rocky history from the *Civil Rights Cases*²¹¹ and *Plessy*²¹² to

207. 97 S.Ct. at 1012-1014.

208. *Id.* at 1013: "[A] purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries. Accordingly, courts might face considerable difficulty in ascertaining whether a given race classification truly furthers benign rather than illicit objectives And if judicial detection of truly benign policies proves impossible or excessively crude, that alone might warrant invalidating any race-drawn line."

209. 426 U.S. 411 (1976).

210. *United Jewish Org'ns of Williamsburgh, Inc. v. Carey*, 430 U.S. at 173-74, 97 S.Ct. at 1014.

211. 109 U.S. 3 (1883).

212. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Brown,²¹³ we seem to have emerged in our law to the position that the richness and worth of each human person, as well as his or her superiority or inferiority, is measured not by race, not by economic resources and not by educational qualification. When working people were in "especial need of protection," many fought for, and accepted, the governmental sanction of protected unionization. To this day, some working people do not see this as a "benefit" and do not want it. Yet they may be subjected to "majority rule."²¹⁴ Undoubtedly, some blacks, Hispanic-Americans and Indians do not want preferential treatment, possibly on the grounds cited in this objection. But when governmental policy decides that past deprivation has made present preference an indispensable tool of effective personhood and citizenship—as in many determinations made primarily in the line of governmental policy—some individual costs are present.

8. It is a "social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected in a given classification."²¹⁵

As a social reality, this objection must be conceded. But it is hardly solid ground for a constitutional barrier by the Court to any program that is otherwise constitutional. The doors are open to such objectors to bring political and legal pressures to bear in their states against instituting and continuing preference programs. Practically speaking, the minorities do not have comparable recourses open to them if a constitutional red light terminates the possibility of such programs. The green light simply leaves to the states an ongoing judgment. Employers, as a group, were adversely affected by national labor policy that required them to deal with recognized labor unions. The progressive income tax fell especially on a particular group of economically advantaged. Like those who would be disadvantaged by preferential admissions, these hard-hit groups were left with possible repeal as the only further avenue of objection. It is a "social reality;" but independent constitutional basis apart ("invidiousness," "arbitrariness" or non-rationality), this plight is simply the democratic process at work in a federal system.

Contrary constitutional policy considerations that must be considered before erecting a definitive constitutional barrier to these controversial programs include the following:

a. Considerations of general constitutional significance.

(1). Federalism and local control.

Counseling against expanding constitutional restraints here are traditional considerations of federalism and the Court's recent reserve against extend-

213. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

214. For the effect in labor law of majority rule upon members of the bargaining unit who want no part of any union, see *J.I. Case Co. v. NLRB*, 321 U.S. 335 (1944).

215. *United Jewish Org'ns of Williamsburgh, Inc. v. Carey*, 430 U.S. 173-74, 97 S.Ct. at 1014.

ing national dominance to areas such as public employment and education, which have traditionally been local concerns.²¹⁶ Many of the considerations that follow are specifications of this larger theme.

(2). Flexibility in a time dimension.

Legislation and administration are better adapted than constitutional judicial decisions to furnish the flexibility required by a program whose legitimacy derives from local support and perception of changing needs and conditions. Again, there is no constitutional mandate for "now" rather than "later."

(3). Varying responses in different states and localities.

A program as controversial as preferential minority admissions evokes varied popular responses in different states. In one, there may be greater concern with generosity to minority groups or perceived social injustice; in another, there may exist a more individualist ("any person") bent. The California Supreme Court (or Washington's) should be free to declare such a program a violation of its own state constitution, rather than evoking a national constitutional inhibition. The political process should be permitted its restraints.

(4). The Constitution mandates no specific theory of justice.

Different theories of justice are in conflict in the debate over preferential minority admissions. One theory of individual justice is rooted in an individual's superior current ability relative to others. Another approach to justice gives place to laying ground for greater future egalitarianism. The Constitution makes no fixed choice of any one theory. Clear "invidiousness" or "arbitrariness" apart, the states should have room for divergent choice among them.

b. Considerations relating to inconsistency with constitutional policies already established (herein of "race" since *Brown*.)

(1). The historic purpose of equal protection, long judicially accepted.

There has been, since *Brown*, unswerving acceptance of the postulate that the fourteenth amendment was enacted primarily to remove the vestiges of slavery.²¹⁷

Brown, and its agonizing successor cases, have recognized this postulate in increasing arenas of public action—but in none so forcibly as education,

216. See *Massachusetts State Bd. v. Murgia*, 427 U.S. 307 (1976) and *National League of Cities v. Usery*, 426 U.S. 833 (1976), for recent expressions by the Court.

217. This does not resolve the disputed historical questions as to the total intentions of the framers of the fourteenth amendment. See note 12 *supra*. Nor does it confront the doubts confessed by the Court in *Brown v. Board of Educ.* as to the specifics of the amendment's aspirations in the race line. This paper has proceeded on the facts that (1) the Court has actually interpreted the fourteenth amendment in terms of the two lines, or principles, discussed herein; and (2) since *Brown*, the Court has recognized that the race line is paramount (as Slaughter-House had, with questionable designs). See notes 9 and 54 *supra*.

the key to full participation in the republic. The intense national experience in viewing "Roots" on television has portrayed to a broader audience than ever before the fact that educational retardation has been imposed on generations of Americans and (I would add) that more than generosity is now at stake here.²¹⁸ The Court is asked to fashion a constitutional obstacle to entering those professions and public universities which are aware of the need to get on with the catch-up. This is hardly in the spirit of *Brown*.

(2). The Supreme Court's use of affirmative corrective measures.

In education decisions following *Brown*, the Court has insisted upon affirmative correction to the extent of imposing serious inconvenience upon non-minority children and their parents and has used explicit racial classifications in the process.²¹⁹

The Court has stood by its position in face of serious social disturbances, derived from white majority protest at the deprivation of their freedom of choice to attend neighborhood schools.²²⁰

(3). The Supreme Court's emphasis on discriminatory purpose.

The Court has hesitated to impose corrective measures where there has been no showing of discriminatory state purpose causing segregation in education.²²¹ In lawyers' parlance, it has moved against *de jure*, but not *de facto*, segregation.²²² The Court has also declined to fashion constitutional rules requested by blacks when the state laws and regulations have discriminatory racial impact, but no discriminatory racial purpose.²²³

(4). Absence of judicial precedent against ameliorative state action.

There is an affirmative message in the fact that the United States Supreme Court has not rebuffed ameliorative state action in behalf of racial minorities since 1878.²²⁴

218. See, e.g. J. RAWLS, A THEORY OF JUSTICE 83-90 (1971); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions*, 49 WASH. L. REV. 1 (1973).

219. Consider, with reference to the Swann remedies (*supra* note 69) Professor Ely's argument: "Children can be hurt by busing, not simply by the inconvenience of the transportation process itself, but also by the transition from a school environment in which they have grown secure to strange surroundings in which they are likely to find themselves in a racial minority for the first time The fact remains that busing hurts people precisely because of their color." Ely, *supra* note 186, at 724.

220. A recent case in point is the Court's denial of certiorari in the fall of 1976 in the Boston busing case.

221. *Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. 189 (1973).

222. See note 72 *supra*.

223. *Washington v. Davis*, 427 U.S. 229 (1976). Recall the Court's hospitable enforcement of the fair employment practice statute (Title VII) as to back pay and seniority. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Consider also the expansive reading given the thirteenth amendment since *Jones v. Mayer*, 392 U.S. 409 (1968) (*supra* note 54).

224. *But cf.* *Hall v. DeCuir*, 95 U.S. 485 (1878), where the Supreme Court struck down, on commerce clause grounds, a Louisiana statute prohibiting racial segregation on common carriers within the state.

c. Considerations of predictable social and educational developments in light of an affirmance of *Bakke*.

(1). Anticipated decrease, rather than increase in participation of blacks and other minorities in at least the two professions considered in *DeFunis* and *Bakke* would result, with comparable anticipated effect in other areas where higher education is the key to entry.

The suggestion by the California Supreme Court of increased recruiting as a viable alternative to the preference plan²²⁵ borders on the "irrational." Demonstrably, the problem is the non-availability of a pool of blacks and other minorities that at present can compete with whites for available seats. Recruiting would serve to attract some to School A as against School B, which did not recruit "vigorously"; still, it would not increase the overall participation of minorities. The question of likely decrease of black and other minority participants in medical and legal education in face of an affirmance of *Bakke* led to attempts at empirical verification. One survey, conducted by North Carolina Central University Law School (see Appendix *infra*), asked a single question of 130 law schools and 120 medical schools with respect to the five-year period 1972-1977: "How many actual minority admittees would probably have qualified for admission on your general admission standards, if there had been no preferential admission plan?"²²⁶ The medical school responses were fragmentary and were not compiled. Howev-

225. *Bakke v. The Regents of the Univ. of California*, 18 Cal.3d at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

226. The summary of Chart I (set out in the Appendix) tells the first part of the story. In 1976-77 there would have been only 80 Blacks entering 42 reporting law schools that enrolled 11,656 1st year prospective members of the bar. The Blacks were, therefore, only $\frac{1}{100}$ of 1% (.0075) of the total entering law students. The methodology of the NCCU survey, conducted in March of 1977, demonstrates that these figures are solidly representative, because the reporting law schools constitute an unusually precise sample of the universe of American legal education. In 1975-76 there would have been only 72 Blacks among 8448 entering law students. (.0085); in 1974-75 only 64 out of 8357 (.0077); in 1973-74 only 42 out of 6511 (.0065); and in 1972-73 only 33 out of 5159 (.0064). In the three-year period from 1974-76 only 216 Blacks would enter these law schools out of 27,444 (.0078). Extrapolating this figure against the total 1st year nation-wide law enrollment for these three years of 117,108, there would have been a total of 913 Black law students entering, an average of 304 for each year. These last figures include those admitted to the four predominantly Black law schools in the United States: Howard University in Washington, D.C.; North Carolina Central University in Durham, North Carolina; Southern University, Baton Rouge, Louisiana, and Texas Southern University, in Houston, Texas.

The same story may be told in another way by comparing the number of Blacks *actually* admitted with those who *would have been* admitted if they had been forced to run the general admissions (LSAT-GPA) gamut. The summary of Chart II (which, like Chart I, is set out in the Appendix) makes this point—that without special minority admissions only 11.19% of the Blacks actually enrolled would have been given a seat in law school. And, instead of the 1383 Black 1st year law students who did enter the reporting schools in the three-year period 1974-76, only 139 (12.36%) would have answered the first roll call in Torts if uniform general admission standards using prevailing LSAT-GPA criteria were enforced. Comparable results ensue when the NCCU survey addresses the standpoint of Indians, Hispanic-Americans, and other minorities whose hypothetical fate was similarly tested.

er, a net 40% return came from the law schools. In 1974-77 if special minority admissions had not been used in the reporting schools, instead of 1383 black students actually enrolled in the 1st year class, there would have been only 171, or 12.36% of the actual figure. If the figures are limited to the single year 1976-77, 78 would have been admitted instead of the actual 697 (11.19%). (See Chart II of Appendix, where these NCCU survey results are elaborated and explained.) Taking the same three-year period 1974-77, if special minority admissions were not used, but the prevailing variations of LSAT-GPA ratings, there would have been only 216 black students admitted to entering classes out of a total 1st year enrollment in those schools of 27,444. That means that only 78/100 of 1% of entering law students would have been black, as compared to the present (unsatisfactory) 2% black lawyer representation in the national lawyer population, and 11% black representation in the total population. (See Chart I of Appendix.)

(2). An affirmance of *Bakke*, unless carefully qualified in its terms, would decrease professional educational opportunities for blacks far beyond their non-admission on preference grounds to predominantly white schools.

Such a decision would raise serious question as to the continued existence of predominantly black schools. For example, there are four law schools in the country that presently fall into this category. So long as there is a pressing demand for admission to the legal and medical professions, such schools may succumb, following a constitutional rule against a preferential admissions policy that was calculated to salvage a reasonable opportunity for the professional education for black students. At the very least, such a decision would raise serious doubts in these schools concerning the implications of improving the quality of professional education for minority students. For as education improves at the now predominantly black school, the number of non-minority applicants with higher scores increases.²²⁷ In time perhaps, the "better" predominantly black schools would become, like the others, predominantly white. Justice Douglas' suggestion in his *DeFunis* dissent for a result-oriented admissions test that would make possible substantial minority entrance "on non-racial grounds" is a non-viable alternative, which raises Disneyesque recollections—of Mickey Mouse.²²⁸

227. See Note, *Alternative Schools for Minority Students: The Constitution, The Civil Rights Act and the Berkeley Experiment*, 61 CAL. L. REV. 858 (1973); Canby, "Northern" School Segregation: Minority Rights to Integrate and Segregate, 1971 L. & SOC. ORD. 489.

The reality of the problem suggested in the text may be verified from admission statistics of such schools, in a period of continuing demand for seats in state law and medical schools. This sensitive problem suggests solution by political give-and-take, with all its unpredictability, rather than by final judicial solution on *per se*, or other, constitutional grounds.

228. The California court, borrowing directly from the Douglas dissent, recommends this unattractive alternative. *Supra* note 171.

d. Considerations of whether the *Brown* heritage has a future.

Beyond history and case law lies the fact that the United States Supreme Court has taken seriously the *Brown* heritage. It is worth considering the bizarre posture that would result from the Court's interpreting its materials in any other way than to require reversal of *Bakke*. In light of what that heritage has been, an affirmation could well signal a new era in constitutional race relations, post-*Brown*, with perhaps a slogan of its own: "each person for one's self." To make this point, first a recap, and then a few illustrations.

(1). The argument to date.

Brown is a landmark in our history. On that date in 1954 the Supreme Court dramatically reaffirmed something that was not new, but had long been forgotten in practice—that the fourteenth amendment had been passed principally to restore to black citizens the dignity and right to equality in citizenship of which they had been deprived. Timidly at first, but resolutely, the Court insisted on nonsegregated equality in education, and then, almost at once, in all public facilities. After an overpatient start, the Court finally insisted, at some cost to other citizens and to its own acceptability, upon implementing educational integration. It has not yet succeeded in its goal, and perhaps it is slowing down too soon, but it has kept both the principle and goal aloft. Meanwhile, in the spirit of *Brown*, it has struck down previously tolerated legislation that impinged on that dignity and full citizenship of blacks, often waving the standard of race as a "suspect class." In this same spirit came effective national legislation, for the first time in three-quarters of a century, which made voting a reality and gave a realistic hope of removing discrimination in employment and housing. Overwhelmingly, the Court interpreted and enforced this legislation in the spirit of *Brown*. In the spirit of *Brown* the Court gave an expansive interpretation of the constitutional bases of the civil rights acts, finding new constitutional authority in the thirteenth amendment, the commerce clause, and the constitutional right to travel.

In this same spirit, professional and educational groups in public and private sectors recognized the need to help qualify the long-neglected black citizens for leadership and professional service. Thus the preferential admission programs were born—beyond the requirements of Constitution or statute. To their credit, these professional persons and educators saw their programs as filling a national need—in the spirit of *Brown*.

(2). The new incongruities.

If the fourteenth amendment's equal protection clause, out of which *Brown* was finally born, is now grasped to extinguish its spirit, consider some incongruities with which we shall have to live.

(a). The members of the white majority will have used the "suspect class" doctrine, developed to prevent indignities and deprivations to blacks, to eliminate possibilities of black training for leadership, fuller citizenship and professional responsibility. A student note, written when *DeFunis* was being considered, stated the dilemma well:

It would be ironic indeed if a standard of review (strict scrutiny/compelling state interest) which was developed to help end discrimination against members of minority groups were used to ban state practices designed to alleviate the effects of that very discrimination.²²⁹

Ironic is an understatement, indeed. Before asking the lawyer's question—"Can you prove that there was actually *de jure* discrimination in this or that medical or law school?"—consider another bizarre consequence of a mechanical affirmance of *Bakke*.

(b). The advantages of *not* being included in a "suspect class" will prove to be greater than the advantages of being, like blacks, clearly included. Recall that both Justice Douglas and the California Supreme Court urged admission procedures that would favor the underprivileged, as such, but not on grounds of race.²³⁰ In *Rodriguez*,²³¹ underprivileged citizens in Texas sought to invoke the "suspect class" formula. The Court said, "no." Empoverishment or minority status does not trigger membership in a "suspect class." "Suspect class" has a very special origin: race and the deprivations visited upon the minority blacks. But Justice Douglas, and the California court, would bar *members* of the "suspect class" from special privileges in admissions, and at the same time welcome *non-members* to such privileges, without running the gauntlet of strict scrutiny. If the law should become such a word game, the cost would be great to the "constitutionally" disadvantaged. But there is more. Consider the Indians.

(c). Preferential treatment for Indians, firmly upheld by the United States Supreme Court, and rightly so, makes incongruous the denial of preferences to blacks. The Supreme Court, alone among governmental branches, has a long and honorable record of sympathetic response to the

229. Note, *Ameliorative Racial Classifications Under the Equal Protection Clause*, 1973 DUKE L.J. 1126, 1149.

The crucial nature of the preferential admissions problem is evidenced by an expanding literature. Among studies not already cited are: A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 61-88 (1976); Karst and Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); Lavinsky, *DeFunis v. Odegaard: the "Non Decision" With a Message*, 75 COL. L. REV. 520 (1975); O'Neil, *Preferential Admissions*, 80 YALE L.J. 699 (1971); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974); R. O'NEIL, *DISCRIMINATING AGAINST DISCRIMINATION* (1975); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1 (1974); Sandalow, *Racial Preferences and Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975).

230. See notes 48 and 171, pp. 132, 135 *supra*.

231. 411 U.S. 1 (1973). See text at note 128 *supra*.

grievances and claims of Indian tribes. In *Morton v. Mancari*,²³² the obvious constitutional challenge was made to a federal program of employment preferences in the Bureau of Indian Affairs—for “suspect classification” of race. The legislative judgment was left undisturbed by Justice Blackmun, speaking for a unanimous Court. All kinds of reasons were given: it was not a racial preference at all, but only applied to tribes; the tribes had to be federally recognized, so it was a political, not a racial preference; it was limited to employment only in the Bureau of Indian Affairs, whose legal status was “truly *sui generis*.” But the bottom line was “the fulfillment of Congress’ unique obligation toward the Indians”²³³—a truly solid and responsible reason. Now, there is no history of treaties with blacks, nor of a guardian-ward status, as is the case with the Native Americans. But what is the meaning of all those pronouncements the Court has made, antedating the *Brown* period but repeatedly made in recent years, that blacks are indeed central to the purpose and remedies of the fourteenth amendment?²³⁴ While all others are protected by “equal protection,” is there not room for a “preferred position” here too? On what constitutional theory will the Court refuse to match judicial concern for article I, section 8, clause 3,²³⁵ and the Indians, by a comparable updated concern for amendment fourteen and the blacks? I have no doubt that an opinion setting out such distinguishing theory could be written. After all, there are different constitutional concerns. My question is, would it be credible?

(d). Consider again the impact of an affirmance of *Bakke* on the predominantly black school. If the California court’s rationale were accepted, banning any use of race as a criterion for admission, such schools (especially professional schools in a period of demand) might well lose their identity. More to our point, they might be unable, (barring exotic admission formulas), to educate any significant number of black doctors or lawyers because of the white in-flight. If blacks can no longer gain admission to predominantly white schools (without preference being available), and can no longer gain admission in significant numbers to now predominantly black schools (because of applications of higher-ranking whites), what has happened to the notion of full and equal citizenship for blacks in American society? Someone will suggest that blacks, entitled like other citizens to associational preference, will be allowed to establish predominantly black private schools. In this day of higher education’s dependence on federal funds, this hypothesis is not beyond criticism. But the fact is that some racial, ethnic and religious groups are able to, and do, support private colleges and professional schools with admission preferences. But for the

232. *Morton v. Mancari*, 417 U.S. 535 (1974).

233. *Id.* at 553-555.

234. See notes 9 and 54 *supra*.

235. “The Congress shall have the Power . . . To regulate commerce . . . with the Indian Tribes.”

most underprivileged of our special groups, the blacks and the Indians, this is just not realistic. These citizens, if we are talking in significant numbers, must attend public-supported schools, or not attend at all. Consequentially, the blacks, at least, would be elbowed out of the professions.

With these by-products, or any of them, in view, the likelihood of the Supreme Court's clearing the path for Mr. Bakke is mercifully slim. If it does, the future will be selfish.

(e). Considerations of basic principle concerning the future direction of the United States, as a polity.

A few United States Supreme Court decisions in each of our centuries have sounded a theme, or a mood, sometimes admirable, sometimes less so, that affected the main directions which the country followed for decades ahead. Is *Bakke* such a case? Perhaps. Consider the recent reflections of a successful, black academic lawyer, Professor Derrick A. Bell, Jr. of Harvard Law School:

Constitutional approval of racial segregation which was rendered obsolete by mid-twentieth century events is now officially condemned. But optimism for the future must be tempered by past experience and contemporary facts. Racial discrimination, stifled but not stilled by a generation's worth of civil rights laws and court decisions, continues to flourish wherever the spur of profit or the fear of loss is present. . . .

Measurable improvement in the status of some blacks, and predictions of further progress have not substantially altered the maxim: white self-interest will prevail over black rights. This unstated, but firmly followed principle has characterized racial policy in this society for three centuries. Racial policies are still based on the sense—no less deeply held when it is unconscious—that America is a white nation, and that white dominance over blacks is natural, right and necessary as well as profitable and satisfying. This pervasive belief, the very essence of racism, remains a viable and valuable national resource. The commitment to white dominance is no less potent because it is usually unrecognized, frequently unintended, and virtually never acknowledged.

There is, I suggest, evidence in the past and indications in the present that the drive of whites to satisfy and justify feelings of racial superiority will result in policies, private and public, that have the effect of retaining dominance over nonwhites for many generations to come.²³⁶

The Supreme Court's establishment of a novel constitutional barrier blocking majoritarian strategies to spur black and other minority participation in crucial social fields would do much to reinforce Professor Bell's worst fears. One of his predecessors once wrote that the Supreme Court is

236. Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 5-6 (1976).

predestined in the long run, not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions, to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and enduring principles.²³⁷

I prefer to cast my hopes with Professor Hart. The result in *Bakke* will go far to show which of them is right.

VII. POSTSCRIPT: FEAR OF STANDING

As suggested earlier, there is a well-founded fear that the Supreme Court may turn aside, as it did in *DeFunis*, from this troublesome issue of minority preferential admissions by reversing on the grounds that *Bakke* has no standing. It has long been the rule of the Court that though a plaintiff may have standing according to the law of the state from which the case ascends, the Supreme Court is free to decide this access question according to its own rules of standing.²³⁸ The Court could well employ its controversial new standing doctrine²³⁹ to relieve it from reaching the merits.

Minority preference admissions have lost momentum since the Court's disposition of *DeFunis*, in 1974, on mootness grounds. Continued uncertainty as to their constitutionality would certainly further erode support for the program. So realistic is this concern that a reversal on standing grounds should be considered not as continuing a stalemate, but as delivering a distinct setback to the concept of preferential minority admissions. In an article²⁴⁰ that had no great influence in its day, but has since come into its own, the late Professor Alexander Bickel urged the Court's use of standing, among other devices,²⁴¹ as a beneficent means by which the Court could avoid controversial constitutional decisions. Recent developments in the Court's cases on standing suggest that a majority of the justices now find Bickel's notion attractive. The policy reasons for reversal of *Bakke*, suggested in the last section, stand against such subtle attractiveness. For escape from responsible decision is no virtue.

The intricacies of the standing labyrinth can be but hinted at here²⁴²—just

237. The late Professor Henry M. Hart Jr., cited in A BICKEL, *THE LEAST DANGEROUS BRANCH* 27 (1962).

238. *Doremus v. Board of Education*, 342 U.S. 429 (1952). See Professor Paul Freund's criticism of *Doremus* in *SUPREME COURT AND SUPREME LAW* 35 (Cahn ed. 1954).

239. As developed principally in *Warth v. Seldin*, 422 U.S. 490 (1975), and *Simon v. Eastern Kentucky Welfare Rights Org'n.*, 426 U.S. 26 (1976). But cf. *Singleton v. Wulff*, 428 U.S. 106 (1976), for a hint of erosion of the five-justice majority that supported Justice Powell's prevailing opinion in *Warth*. Cases in the 1976 term shed no further light. See *Village of Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252 (1977) and *Craig v. Boren*, 429 U.S. 190 (1976).

240. Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). But see Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

241. Such as ripeness, mootness, abstention, and political questions.

242. I dealt more fully with the present standing confusion in *The Warth Optional Standing Doctrine: Return to Judicial Supremacy?*, 25 CATH. UNIV. L. REV. 467-534 (1976).

enough to indicate the reality of the concern. In *Warth v. Seldin*,²⁴³ in 1975, the Court, by a bare 5-4 majority, accepted an opinion by Justice Powell that proposed a broad "prudential" power in the Court to dismiss cases for want of standing, even when the article III requirements had been met. This notion seemed to be an across-the-board extension of the familiar doctrine that there is no absolute right of litigants to assert constitutional rights of third parties (*jus tertii*), although the Court may permit a litigant in certain specified situations to do so.²⁴⁴ The Powell opinion in *Warth*, a restrictive zoning case, further specified that a complaint could be dismissed for want of standing where it does not allege facts "from which it reasonably could be inferred that, absent the offensive state action, petitioners would have been able to achieve their objective," and that, "if the court affords the relief requested, the asserted inability of petitioners will be removed."²⁴⁵ The plaintiffs in *Warth*, members of minority groups, had alleged that "as a result" of respondent's exclusionary scheme, they could not live in Penfield, although they desired and attempted to do so. To four dissenting justices, this argument seemed adequate to constitute the allegation of a "personal stake," or "injury-in-fact," which had been the accepted standing formula of the Court for several years.²⁴⁶ Three of these Justices—Brennan, White and Marshall—argued that "the Court's real holding is not that these petitioners have not *alleged* an injury resulting from respondent's action, but [that] they are not to be allowed to prove one. . . . To require them to allege such facts is to require them to prove their case on paper in order to get into court at all, reverting to the form of fact-pleading long abjured in the federal courts."²⁴⁷

The controversy continued in *Simon v. Eastern Kentucky Welfare Rights Organization*²⁴⁸ the following term. In this case, individuals and organizations had sued the Secretary of the Treasury to enjoin enforcement of a new treasury regulation. All the justices agreed that there was ample basis to dismiss the complaint. The plaintiffs claimed the regulation violated the Internal Revenue Code by encouraging hospitals to refuse them the charity treatment that the Code required, as basis for a special tax exemption. Justices Brennan and Marshall agreed that the claimed injury was not ripe for adjudication, because it had not effectively alleged, or proved, that the hospitals in question were affected at all by the challenged regulations. Writing the opinion for the Court, Justice Powell chose to assume, *arguen-*

243. *Supra* note 178.

244. For further elaboration of the *jus tertii* problem, see article cited *supra* note 242. The Court fully reconsidered it in *Singleton v. Wulff*, 428 U.S. 106 (1976), without agreeing on further clarification.

245. *Warth v. Seldin*, 422 U.S. at 504.

246. The "personal stake" requirement for Article III standing derived from *Baker v. Carr*, 369 U.S. 186, 204 (1963). This was further identified as "injury in fact, economic or otherwise" in *Ass'n of Data Processing Serv. Org'ns, Inc. v. Camp*, 397 U.S. 150, 152 (1970).

247. *Warth v. Seldin*, 422 U.S. at 526, 528.

248. 426 U.S. 26 (1976).

do, that such allegations had been adequate. He contended, even so, that the complaint was vulnerable to the want-of-standing doctrine, as developed in *Warth*.

In *Simon*, the Court assumed the plaintiffs had implicitly alleged that a grant of the requested relief would (1) result in a requirement that all hospitals serve indigents as a condition to favorable tax treatment, and (2) "would 'discourage' hospitals from denying their services" to plaintiffs.²⁴⁹ But this was not enough, wrote Justice Powell, for "it does not follow from the allegation and its corollary that the denial of access to hospital services *in fact results from* the contested new ruling, or that a court-ordered return by [the government defendants] to their previous policy would result in these [plaintiffs] receiving the hospital services they desire."²⁵⁰

The implications of this conclusion for Bakke, which the Court roots in article III standing requirements as opposed to "prudential" considerations, are obvious. The *Simon* opinion called it "purely speculative whether the denials of service specified in the complaint fairly can be traced to [the government defendants'] 'encouragement'" and "equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to [plaintiffs] of such services."²⁵¹ If this analysis is insisted upon by the Court, with respect to Bakke's claim, it would conclude that even by granting Bakke's request to brand the preferential minority admissions program unconstitutional, there is still no assurance that Bakke, rather than some other non-minority applicants, would actually receive places in the medical school class.²⁵² The California court apparently recognized this infirmity and sought to circumvent it. Citing the analogy of certain Title VII discrimination cases,²⁵³ the California opinion (without hinting of a standing concern) held that when Bakke proved unconstitutional discrimination, "the burden of proof shifted to the University to establish that he would *not* have been admitted to the 1974 or 1975 entering class without the invalid preferences."²⁵⁴

There is some basis for a belief that a majority of the United States Supreme Court is no longer firmly aligned behind Justice Powell, either with respect to his general ("prudential," trans-article III) theory, or with

249. *Id.* at 42.

250. *Id.* at 42. (emphasis supplied)

251. *Id.* at 42-43.

252. "The trial court found that Bakke would not have been admitted to either the 1973 or 1974 entering class at the University even if there had been no special admissions program." *Bakke v. The Regents of the Univ. of California*, 18 Cal.3d at 63, 553 P.2d at 1172, 132 Cal. Rptr. at 700. However, in their petition for rehearing the Regents conceded that they could not sustain the burden of proving that Bakke would not have been admitted absent the preferential admissions program. (Record in U.S. Supreme Court, p. 445.)

253. In particular, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). Oddly, the California court overlooked *Washington v. Davis*, 426 U.S. 229 (1976), and the indication that Title VII decisions did not track determinations on fourteenth amendment equal protection issues (although it discussed *Davis* in another connection).

254. *Bakke v. The Regents of the Univ. of California*, 18 Cal. 3d at 63, 553 P.2d at 1172, 132 Cal. Rptr. at 700 (emphasis added).

respect to his insistence on detailed factual allegations, and precise proof of nexus, as a basis for article III standing itself.²⁵⁵

The possibility remains of a “technical” reversal. But one would hope that the Court does not succumb to the temptation—for the reasons suggested above, as well as the plain absurdity of any analysis of standing that would deny Bakke access to the courts for the purpose of challenging this program.

255. Justice Brennan's argument that the Powell approach is “reverting to the form of fact pleading long abjured in the federal courts” (*Warth v. Seldin*, 422 U.S. at 528; *Simon v. Eastern Kentucky Welfare Rights Org'n*, 426 U.S. at 55 n.6) may be winning recruits. At least in *Singleton v. Wulff*, 428 U.S. 106 (1976), only four justices accepted Justice Powell's dissenting opinion on standing. The majority opinion in *Singleton*, by Justice Blackmun, treated the case strictly as involving only the question of assertion of constitutional rights of third parties (*jus tertii*, *supra* note 244), and sought to firm up the factors applicable to that specific concern. Justice Powell (with three Justices joining him) concurred in the result but, as in *Simon*, tried to use the opportunity to reinforce his *Warth* position. Justice Stevens, concurring, went a long mile with the majority, but held aloof from alignment with either bloc (Blackmun-Brennan-Marshall-White, on the one hand or Powell-Rehnquist-Burger-Stewart, on the other).

APPENDIX

NORTH CAROLINA CENTRAL UNIVERSITY LAW SCHOOL SURVEY, March, 1977

1. Design of Survey—

The NCCU survey expressly builds upon the extensive statistical report on minority group enrollment data in American law schools by James P. White, Consultant on Legal Education to the American Bar Association (MEMORANDUM QS7677-9, dated January 18, 1977, hereinafter called ABA Report.) This report compiles the minority group student enrollment of individual law schools for each year from 1971 to 1976 under six specific minority categories. In addition, it has a valuable compilation table of each minority group for each year since 1969-70, broken down by year of law school study.

The NCCU survey referred to the ABA Report and asked a single question: "How many actual minority admittees would probably have qualified for admission on your general admission standards, if there had been no preferential admission plan?" Replies were requested for five years, from 1972 to 1976, under four minority headings—Blacks, Hispano-Americans (including Mexican-American and Puerto Rican), Indian and "other (please identify)". A final column asked for "Total 1st Year Admissions." The survey was sent to 131 law schools, the law schools listed in the ABA Report that had indicated admitting blacks and other minorities, with the exception of the four predominantly Black law schools. A comparable survey was sent to 120 medical schools.

2. Response to NCCU Survey—

As soon as the NCCU Survey was sent out it became apparent that it had crossed in the mail with the Law School Admissions Council survey asking substantially the identical question. However, it proved crucial that LSAC had inquired only with respect to the single year 1976-77. For, unexpectedly (in face of the competition), there were substantial returns to the NCCU law school survey. By contrast the NCCU medical school survey returns were insufficient to justify compilation.

Some early replies to the NCCU law school survey had begged off on grounds that it "crossed with a similar request from the Law School Admission Council." Others pointed out "that we have recently sent out a similar form, but of a more confidential nature" to LSAC. But with the Supreme Court's grant of an extension for filing briefs the tide turned and the final net was a 40% response. In the circumstances this compared favorably with the 51.9% response from law schools to the recent Cartter Report on "The Leading Schools of Education, Law and Business." (See *Change*, February 1977, pp. 44-48).

Of the 40% replying, 32 percent (43 law schools) furnished data that was responsive to the questions asked and constitutes the main data upon which

are based the survey's conclusions. Supplemental connecting data derived from the ABA Report is explained below.

3. Reporting Law Schools Constitute a "Fair Sample."

The 40% return, and the 32% data-furnishing response, are highly satisfactory in the circumstances. But since they are considerably less than 100% completeness one fairly inquires whether those reporting constitute a "fair sample" of American law schools, so that the conclusions reached may be taken as representative of the views of American law schools as a whole. Were it possible to identify the reporting schools by name it would be clear that these schools constitute a representative cross-section of American legal education institutions. However the NCCU survey specified that data would be treated on a confidential basis by law schools requesting confidentiality, and most did. While maintaining the promised confidentiality the reporting schools may be still adequately placed in reference to the universe of American law schools by considering three factors: geographical distribution, public or private character, and level of academic repute. The first two may be dealt with straightaway, the third requires consideration of two independent studies.

The 43 law schools reporting usable data cover 26 states: 21% from the New-England-Middle Atlantic area, 22.5% from the South, 37% from the Middle West, 16% from the Far West (Trans-Rocky Mountains). 44% of these schools are public, and 56% private. Only one of the 43 reporting schools said simply: "Don't know."

Moving to the level of academic repute, among the data-furnishing law schools are five which are ranked among the top 15 American law schools in the recent Carrter Report (cited above). However a representative sample is not assured by the mere presence of excellence. To establish the validity of the sample from the vantage point of the standing of the schools reporting we refer to the "Law School Locator 1976-77" prepared by the University of Rochester to "help the student find a set of appropriate law schools, given that student's grade point average and LSAT score." This study classifies law schools under 13 headings (A to M). Law Schools with highest admission requirements are classed in A (LSAT 700+, GPA 3.75-4.00) and B (LSAT 700+, GPA 3.50-3.74). Succeeding letters represent lower admission requirements down to M (LSAT 500-549, GPA 2.75-99). Within these letters A to M, are included 145 law schools. A final category lists 18 "schools with no information available this year."

For greater simplicity we consolidate the 13 A-to-M headings into five couplings based on LSAT, and ask how the NCCU reporting schools fall into these five coupled headings as compared with how the Rochester universe of 145 law schools fits within the same coupled headings. The following chart shows how remarkably closely the NCCU distribution tracks the proportions of the de facto classification based on admission requirements of the Rochester survey. This correspondence effectively establishes the validity of NCCU's 43 reporting schools as a "fair sample" of the American law school universe.

	LSAT	Rochester Distribution (145 schools)	NCCU Distribution: Reporting Schools (43)
A-B	700+ 2*/8	5.5%	4.8%
C-D	650+ 13/31	21.4%	31%
E-F-G-H	600+ 19/66	45.5%	45.2%
I-J-K	500+ 8/37	25.5%	19%
L-M	500+ 0/3	2%	0%

* NCCU schools here total 42; the 43rd was unclassified.

The top line of the above chart expresses that in the combined categories A and B of the Rochester reportage, law schools require 700+ LSAT for admission. Two of the NCCU reporting schools fit into this coupling, out of the total of eight schools listed by the Rochester report as having this requirement. This category A-B includes 5.5% of the 145 schools constituting the Rochester classifiable universe. The category also constitutes 4.8% of the reporting schools in the NCCU survey. A comparable correspondence is seen in the largest category, E-F-G-H. The other categories are less identical in correspondence, but still remarkable. (The "unclassified" schools in the Rochester report are 18; one of the NCCU schools is on this list. This factor has been left out of the above computations as not significant.) See Chart III, *infra*, for correction of NCCU sample for lower participations of reporting schools.

4. Supporting Data from ABA Report—

Some reporting schools did, and some did not, list the total Black admissions in each given year. When they did there was no need to look elsewhere. Where they did not, the data were supplied from the ABA report, by averaging the minority total attendance figures for three years, dividing by three to secure a 1-year factor, and adding 20%. This 20% factor is justified by conclusive data in Table A of the ABA report, which shows a decline of 20% from Black 1st year enrollment to Black attendance in 2nd and 3rd year of law school. Incidentally, this is not simply a reflection of academic deficiency. As one reporting school pointed out, "We experience a significant amount of attrition among Black students who are very well qualified for us but who are affirmatively acted upon at other schools." Other schools commented on other grounds for the attrition. The point must be stressed that all candidates admitted, by general or by special minority admission programs, are certified as qualified to aspire to professional work in a particular school, by the specialists on the scene who are best qualified to make that judgment. To date most law schools have made their admissions choices within the two-track system of general admissions (LSAT-GPA, see discussion of Rochester Locator, *supra*) and special minority admissions.

5. Data Charts

Chart I (Summary Form)

Effect of Elimination of Special Minority Admissions:
Black Students in Total Entering Law Classes, 1972-1976

1976-77			1975-76			1974-75			1973-74			1972-73		
A.	B.	C.	A.	B.	C.	A.	B.	C.	A.	B.	C.	A.	B.	C.
10,639	11,656	80	8448	9196	72	8357	9125	64	6511	7010	42	5159	5432	33
.0075	.0069	.0085		.0078	.0077		.007	.0065		.006	.0064		.0061	
(42 Schools)			(35 Schools)			(34 Schools)			(28 Schools)			(22 Schools)		

Interpretation: In 1976-77 if special minority admissions programs were not used (but the prevailing variations of LSAT-GPA ratings) there would have been only 80 Black students enrolled in the 1st year class in the 42 law schools covered by these computations. The total 1st year enrollment in these schools (column A) is computed by deducting from the actual enrollment all minorities benefited by the special minority admissions plan (except the 80 who would be admitted even without the special minority program). The figures in Column B represent the actual total enrollment in these schools without the deduction of minorities. Either figures (Columns A or B) are arguably appropriate. Column A assumes that the vacancies now filled by enrollees benefiting from special minority admissions would *not* be filled by others if special minority admissions were eliminated. Column B assumes that they would be. It seems that Column A represents the statistically more conservative figure. (The sample becomes less impressive as the participating schools descend from 42 to 22. But it still has a large claim to respect.)

Combining 1976-77, 1975-76, and 1974-75 into a 3-Year Total, there would have been 216 Black students admitted to entering classes in those years out of a total 1st year enrollment in the participating schools of 27,444. That is 78/100 of 1% of entering law students would have been Black, as compared to the present 2% Black representation in the national lawyer population, and 11% in the total population. (This 3-Year Total uses the figures from Column A).

CHART I

	1976-77			1975-76			1974-75			1973-74			1972-73		
	A.	B.	C.	A.	B.	C.	A.	B.	C.	A.	B.	C.	A.	B.	C.
1.	241	254	2	241	255	2	257	268	4	219	233	2	240	253	2
2.	169	183	0	166	180	2	147	160	8	166	180	2	166	180	2
3.	199	230	1	186	215	2	182	215	1	174	208	0	166	198	2
4.	307	357	0	312	362	0	310	359	2	265	316	1	283	331	4
5.	346	354	3	300	309	1	292	303	0	268	278	1	318	324	3
6.	200	200	12	199	190	9	179	180	12	178	180	8	—	—	—
7.	167	182	0	166	183	0	154	172	0	118	137	0	179	197	0
8.	186	190	1	187	190	2	185	190	1	195	200	1	195	200	1
9.	221	236	2	222	238	1	222	238	2	223	239	1	211	228	1
10.	445	456	4	431	453	3	421	443	5	398	423	5	—	—	—
11.	460	525	2	380	525	2	377	525	1	—	—	—	—	—	—
12.	519	625	0	—	—	—	—	—	—	—	—	—	—	—	—
13.	208	275	1	—	—	—	—	—	—	—	—	—	—	—	—
14.	478	527	1	—	—	—	—	—	—	—	—	—	—	—	—
15.	434	437	3	429	434	2	408	423	3	349	371	3	337	355	4
16.	160	163	0	161	161	0	155	155	0	155	155	0	—	—	—
17.	174	207	0	175	198	0	175	195	0	174	197	0	—	—	—
18.	280	293	1	302	314	2	314	327	0	324	324	0	324	248	0
19.	217	223	0	184	189	3	190	195	0	188	191	0	180	188	1
20.	139	141	1	127	129	1	147	150	0	158	161	0	107	110	0
21.	154	165	0	—	—	—	—	—	—	—	—	—	—	—	—
22.	215	227	0	149	160	0	158	184	0	147	152	4	—	—	—
23.	125	151	0	124	149	0	135	158	0	153	175	0	124	150	0

PREFERENTIAL ADMISSIONS

[illegible]

* For interpretation see Chart I (Summary Form).

** For evaluation of sample see Appendix p. 4, and for correction of sample for lower participation see Chart III, *infra*.

Chart II (Summary Form)

Effect of Elimination of Special Minority Admissions:
Hypothetical vs Actual Black Law School Enrollment,
1974-1976

	Three-Year Period
1976-77	(1974-76)
78/697	171/1383
11.19%	12.36%
(41 Schools)	(31 Schools)

Interpretation: In 1976-77 if special minority admissions programs were not used (but the prevailing variations of LSAT-GPA ratings), instead of the 697 Black students actually enrolled in the 1st year class in the 41 law schools covered by these computations, there would have been only 78 Black law students enrolled. This constitutes but 11.19% of those Black students actually enrolled in 1st year law classes that year in those schools (The Three-Year Total comes to 12.36% in 31 law schools.)

Chart II

1976-77	3 yrs (1974-77)	1976-77	3 yrs (1974-77)
1. —	—	31. 0/17	0/51
2. 0/15	4/55	32. 1/11	1/36
3. 1/22	4/66	33. 0/17	2/52
4. 0/40	2/121	34. 0/14	0/41
5. 3/9	4/26	35. 0/2	0/5
6. 12/12	33/36	42. 0/13	2/39
7. 0/12	0/35	43. 4/11	—
8. 1/5	4/15	44. 21/45	62/134
9. 2/17	5/52	45. 0/13	—
10. 4/11	12/34	46. 2/16	—
11. 2/22	5/50	48. 1/15	1/44
12. 0/69	—	51. 2/2	3/4
13. 1/48	—	52. 0/34	1/102
14. 1/39	—	53. 1/7	1/21
15. 3/11	8/34	54. 3/8	—
16. 0/2	0/6	55. 1/32	5/96
17. 0/22	0/70	56. —	—
18. 1/11	—	57. 8/17	—
19. 0/4	3/15	58. 0/11	1/34
20. 1/3	1/9	—	—
21. 0/8	—	* 78/697	171/1383
22. 0/8	2/35		
23. 0/7	0/22	11.19%	12.36%
30. 2/15	5/43	41 schools**	31 schools

* For interpretation see Chart II (Summary Form).

** For evaluation of sample see Appendix, p. 4, and for correction of sample see Chart III, *infra*.

Chart III

Correction of Sample for Lower Participations (See 3, above)

	Rochester (145 schools)	1976-77 (41)	1975-76 (35)	1974-75 (34)	1973-74 (28)	1972-73 (22)
A-B	5.5%	4.9%	2.9%	2.9%	0	0
C-D	21.4%	31.7%	34.3%	35.3%	35.7%	31.8%
E-F-G-H	45.5%	46.3%	45.7%	44.1%	46.4%	54.6%
I-J-K	25.5%	17.1%	17.1%	17.7%	17.9%	13.6%
L-M	2%	0	0	0	0	0

