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WHAT DOES *BAKKE* REQUIRE OF LAW SCHOOLS?
THE SALT BOARD OF GOVERNORS STATEMENT

By

HOWARD LESNICK

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WHAT DOES *BAKKE* REQUIRE OF LAW SCHOOLS?

THE SALT BOARD OF GOVERNORS STATEMENT *

HOWARD LESNICK †

I. THE ISSUES FACING LAW SCHOOLS

The decision of the Supreme Court of the United States in *Regents of the University of California v. Bakke*¹ has prompted many law schools, and the universities of which they are parts, to reexamine existing admissions criteria and procedures. Such re-examinations may raise considerations of educational policy, including issues of fairness and justice to the individuals and groups affected by race-conscious admissions programs. They may also involve the introduction of legal imperatives perceived to arise from the *Bakke* decision itself. All too often, there is a tendency to merge these very distinct inputs, and to seek refuge from the burden of pursuing difficult and divisive issues of policy in an asserted legal compulsion.

This essay does not undertake to reexamine the questions of educational and social policy involved in the establishment or structuring of particular admissions programs. The question it does address is: What changes (if any) in minority-admissions programs are university law schools now obliged to make to comply with the Supreme Court's decision in *Bakke*—put another way, what forms of programs are now placed beyond the discretion of individual schools?

In examining this question, we should begin by clarifying two conditioning factors. The first concerns the moral imperative to obey the normative standards of the law (including the principle that one should avoid encouraging litigation); the second is the role of university counsel in guiding consideration of important changes in an admissions program.

* This essay is a slightly revised version of a paper prepared by Professor Lesnick for the Board of Governors of the Society of American Law Teachers and adopted by it in January, 1979, as a statement of the Board. The Society of American Law Teachers is a membership organization of individual law teachers. It is interested in questions concerning the capacity of the legal profession, as a public profession, to serve societal needs, and in the relation between legal education and the quality and availability of legal representation, including matters of professional responsibility and greater equality of access to the legal profession and to legal representation. It has worked to support the appropriate use of race-conscious admissions criteria by law schools.

† Professor of Law, University of Pennsylvania. A.B. 1952, New York University; A.M. 1953, LL.M. 1958, Columbia University.

¹ 438 U.S. 265 (1978).

As lawyers and teachers of law, members of law school faculties presumably accept, indeed espouse, an obligation to obey the law, not only in the narrow sense of Justice Holmes's "bad man," but, more broadly, to seek to conform their conduct to what they have conscientiously determined to be the norms embodied in it. It is essential, however, to recognize that this principle does not resolve the question of interpretation of a difficult set of opinions such as those produced by the *Bakke* litigation. It especially does not justify what amounts to a rule of construction favoring an interpretation giving the broadest tenable reach to every uncertain aspect of the decision. Such an approach may or may not commend itself, but it can claim no moral force: It is no more "ethical" or "responsible" than a rule of narrow construction, as long as each is held in good conscience and is objectively tenable.

Nor is the value afforded simple prudence and the related desire to avoid litigation sufficient to justify an expansive reading of *Bakke* without taking into account the seriousness of the educational objectives which might be sacrificed thereby. Law schools reject many applicants for each accepted. The decision of the Supreme Court of California, unreversed by the Supreme Court, places on the school the burden of proving lack of any causal relation between a minority-admissions program and the rejection of a particular applicant.² Presumably, then, a rejected white applicant wishing to assert a claim of unlawful "reverse discrimination" will often be able to force a school to defend its admissions program merely by showing that he had a higher admissions score than a successful minority candidate.³ Each school has dozens, perhaps hundreds, of such potential plaintiffs each year. Moreover, it seems clear that this will remain true no matter how a minority-admissions program is changed. While one might hope that the likelihood that potential plaintiffs will actually sue would be reduced by the evident eagerness of a university to avoid legal challenge, no one can confidently assert that such an effort would be totally successful. Thus, because universities will live with a substantial risk of litigation no matter what they do, it would be fruitless to sacrifice important educational objectives in the hope of escaping the threat of suit.

² *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 63-64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976). In the Supreme Court, see *Bakke*, 438 U.S. at 280 n.13.

³ See *Bakke*, 438 U.S. at 277 & n.7, 280.

In such a climate, and bearing in mind that many law teachers feel a strong ethical obligation not to have too weak a minority-admissions program, the strength of the case for particular changes in a school's program will more often need to be made on the basis of a contention that valued educational objectives will not be impaired—that is, on considerations of policy, fairness, and equity—than on a desire to avoid litigation or the risk of legal liability. Law schools are in a difficult position no matter how they act, for their responses to the competing demands affecting the shape of a minority-admissions program implicate the interests of many beside themselves: minority and non-minority applicants and students, the university as a whole, the legal profession, and the larger society. For many of us, it is uncomfortable to be making decisions affecting these interests. It is essential to recognize that there is no escape from that discomfort. Any decision a law school makes has such an impact, and the propriety of a particular decision within the range of arguable differences over what the law requires must therefore be ultimately justified on policy grounds. A school may choose to narrow its program more than is required, but it would be tragic for such a choice to be made on the basis of supposed moral or legal imperatives grounded in a broader reading of *Bakke* than a conscientious, fair-minded analysis requires.

In this connection, the role of university counsel is a critical one, and law professors should be particularly advertent to that role. The task most schools will face is not the shaping of a law suit or the drafting of a brief in support of a program challenged in court. It will be the more sensitive, less familiar one of a claimed need to restructure an existing program to avoid litigation or a threat of liability, or to carry out what is argued to be a morally required course of action. Critical decisions narrowing a program might be made by law school faculties or administrations or by university administrations. The latter will often look to their counsel to learn what their legal obligations are. Faculty members who believe that a particular program remains lawful, and that university trustees or administrators should not insist on changes out of a belief that they have no choice under the law, should be aware of the hazards of seeking to persuade lay administrators or trustees of the legal merit of a position contrary to that taken by their attorneys. Rather, attention should be paid to the advice-giving process itself.

As an example, a faculty faced with the assertion that the administration has been advised that a particular program is now

unlawful should insist that that advice be supported by a written opinion of counsel. Such a course will often deter, and will at least expose, advice based on nothing more than a reflexive preference for the most cautious—that is, the broadest possible—reading of the decision. The critical vice in such a preference is that it overrides the concerns of educational policy which are sacrificed by the particular changes said to be mandated, not because a conscious policy choice is made that the costs involved are not entitled to greater weight, but because the issue is said to be removed from the policy arena. Once the issue is perceived as one of educational policy, it becomes clear that it is not the function of counsel to determine what weight particular objectives should have. Specifically, it is not the role of counsel to decide whether or not the setting of a particular numerical goal, the administration of a program by a particular form of committee, or the input of specific policy objectives are important to the achievement of particular educational aims.

The question, what *is* removed from university discretion by *Bakke*, is the subject of this essay. The discussion which follows assumes that the reader is familiar with the litigation involving the admissions program of the University of California Medical School at Davis. It will be recalled that all of the Justices expressed views with respect to the meaning of the statutory prohibition contained in Title VI of the Civil Rights Act of 1964,⁴ but only five spoke to the meaning of the equal protection clause of the fourteenth amendment.⁵ The litigation produced two different five-Justice majorities, one to affirm the judgment that the Davis program was unlawful and another to reverse the judgment that race may not be a positive factor in determining relative admissibility.⁶ Justice Powell was the only Justice in the majority on both dispositions. Section II examines the question whether the mandate of *Bakke* is

⁴ 42 U.S.C. § 2000d *et seq.* (1977).

⁵ Justice Powell, who announced the judgment of the Court, held that Title VI proscribed "only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Bakke*, 438 U.S. at 287. Justices Brennan, White, Marshall, and Blackmun agreed with Justice Powell: "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment . . ." *Id.* 325. Justice Stevens, in an opinion joined by Chief Justice Burger and Justices Stewart and Rehnquist, held that Title VI was not limited by the substantive reach of the fourteenth amendment, *id.* 416-18, and that the medical school's minority-admissions program violated Title VI, *id.* 421. The Stevens Four declined to reach the constitutional issue, *id.* 411-12, 421.

⁶ Justice Powell, disagreeing with the Brennan Four, found that the Davis program violated constitutional standards. Accordingly, he voted with Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens to form the majority holding the Davis program unlawful. *Id.* 271. Justice Powell voted with Justices Brennan, White, Marshall, and Blackmun to form the majority holding that it is not always unlawful to consider race in an admissions program. *Id.* 272.

to be found in his position; section III considers what he would require of minority-admissions programs.

II. THE AUTHORITATIVENESS OF THE POWELL POSITION

It was understandable that the immediate reaction of many to the *Bakke* decision was to find "the law" in the views of Justice Powell. He not only announced the judgment of the Court, but provided the "swing" votes and was therefore the only Justice whose position paralleled the actual disposition of the litigation between Mr. Bakke and the University of California Medical School at Davis. By combining the opinions of Justices Powell and Stevens, the proponents of this view argue that five members of the Court announced views which hold at least that a minority-admissions plan failing to meet Justice Powell's constitutional standards violates Title VI. In making this argument, these commentators are not predicting how the Justices will vote in future litigation; rather they are contending that this rule commands normative force.

It is important to recognize that, although this initial view persists in legal as well as popular discussions, and indeed is held by many law teachers,⁷ it rests on premises plainly open to reasonable debate and dispute. As the Report of the American Council on Education and the Association of American Law Schools Committee on *Bakke* concluded:

Justice Powell . . . addressed only two of the many possible approaches to race-conscious admissions. Moreover, four members of the Court did not address the issue of the permissible use of race under the Constitution, while four others believe that the Constitution would permit more extensive use of race than did Justice Powell. . . . No Justice concurred in the Powell discussion of permissible and impermissible purposes. Under the circumstances, it is not at all clear what might be the result if the Court were faced with a slightly different admission plan or a similar plan under different circumstances.⁸

The conclusion that Justice Powell's views express the minimum standards of legality for a minority-admissions program under

⁷ For a carefully reasoned conclusion to this effect, see Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21, 23-24, 30 (1979). For a casual assumption of a similar conclusion, see Posner, *The Bakke Case and the Future of Affirmative Action*, 67 CAL. L. REV. 171, 177-78 & n.20 (1979).

⁸ AMERICAN COUNCIL ON EDUCATION and ASSOCIATION OF AMERICAN LAW SCHOOLS, *THE BAKKE DECISION: IMPLICATIONS FOR HIGHER EDUCATION ADMISSIONS* 17 (1978).

Title VI depends on the truth of three propositions. First, it is contended that, since Justice Powell read Title VI to condemn admissions arrangements violative of the Constitution, and since he went on to hold that the Davis program did violate the fourteenth amendment, he necessarily held that it violated the statute as well. Second, the opinion by Justice Stevens is read to hold that Title VI mandates a "colorblind" approach, and that all race-conscious programs are therefore unlawful under it. Finally, it is asserted that those Justices joining the Stevens opinion may still claim normative power for its view of the statute, because the five Justices rejecting it do not themselves agree on the proper reading of Title VI (that is, although all five agree that the question under the statute turns on the meaning of the equal protection clause, they differ as to that meaning).⁹ Until one or more of these propositions proves false in future litigation, so the argument runs, any program not meeting Justice Powell's criteria for constitutionality violates the statute.

It is clear that the foregoing position is logically tenable. It is no less clear that, at each point, it chooses to regard as not controlling significant factors which point another way, and that the issue whether those factors are to be controlling is one on which the Court itself has not spoken.

To begin with the Stevens opinion, although the interpretation described above surely draws support from the content of Justice Stevens's discussion of Title VI, it chooses to give no substantial weight to the observation he was at pains to emphasize at the outset—that the issue before the Court concerned only the Davis minority-admissions program and, indeed, only involved it to the extent that it affected the processing of Bakke's own application. "[T]here is no outstanding injunction forbidding any consideration of racial criteria in processing applications,"¹⁰ Justice Stevens emphasized, and argued that it was "therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate."¹¹ Many find it difficult to reconcile Justice Stevens's concern for confining the reach of his opinion with the apparently broader implications of his substantive discussion—in particular, his omission to refer to any specific failing of the Davis program

⁹ Justice Powell's view of the constitutional issue is discussed below, *see* section III *infra*; for the approach of the Brennan Four, *see* Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 110-17 (1979).

¹⁰ *Bakke*, 438 U.S. at 411.

¹¹ *Id.*

other than race-consciousness itself. It may be that race-conscious programs would be permissible under Title VI, according to the Stevens view, where "regular" programs are thought or found to have a discriminatory purpose or effect. In any event, it is ultimately for Justice Stevens—and for each of the Justices joining his opinion—to find the proper basis for integrating its two branches, or failing in the attempt, to choose whether to discard the one or narrow the other. For the present, nothing more can be known than that there is more than one sensible way to read their position.¹²

Second, it is of course possible that each of the four Justices joining the Stevens opinion will believe that the matter of the proper meaning of Title VI is sufficiently clouded, by reason of the disagreement between Justice Powell and the four remaining Justices over the content of the constitutional norms involved, to warrant his continuing to take a view of the statute rejected by five of his colleagues. It is, however, impossible to read the opinions as a whole without observing that the statutory issue was viewed by the entire Court in dilemmatic, fairly abstract terms: whether Title VI embodied constitutional norms, or went beyond them. Put that way, the issue was squarely resolved in favor of the narrower position by a five-Justice majority.¹³ In those circumstances, it is surely not unreasonable to regard the statutory question as behind us, and view future litigation as turning solely on the proper construction of the fourteenth amendment.

Finally, although in one sense it is logically deducible from Justice Powell's opinion that he would hold Title VI violated by a program which he viewed as unconstitutional, it would have been impossible for him to join a holding that the medical school was

¹² Indeed, Justice Stewart, one of the Stevens Four, recently joined the opinion of the Court, per Justice Brennan, in *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979), which refused to construe Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (1977), to prohibit all race-conscious programs to which it applied. (Justice Stevens did not participate in the decision.) Plaintiff's proffered reading of Title VII was similar to the broader reading of Title VI which some find taken in the Stevens opinion in *Bakke*, and was rejected by the Court as inconsistent with the perceived dominant legislative purpose to open opportunities for racial minorities. Voluntary race-conscious programs serving this purpose, which do not "unnecessarily trammel the interests" of whites, 99 S. Ct. at 2730, were held lawful. While there are many differences in purposes and scope between Title VII and Title VI, *see id.* 2729 n.6, so that the criteria of legality adopted might differ under the two provisions, the view of the dominant legislative purpose which animated the *Weber* Court's rejection of a "color-blind" approach to Title VII seems to apply to Title VI as well.

¹³ *See* note 5 *supra*.

liable under Title VI, without resolving the jurisdictional issue of Bakke's right to maintain an action under the statute.¹⁴ Indeed, although the trial court specifically found in Bakke's favor on statutory as well as constitutional grounds,¹⁵ Justice Powell's vote to affirm was carefully applied only to that portion of the judgment invalidating the program under the Constitution.¹⁶ While there is much force to the assertion that universities receiving federal financial support should not take advantage of the possibility that the Court may ultimately deny the existence of a private right of action, but should obey the substance of the statutory mandate once it is authoritatively construed by the Court, it is ironic to see that principle advanced in this context, where a majority of the Court has squarely rejected the contention that Title VI goes beyond constitutional norms, and four of the five Justices who discuss constitutional norms have adopted a position permitting much which Justice Powell's position would proscribe.

The point of recognizing that there are competing interpretations of *Bakke* is not to enable a school to choose a "correct" interpretation. Law schools are not being asked to decide a case which will interpret and clarify *Bakke*, but to consider the extent of their own discretion under *Bakke* to do as wise educational policy seems to lead. The need in such a context is to recognize that tenable choices are available, and that those who insist that the Powell opinion has normative authoritativeness have *chosen* to take a broad reading of his and Justice Stevens's opinions at several critical points. They are of course free to do that, but others are equally free, morally and legally, to choose narrower interpretations. The critical issues remain ones of educational policy, including each university's own sense of fairness in dealing with the competing interests. Those seeking to restrict minority-admissions programs should meet the issues of policy thereby raised. They should not seek to insulate their views on the merits of those issues by an appeal to respect for law and the Supreme Court.

¹⁴ Justice Powell (like Justices Brennan, Marshall, and Blackmun) concluded that it was unnecessary to decide whether Title VI confers a private cause of action. *Bakke*, 438 U.S. at 283 (opinion of Powell, J.); *id.* 328 (opinion of the Brennan Four). Justice White decided that Title VI contained no such right of action, *id.* 379-87, and the Justices joining the Stevens opinion, while asserting that the question of the availability of a private right of action under Title VI was not properly before the Court, *id.* 419, indicated that they would infer a private right of action under the statute, *see id.* 419 & n.25, 420 & nn.27 & 28.

¹⁵ *Id.* 270.

¹⁶ *Id.* 320.

III. THE REQUIREMENTS OF THE POWELL POSITION

It does not detract from the analysis in the preceding section to agree that Justice Powell's views are entitled to the most careful attention and deference and, indeed, that they may claim controlling force when that can be given them without compromising important educational values. Accordingly, this section addresses the question: What kinds of race-conscious programs would be deemed constitutional according to the norms espoused in the Powell opinion? The following discussion attempts to discern, articulate, and apply the premises and priorities of that opinion conscientiously, even where they seem troublesome on one or another ground. To those sharply critical of the Powell analysis, it may be disturbing for its lack of critical evaluation; to those strongly hostile to race-conscious admissions programs, it may be thought simply a product of disagreement with the Justice. I believe that I have applied Justice Powell's norms in a fair-minded and conscientious way, and hope that most readers will agree.

The key to Justice Powell's approach is *individual competitive consideration for all applicants*.¹⁷ Each applicant must theoretically be able to compete for every open place. The race of a minority applicant is a factor which may be weighed against other factors in determining relative admissibility, but no commitment to a particular racial goal will normally be permitted to insulate any successful applicant from that competitive inquiry.

It is useful to consider the specifics of the Powell approach in the context of particular issues in the administration of a minority-admissions program. These typically involve the numerical target involved; the administration of the program by a separate committee or sub-committee, to which some members may be appointed on a racial or ethnic basis; and the educational or societal objectives which shape a school's program.

A. Numerical Targets, Goals, and Quotas

Justice Powell expressly permits the overt consideration of race as a factor in admissions decisions,¹⁸ yet he rejects the University of California's reliance, in its attempt to draw a legal distinction between "goals" and "quotas," on the asserted fact that the sixteen seats in question would only have been filled with minority appli-

¹⁷ I am indebted to my colleague on the SALT Board of Governors, Professor Robert A. Sedler, Wayne State University Law School, for this phraseology.

¹⁸ *Id.* 320.

cants if enough were available who met an absolute standard of qualification.¹⁹ His reason for such rejection is that, even where a minimum-qualification requirement exists, as long as it is satisfied, "white applicants could compete only for eighty-four seats in the entering class, rather than the one hundred open to minority applicants."²⁰ This is significant to Justice Powell because it is not enough to look simply at the strength of the case for admitting a minority applicant, as the "minimum qualification" requirement does. There must be some examination as well of the relative strength of the claim of non-minority applicants at the margin of admissibility. The reason that the "Harvard model" is constitutionally different from the Davis program is that in the former case "race or ethnic background . . . does not insulate the individual from comparison with all other candidates for the available seats."²¹ "The denial to [Bakke] of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program."²²

This reasoning entails an important limitation on the permissibility of a numerical target. No less important is the need to recognize that the limitation is itself quite limited in its thrust. As already noted, it in no way suggests that there is anything illicit about an avowed use of race in determining relative admissibility. It does not even prohibit the setting of a numerical target or goal, as long as a program that includes such a goal is administered so that the comparative evaluation referred to can be carried out. It therefore remains perfectly legitimate for a faculty to announce the hope or expectation—even the presumptive belief, based on prior years' experience—that a given number or range of minority applicants will be admitted, *provided* that before the least strong members of that group are admitted there is a genuine examination of their relative desirability as against the strongest group of non-minority applicants whose claim to the seats in question is at stake.

In prescribing a determination of relative admissibility, Justice Powell does not preempt the discretion of each university to decide for itself how much weight a particular institution, in a particular time and place, will give to any particular factor, whether race or ethnic background or (to use his catalogue) "exceptional personal talents, unique work or service experience, leadership potential,

¹⁹ *Id.* 288 & n.26, 289.

²⁰ *Id.* 289.

²¹ *Id.* 317.

²² *Id.* 318 n.52.

maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications.”²³ As the Justice says:

In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the “mix” both of the student body and the applicants for the incoming class.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a “plus” on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.²⁴

Thus, a university remains free to set a numerical target and to use its own discretion in judging the comparative claims of the least strong candidates admitted under a minority-admissions program against the claims of the most attractive unsuccessful non-minority applicants, as long as it carries out that process in a timely and fair manner during each admissions cycle. Any broader reading of the Powell discussion of numerical goals would go beyond his expressed concern—individual consideration for all—and would fail to give weight to his espousal of the legitimacy of the consideration of race and to his expressions of deference to university discretion in setting admissions policy.²⁵

The issue will doubtless arise, how many minority and non-minority applicants must be weighed comparatively. There is

²³ *Id.* 317.

²⁴ *Id.* 317-18.

²⁵ *Id.* 315-19. A Policy Interpretation recently issued by HEW in light of *Bakke* asserts that a university may determine the “relative weight” to be given race and other discretionary factors, and specifically approves a decision to give race “greater weight” than others. 44 Fed. Reg. 58509, 58510 (1979).

clearly no requirement that each minority applicant accepted be so examined. Indeed, taken literally, Justice Powell's opinion says that a comparison of only one applicant in each group is needed: "the last available seat."²⁶ This of course refers to the one minority applicant who is ranked lowest among others, yet is judged preferable to the one non-minority applicant ranked highest among the unaccepted non-minority applicants. Many schools will not want to make such precise gradations, and would accordingly need to compare a few of each group. If the lowest-rated group of minority applicants whose admission is being favorably considered is compared with the highest-rated group of non-minority applicants who are likely to be rejected, and one or more of the former is deemed preferable, the job is done. A school need not compare all of the minority applicants directly to the non-minority group because it can assume that all other accepted minority applicants (and rejected non-minority applicants) present cases which are *a fortiori*. Of course, if on a comparative evaluation of a few from each group, all of the minority contenders are rejected, the next-lower-rated group of non-minority applicants is entitled to a comparative examination against the next-higher-rated minority applicants.

B. *The Separate Minority-Admissions Committee*

Justice Powell does not discuss explicitly the legitimacy of the widespread use of a separate committee to administer a race-conscious program. Nonetheless, many have asserted that the rationale of his approach is inconsistent with such a committee. Here too, it is as easy to overstate the Powell position as to understate it: While his concerns require significant safeguards in the administration of a separate-committee process, they do not provide a basis for asserting that such a process is invalid per se.

The discussion above regarding individual competitive consideration for all provides the touchstone for analysis here. A separate committee may not administer a race-conscious program without consulting with those who administer the processing of non-minority applicants, for if there were no such contact at least once in every admissions cycle the admissions process would lack the comparative weighing which is critical to Justice Powell; a separate committee could only evaluate absolute admissibility and relative strength from within the "special" admissions group, and that is insufficient. There is no reason, however, to regard the choice of the particular manner by which the overall comparison is made as

²⁶ *Id.* 318.

beyond the law school's discretion. A separate sub-committee operating within the framework of a single admissions committee is certainly one way of doing this work. There is nothing of constitutional moment, given Justice Powell's analysis, in the subcommittee-parent arrangement. The two groups could work as separate committees, as long as there was adequate provision for their deliberating together when the time came to make the final comparative judgments. Indeed, it would be wrong to assume, when Justice Powell says nothing to require the assumption, that the ultimate decision must be one which is left to the "regular" committee. As long as the job of comparative evaluation is in fact carried out in a timely and fair manner, Justice Powell's opinion provides no warrant to suggest that individuals chosen to do that work on the basis of any factor which seems sensible to a school—including, as is often the case with student members, their own racial or ethnic identification—are constitutionally disqualified from participating in it, or are constitutionally relegated to an advocate's or advisor's role. It is the substance of the comparative evaluation, and not the particular form by which it is made, which is of constitutional import. The form should be decided by each school on the basis of its own perceived needs and priorities, unencumbered by any assertions of legal mandate other than the good faith which Justice Powell requires and presumes.²⁷

C. Program Objectives: Diversity and Others

The final issue is that of permissible and impermissible objectives in the shaping of a program. It is probably true that for many teachers the interest in a diverse student body has been a far less significant factor in individual and faculty decisions to initiate and shape a race-conscious program than have been other objectives.²⁸ These other goals the Powell opinion found insufficient in the Davis litigation. The question therefore arises whether diversity is the only licit objective which a school may consider in light of *Bakke*. For if the major determinants are to be judgments of educational policy, but certain objectives must be abandoned, a conscientious faculty might well decide to cut back its program, or give far less weight to one or another factor which has shaped its administra-

²⁷ *Id.* 318-19 & n.53.

²⁸ Cf. Henkin, *What of the Right to Practice a Profession?*, 67 CAL. L. REV. 131 (1979) (criticizing the decision in *Bakke* for emphasizing educational goals as the relevant area of state interest, rather than examining the interests affecting individual and group access to membership in the legal profession).

tion. Accordingly, it is important to address the question of the circumstances under which, according to Justice Powell, particular objectives may be sought and what their content may be.

First, as to diversity itself: It bears repeating that Justice Powell does not hold that a university must value all forms of diversity equally, or to any particular degree. Many have expressed surprise at Justice Powell's rather casual assertion that the Constitution mandates a particular form of diversity as educationally justifiable.²⁹ The apparent basis for Justice Powell's insistence that the Constitution intrudes on academic discretion to the extent of forbidding an interest in diversity which is limited to racial or ethnic minorities lies in his perception of the concerns and reach of the fourteenth amendment.³⁰ As a result of these concerns, he evidently feels justified in requiring a commitment to a broader form of diversity, one which affords all applicants the opportunity to have considered the strength of their individual contributions, "including their own potential for contribution to educational diversity."³¹ But, as noted above, it is another matter entirely to read in this requirement any desire to require a university to assert any particular degree of commitment to specific kinds of diversity, as long as there is sufficient open-mindedness to give fair consideration to other types of claims.

To many, a far more significant social-educational goal supporting race-conscious programs in law school is the desire to contribute, through that means, to ameliorating the extreme relative unavailability of legal representation to members of racial and ethnic minorities. It is essential to bear in mind that Justice Powell does not cast doubt on the constitutional validity of this objective. (In *Bakke*, of course, the objective concerned medical rather than legal services.) He rested entirely on the position that a university must bear the burden of showing in litigation that its program is "needed [and] geared to promote that goal."³² Any faculty which

²⁹ Justice Powell states that:

the nature of the state interest that would justify consideration of race or ethnic background . . . is not an interest in simple ethnic diversity The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Bakke, 438 U.S. at 315 (emphasis in original).

³⁰ See Justice Powell's discussion of the suspect quality of racial and ethnic distinctions, *id.* 291-99.

³¹ *Id.* 319.

³² *Id.* 310.

believes that its program is so needed and so geared is in no way evading Justice Powell's mandate in continuing to permit such an objective to shape the admissions process. Particularly in light of the way *Bakke* was tried,³³ the failure of that record to meet this need hardly bespeaks an inability to do so in the future. Indeed, in this connection it is extremely relevant that the Association of American Law Schools, the American Bar Association, and others all took the position *amicus* that the relationship in question does in fact exist. While Justice Powell rejected the adequacy of that form of making such a showing, the result is simply to transfer the question to future cases and to the proof rather than the argument stage. Again, differences among us as to the wisdom of that result should not lead us to overstate its significance.

A third objective, and one which again has probably played a major role in shaping many programs, is the desire to offset historic patterns of societal discrimination, and more specifically to prevent the use of standard admissions criteria from reenforcing the effects of historic discrimination. Here, the conclusion that Justice Powell rejects the adequacy of such an interest finds rational support in his insistence on legislative, judicial, or administrative findings both of particular discrimination by specific schools and of the equity of a specific race-conscious program as a remedy for concrete wrongful acts.³⁴ Even here, however, the Powell position may have a narrower reach than many attribute to it. First, the opinion does not at all address the question what options are available to a faculty which honestly believes that there has been actual past discriminatory conduct at its school. Were a rejected minority applicant to bring a suit which came to judgment before a *Bakke*-type suit, there might well be the remedial predicate upon which Justice Powell insists. It seems bizarre to say that a faculty may not consider the vulnerability of its institution to such a suit in structuring a program.³⁵ This issue would be particularly poignant in any school in

³³ See Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 4-7 (1979); Smith, *Reflections on a Landmark*, 21 HOW. L.J. 72, 77-79 (1978).

³⁴ See *Bakke*, 438 U.S. at 307-10.

³⁵ Compare the perceptions of Justices Brennan and Blackmun in *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979): "It would be ironic indeed if a law [Title VII] triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy," *id.* 2728, (opinion of the Court per Brennan, J.); "[it] would be 'ironic,' given the broad remedial purposes of Title VII," to interpret the statute to "lock in" the effects of past segregation, *id.* 2733, (opinion of Blackmun, J.).

which such a suit was actually pending when its program was adopted.

More broadly, Justice Powell does not wholly close the door on the legitimacy of a school's departing from its normal standards because of its concern that they would be regarded as discriminatory in the objective sense that their disparate racial impact is not justified by their predictive validity in judging among qualified applicants. He rejects this contention in *Bakke* in substantial part on the ground that there was nothing in the record below suggesting that any disparate impact "is without educational justification."³⁶ Accepting the evident holding that the burden here rests on those defending the program to show the lack of educational justification for the school's normal standards, it may well remain open to a school to act on a belief that such justification is in fact lacking, and to stand prepared to support that conclusion in litigation, much as Justice Powell plainly permits with respect to demonstrating the minority community's need for more minority lawyers. Again, whatever one might think of the wisdom of having this issue litigated in individual suits, Justice Powell clearly elected to require that method.³⁷

IV. SUMMARY

First, a university which desires to operate a race-conscious admissions program not meeting Mr. Justice Powell's criteria has a sufficient legal basis for doing so.

a) Stated as requisites of constitutionality, the Powell criteria have been rejected by every Justice who has considered the question.

b) The conclusion that the Powell criteria represent conditions of lawfulness which a majority of the Supreme Court has found to

³⁶ *Bakke*, 438 U.S. at 308 n.44.

³⁷ Some will read the whole of Justice Powell's note 44, 438 U.S. at 308 n.44, more broadly, either to require as well that the university be prepared to prove in court that the disparate impact was the product of discrimination, or to reject the sufficiency of "disparate impact" analysis in Title VI litigation altogether. The requirement of the first of these broader readings is one which a faculty might think could readily be met in litigation, *cf.* Justice Blackmun's observation in *United Steelworkers of America v. Weber*, 99 S. Ct. 2721, 2732 n.* (1979) (concurring opinion) (underrepresentation of blacks in the craft work force did stem from "purposeful discrimination in the past"). The second broad reading of note 44 would reject the legitimacy of any proof which might be offered. Whatever is ultimately said further about note 44, the issue can hardly be thought at present to have been resolved with clarity and finality. The recent HEW Policy Interpretation reads *Bakke* to permit a university which has not discriminated to act to "overcome the effects of conditions which resulted in limiting [minority] participation" 44 Fed. Reg. 58509, 58511 (1979).

be necessary under Title VI of the Civil Rights Act of 1964 rests on a judgment to disregard all of the following aspects of the *Bakke* opinions:

(1) Justice Stevens specifically disclaims any judgment regarding the general legitimacy of race-conscious programs.

(2) The Justices joining the Stevens opinion voted as they did on a view of Title VI as independent of constitutional norms, a view now squarely rejected by a majority of the Court.

(3) Justice Powell himself has not resolved a question—the existence of a private right of action under Title VI—which is anterior to his joining any majority to hold a program in violation of the statute.

While a conclusion to disregard all these factors is permissible, it is not required by a conscientious fair-minded reading of the *Bakke* opinions or by relevant ethical or prudential considerations.

Second, a university which elects to structure its law-school admissions program to meet Justice Powell's criteria of constitutionality may act as follows:

a) Race or ethnic identity may be overtly employed as a factor enhancing the relative admissibility of minority applicants, provided that such admissibility is not determined merely according to an absolute measure of qualification or by a comparative ranking of minority applicants against one another, but includes an evaluation of the relative qualifications (judged by the school's criteria) of the lowest-ranked group of favorably considered minority applicants and the highest-ranked group of unfavorably considered non-minority applicants.

b) A specific numerical objective for minimum minority-student membership in the entering class may be employed as a guideline or goal for those administering the program, provided that neither the size of the number chosen nor the strength of the desire not to depart from it impairs the ability of those administering the program to carry out in good faith the comparative evaluation required.

c) A law school may employ a committee to which members are assigned on the basis of their racial or ethnic identification to administer a minority-admissions program, provided that the required comparative evaluation is made. As long as that compara-

tive evaluation can be and is carried out in a fair and timely way, a school may structure the relation between the processing of minority and non-minority applicants, including the existence and respective roles of separate committees, as it wishes.

d) In considering the educational or societal goals which a race-conscious program is intended to serve, a law school:

(1) may not pursue the goal of diversity by a consideration of racial or ethnic diversity alone, but may pursue those forms of diversity along with others, and in doing so may choose which other aspects of diversity to value and to what degree;

(2) may seek to ameliorate the relative unavailability of legal representation to members of minority groups only if it is prepared to establish in any litigation that its program is necessary and useful to meet that objective;

(3) may seek to offset, or avoid reenforcing, historic patterns of societal discrimination only if—and here, the contours of the “only” are least clear—it is prepared to establish in any litigation that purposeful discrimination existed at the particular school involved or that the “regular” criteria of admissibility have a disparate racial impact (perhaps one attributable to societal discrimination) and are lacking in predictive or other educational justification.