THE USES OF AMBIVALENCE: REFLECTIONS ON THE SUPREME COURT AND THE CONSTITUTIONALITY OF AFFIRMATIVE ACTION*

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I am deeply honored to be here today. There is, of course, an element of homecoming in returning here to the school and the people with whom I spent so many good years. It is especially affecting to be invited back to give the Owen J. Roberts Lecture.

The Supreme Court as an institution was very important to Owen J. Roberts,¹ and I have chosen to speak on that subject. I shall focus on a group of cases dealing with the constitutionality of race-conscious governmental affirmative action, sometimes called "reverse discrimination." But my emphasis is not upon the substantive results; rather it is upon the Court as an institution in American society, and upon the judicial techniques of that institution in dealing with this difficult constitutional and social issue.

It has often been noted that the Supreme Court stands at the intersection of principle and politics. On the one hand, its power and its function are rationalized by its obligation to decide in terms of principle. This implies, at least, that the Court must be able to justify its results in terms of principle. On the other hand, the issues posed involve broad societal problems, and the decisions of the Court have an impact that the Justices cannot ignore (and probably should not if they could). The demands of a wise or politic result may be in tension with the dictates of principle. The issue of the constitutionality of affirmative action poses in particularly intense form one instance of that conjuncture. The issue, and the Court's modes of dealing with it, are not typi-

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I would also like to record my deep appreciation for the warm reception and generous hospitality accorded us in Philadelphia by all those associated with the Roberts Lecture.

¹ See, e.g., O. ROBERTS, *THE COURT AND THE CONSTITUTION* (1951); Frankfurter, Mr. Justice Roberts, 104 U. PA. L. REV. 311 (1955). This is, of course (and one would hope needless to say), not to give any credence to the famous supposed "switch in time" on the validity of minimum wage legislation. See *id.* at 313-17; Griswold, *Owen J. Roberts as a Judge*, 104 U. PA. L. REV. 332, 340-45 (1955).

cal or even usual. But the close examination of this extraordinary situation yields insights.

The issue of affirmative action or reverse discrimination is, needless to say, highly emotionally charged. I do not propose to deal today with the merits. I do not know that I could add usefully to what has already been said on the subject, and I doubt very much that I would make any converts in either direction, even if this lecture ran much longer than it will. At the same time, it will be impossible not to touch on those merits. To avoid any misunderstanding, let me state at the outset that I served as special counsel to the Petitioner, the Regents of the University of California, in the *Bakke* case in the United States Supreme Court.² The views that I am expressing here, however, are entirely my own. In fact, the views I am expressing now are somewhat different from those I personally held at the time of the litigation and immediately thereafter—as I intend to suggest by the use of the term “Reflections” in the title of this lecture.

My view is that the Court has achieved good results on this issue. I have some questions about how those results have been achieved, and it is on that lack of congruence between results and methods that I shall ultimately focus. That statement of position may predispose some to reject everything that follows. There are those who believe that any race-conscious measures by government are wrong, immoral, and unconstitutional. These people may feel that (at least once a case arose) the Court's duty was to address that issue on the merits, that if it had done so there was only one principled answer—namely that no race-conscious action is permissible—and that any other response was a shirking of the very responsibility which justifies the Court's power. Again, I do not propose to debate this position here, either in its absolute form or in more limited versions that might permit race-conscious measures as specific redress for race-consciously inflicted injuries. This is an issue of much larger scope that I propose to treat today. It is an issue that has divided Professors Herbert Wechsler and Alexander Bickel, and they have debated it in terms that I cannot improve upon.³ If the conception of a “principled” resolution is one that will not admit of the possibility that transitional race-conscious measures may be suffi-

² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). I was senior author of the Brief for Petitioner. On the merits of the issues, including particularly the justification for programs of special admissions, the substance of the brief represented my views then, and those views remain essentially unchanged today.

³ See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 49-65 (1962); H. WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* xiii-xiv (1961); see also Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), reprinted in H. WECHSLER, *supra* at 3.

ciently necessary to be acceptable, I cannot respond better to such a conception than to say, with Professor Bickel, that no viable society can be governed by that rigorous a standard.⁴ Although he argued against the validity of affirmative action, and indeed once filed an eloquent brief attacking such programs, I think he would have agreed that his was not the only position open to the Court.⁵

I believe there is a less assertive sense of the word "principle" than Professor Wechsler's that may still make its demands—though perhaps only demands of generality and fidelity—requiring sincere efforts to reason in terms of precepts that transcend the individual case and that are conscientiously seen as governing in all cases within their stated terms. Even those demands, as we shall see, may pose some difficulties in the area we are examining. But for those who subscribe to the more absolute view, I can only suggest that even from their point of view they may still find it interesting to examine how the Court, with a majority apparently willing to allow at least some such race-conscious action, managed to reach that result without a resounding reinforcement of the principle of race-consciousness.

There are others who might join issue from the other end of the spectrum. They may feel that the Court has insufficiently validated affirmative action, that race-conscious remedial measures have been deprived of the approval and support to which they are entitled, and that the Court's disposition has made efforts to advance such measures and to enforce them in operation unnecessarily difficult. On one level, I can only say that I understand but do not presently share that position. On another, however, a major element of this lecture will focus on whether, if the Court cannot find or is not prepared to announce a principled basis which would support acceptance of less than that fully endorsing position, it can then be justified in acting as it has.

Let me first briefly summarize the decisions in these cases; some or all may be familiar. There are only four in the decade and a half since

⁴ A. BICKEL, *supra* note 3, at 64.

⁵ As he said:

Is it not clear that our nation would be severely damaged—inwardly, not merely in its external relations—if in the second half of the twentieth century it believed that segregation of the races was neither right nor wrong; if it were committed to no principle in the matter, one way or the other? But is it not equally clear—[and he uses the example of the "benevolent quota" intended to preserve an integrated housing situation; I would extend it, though he might not, to affirmative action of the kind we are discussing]—that the problem of the association of the black and white races will not always yield to principled resolution, that it must proceed through phases of compromise and expedient muddling-through, or else fail of an effective and peaceable outcome?

Id. at 64-65.

affirmative action became widespread.⁶ The immediately striking thing about these four cases is that the Court avoided reaching the merits in the first and the last, and failed to coalesce on a majority opinion for its substantive decisions in the two in the middle. The most constant feature is the ambivalent signal which the Court has sent out. Not so much the sound of an "uncertain trumpet" alone (although there was a good deal of that) as one accompanied at crucial times by a clear note of ambivalence.

The issue of the constitutional validity of affirmative action first reached the Supreme Court in 1973 in the case of *Defunis v. Odegaard*,⁷ an attack on the special admissions program of the University of Washington Law School under which specific minority groups were given special preference for admission, with the goal that members of such minorities amount to "approximately 15 to 20 percent" of the student body.⁸ Marco DeFunis, a white applicant, was rejected although he had better numerical credentials than virtually all of the minority students admitted.⁹ The Washington Supreme Court upheld the state law school's program against his constitutional attack, a majority finding the race-conscious special admissions policy sufficiently justified to be valid.¹⁰

The United States Supreme Court granted certiorari, bringing the case before it for review.¹¹ But, after the case had been fully briefed and argued orally, a 5-4 majority dismissed the case without passing on the merits. It did so on the stated grounds that the controversy was moot.¹² Defunis had been attending the University of Washington Law School under court order pending the litigation. By the time the case reached the United States Supreme Court, he was in his final year; he entered the last quarter of that year a few days after oral argument. The school had agreed that he would be permitted to finish that quarter even if the case were decided against him. On this basis, the majority concluded that DeFunis himself no longer had anything at stake, and that the case was therefore moot and had to be dismissed without passing on the merits.¹³

⁶ *Minnick v. California Dep't of Corrections*, 452 U.S. 105 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Defunis v. Odegaard*, 416 U.S. 312 (1974).

⁷ 416 U.S. 312 (1974).

⁸ *Id.* at 347 (Appendix to opinion of Douglas, J., dissenting).

⁹ *Id.* at 324 (Douglas, J., dissenting).

¹⁰ *DeFunis v. Odegaard*, 82 Wash. 2d 11, 32-37, 507 P.2d 1169, 1182-84 (1973).

¹¹ 414 U.S. 1038 (1973).

¹² *DeFunis*, 416 U.S. at 316, 319-20.

¹³ *Id.* at 315-17. Justice Brennan dissented on the mootness issue in an opinion joined by Justices Douglas, White, and Marshall. He argued on the technical level that unexpected events

Professor Bickel has provided one possible explanation, if not justification, for such a dismissal. Building on the work of Professor Charles Black,¹⁴ he developed the idea that a Supreme Court decision holding a particular statute or course of action not unconstitutional is often taken as importing much more—as connoting that the Supreme Court is affirmatively legitimating the challenged governmental action.¹⁵ He asserted, with much force, that this can precipitate a dilemma in which the Court feels called upon ultimately to uphold challenged action, and yet does not wish to give that action the added impetus that its imprimatur of legitimacy would provide. Under those circumstances, he said, the Court should, and often does, find means to avoid passing on the merits when that would leave the challenged statutes or programs in operation. He described and catalogued a vast arsenal of techniques for achieving that end.¹⁶

The dismissal for mootness in *DeFunis* surely seems to deserve characterization as an avoidance decision. The possibility that the case might become moot was known to the Court before it decided to take the case for review. The Court had actually requested the parties to brief the question of mootness and had received the memoranda before certiorari was granted in mid-November 1973.¹⁷ The University stated that if *DeFunis* registered for the spring quarter by March 1st, “that registration would not be cancelled unilaterally by the university regardless of the outcome of this litigation.”¹⁸ The hearing was nevertheless allowed to come up in due course—at the end of February. Then, having heard full argument exactly three days before the beginning of that final spring quarter, a majority of the Court two months later held that the case should be dismissed as moot.¹⁹

The Court’s action, of course, let affirmative action programs con-

might yet prevent *DeFunis*’ graduation at the end of the then current term, and more generally, that the issue was appropriate for Court resolution in this case. *Id.* at 348-50.

¹⁴ C. BLACK, JR., *THE PEOPLE AND THE COURT* (1960).

¹⁵ A. BICKEL, *supra* note 3, at 69-72.

¹⁶ *Id.* at 111-98. I do not mean to suggest that I consider these techniques all of equal propriety; in fact, they range in my judgement from the entirely proper to others of entirely dubious propriety. See P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 240-41, 656-62 (2d ed. 1973); see also Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (critique of Bickel’s thesis).

¹⁷ *DeFunis*, 416 U.S. at 315.

¹⁸ *DeFunis*, 416 U.S. at 316 n.3.

¹⁹ *DeFunis* was decided on April 23, 1974. The technical correctness of the mootness holding is debatable. There was, as the dissenters pointed out, some possibility that *DeFunis* would for one reason or another fail to complete that quarter successfully. Once *DeFunis* graduated, a holding of mootness would seem clearly justified. But waiting the extra few weeks for that would have made even more obvious that the Court was seeking a means to avoid deciding the merits. As it is, that inference seems clear enough.

tinue, in the University of Washington and elsewhere. On Professor Bickel's theory, the dismissal was most easily justified as an avoidance technique on the premise that, had the Court addressed the merits, it would have held the program to be valid. In that case the mootness dismissal would have been a means of continuing the programs without giving them the positive legitimization of Court approval.

Whether that was actually the view of the majority is, of course, impossible to say. There is some suggestion that this might be the case from the fact that Justices Brennan, Douglas, White, and Marshall were the ones who dissented on the mootness issue.²⁰ Considering their general substantive stance on related matters, one might be tempted to draw the inference that they believed that if the Court did address the merits, a majority would uphold the race-conscious special admissions program. That inference, however, may be too simple by half—or at least by a quarter—as Justice Douglas' separate individual opinion on the merits revealed.²¹ But it does seem safe to say that, at the least, a majority was willing to see these programs continue in operation for some further period, to gain additional experience if nothing else.²²

The most recent case in this series has some interesting parallels to the *DeFunis* disposition. In *Minnick v. California Department of Corrections*,²³ the Court also granted certiorari, received full briefs and

²⁰ *DeFunis*, 416 U.S. at 320, 348.

²¹ His was the only opinion that reached the merits. On the broad issues the opinion equivocated, ultimately going off on the suggestion that there might be bias in law school admissions tests and urging remand for consideration of the question. But a stressed and repeated theme was "[w]hatever his race, [DeFunis] had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *Id.* at 336-37; see *id.* at 343-44.

²² It is arguable that, for this objective, the Court could and should have simply denied certiorari in *DeFunis* in the first place. It is perhaps sufficient to point out that such an action, with its traditional absence of explanation, would have most obviously attracted charges of willful shirking on a tough, crucial issue. Beyond that, even bare denial of certiorari is not uncommonly taken as signifying approval of the result below. This is true of lower courts, particularly where certiorari was denied "despite the great importance and controversial nature" of the prior decision. See Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1277-78 (1979). Whether or not such an inference may occasionally be justified on close professional examination, the reaction of journalists, headline writers, and the public is not likely to be that carefully restrained.

A suggestion of deliberate shirking or implicit approval—or a combination of the two—would have been particularly likely in *DeFunis*. In that case, Supreme Court jurisdiction was invoked by appeal (asserted to be as of right). That appeal was dismissed for want of jurisdiction. *DeFunis*, 414 U.S. 1038 (1973). Combining that dismissal with a denial of certiorari might have strongly suggested evasion of the issue, especially because the dismissal of the appeal was itself not clearly compelled. It presumably went off on the basis that the University of Washington's program was not a "statute" within 28 U.S.C. § 1257(2). *But cf.* *Lathrop v. Donahue*, 367 U.S. 820 (1961) (state supreme court order held to be statute for purposes of § 1257(2)); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934) (Regents' order requiring a course held to be statute). Note, further, that the combination of the dismissal with denial of certiorari might more readily have been construed by the media and the public as approval of the decision below. See discussion of the *Minnick* case, *infra* text accompanying notes 26-35.

²³ 452 U.S. 105 (1981).

heard oral argument, and thereafter dismissed the case on jurisdictional grounds without reaching the merits. But the issues and the setting were different.

Between *Defunis* and *Minnick*, the Court passed on the constitutionality of affirmative action in two cases. The *Bakke* case,²⁴ you will recall, involved a challenge to the special admissions program of the Medical School of the University of California at Davis, under which 16 places out of each class of 100 were "set aside" for qualified disadvantaged minority students who were selected for admission through a special Admissions Committee subgroup made up in good part of minority members. The Supreme Court, by one vote of 5-4, held that specific program invalid and ordered Bakke admitted to the Davis Medical School. At the same time, the Court also expressly held, by a different 5-4 vote, that race could be used explicitly as a "plus" factor in selecting students for admission to medical, law, or other university schools. The *Bakke* decision was, of course, the crucial case in this series and we shall come back to discuss it in some detail.

The voting configuration and opinions in *Bakke* left uncertain, among other things, the ultimate significance of the use of a numerical set-aside (as distinguished from more indirect methods), and the relevance of the fact that the program there had been adopted by the University rather than by the general legislature. These two elements (and some others) came before the Court two years later in *Fullilove v. Klutznick*,²⁵ involving the validity of an Act of Congress requiring that at least 10 percent of the federal funds granted for local public works projects must ordinarily be used by the state or local grantee to purchase goods or services from minority-owned businesses. A majority of the Supreme Court upheld this set-aside. The vote this time was 6-3, but again there were a number of separate opinions and no single "Opinion of the Court" supported by a majority vote.²⁶

The Court granted certiorari in *Minnick* on the same day that *Fullilove* came down.²⁷ *Minnick* involved an affirmative action plan

²⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

²⁵ 448 U.S. 448 (1980).

²⁶ Chief Justice Burger wrote an opinion upholding the set-aside which was joined by Justices White and Powell, the latter also writing separately. Justices Brennan and Blackmun joined Justice Marshall's opinion, which also upheld the set-aside. Joined by Justice Rehnquist, Justice Stewart dissented, as did Justice Stevens separately. The opinion of the Chief Justice stressed deference to the power of Congress and its necessary latitude to remedy the effects of past discrimination. See 448 U.S. at 490. Justice Marshall's opinion found the set-aside constitutionally valid since it sought to serve the important governmental objective of remedying the present effects of past racial discrimination and was in fact substantially related to the achievement of that remedial purpose. 448 U.S. at 519-21.

²⁷ July 2, 1980. *Minnick v. California Dep't of Corrections*, 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979), cert. granted 448 U.S. 910 (1980).

adopted by the California Department of Corrections setting forth a five-year goal of employing 36 percent minorities and 38 percent women in the Department's personnel.²⁸ These figures represented substantial increases above existing levels. The plan had been adopted by a state agency, not the general legislature. Moreover, it used definite numbers, although apparently as goals subject to some flexibility. Of potentially even greater significance, however, the percentages set out in the plan in *Minnick* were not only larger, but perhaps even of a different order, from the proportions in the cases previously decided by the Court. In *Bakke* and in *Fullilove*, the figures used in the "set-asides" were in each case significantly below the percentage of the identified minorities in the population. In *Minnick*, however, the figure for women explicitly represented the percentage of women in the total labor force in California, while the proportion for minorities exceeded that in the labor force (and the general population) and was apparently linked to the percentage of minorities in the inmate population of the Department's prisons.²⁹ Not only were these numbers relatively high, they seemed to be chosen on two different standards with neither a ready explanation for their choice nor apparent consistency in their rationale.

The Court dismissed the case without going to the merits, in the main suggesting that the decision below was not "final" within the meaning of the jurisdictional statute. The somewhat labored opinion cited "significant ambiguities in the record"³⁰ and relied on the fact that the trial court proceedings in the case had taken place before the Supreme Court's decision in *Bakke*. The holding may have been technically supportable. It is also true, however, that the bases for this conclusion were generally available at the time of the original decision to grant certiorari.

In one aspect this may appear, like *DeFunis*, a classical instance of a Bickelian avoidance technique. The technical holding of dismissal on jurisdictional grounds left standing a California intermediate appellate court decision that generally upheld the affirmative action plan.³¹ At least until some future litigation and decisions, this program—and presumably others like it—was permitted to go on. Were Bickel's theory governing, one would presume that this action rested upon an internal judgment that if the merits had been addressed, the program

²⁸ *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 109 (1981).

²⁹ *Id.* at 109-10.

³⁰ *Id.* at 127.

³¹ *Id.* at 116.

would have been upheld as valid.³² I doubt, however, that there is any basis, at least externally, for a reliable inference that this is so.

My own speculation is that the Court majority has not gone that far. The one thing we can be sure of is that there were at least four votes to grant certiorari. From that point forward, all is speculation. It does seem significant that certiorari was granted on the same day that *Fullilove* was handed down. From one aspect, this might suggest that the decision to grant could have been motivated by concern that simply letting the result in *Minnick* stand, at the same time that the set-aside in *Fullilove* was upheld, might be taken as implying broad acceptance of affirmative action programs. A vote, or decision, on this basis would then be entirely consistent with readiness to dismiss certiorari and avoid addressing the merits at a later point.³³

Alternatively, one might view the grant of certiorari in *Minnick* as a decision to consider the merits. This could represent a continuation of debate within the Court. *Minnick* was a testing case for the rationales advanced by Chief Justice Burger and Justice Powell in their *Fullilove* opinions. Those opinions put heavy stress on the powers of Congress, on its general authority and particular responsibility to determine and remedy the lingering effects of past societal discrimination, and upon the proposition that Congress had specifically addressed these problems in devising the remedy under attack in *Fullilove*.³⁴ The facts of *Minnick*, in this dimension, might be seen to pose a particularly difficult case: the California Department of Corrections might well be viewed as having no more general legislative authority than the University of California Regents, and the use of the numerical percentages could easily be analogized to the "set-aside" percent in *Bakke*. Moreover, the particular percentages used in the Corrections Department plan might also be seen to make it generally more vulnerable; the figure as to women was directly proportional to the work force, while the minority percentage was higher still. That sort of proportionality, especially with the use of two disparate rationales, is harder to justify as solely remedial of past discrimination.

From this perspective, *Minnick* might be seen as posing particular difficulty for the Justices whose votes made the majorities that sustained race-conscious affirmative action in *Bakke* and *Fullilove*. Further, if there were a desire on the part of a majority to "send a signal" that affirmative action plans were going to be subject to closer judicial

³² See *supra* text accompanying notes 14-16.

³³ One can find some confirmation of this in the way the oral argument proceeded. See summary at 49 U.S.L.W. 3417-19 (U.S. Dec. 9, 1980).

³⁴ See *Fullilove v. Klutznick*, 448 U.S. at 472-92, 495-517.

scrutiny, or perhaps even to imply some heightened caution or disapproval, *Minnick* probably provided as good a vehicle as any for invalidating a plan. Yet when the chips were down, every member of the Court except Justice Stewart voted to dispatch the case without a holding on the merits.³⁵ On this basis I infer that a majority is at this point not willing to announce such invalidation. It is surely too much to infer a broad commitment to uphold affirmative action plans, but it does seem that a majority of the Court is not especially eager to invalidate such plans, at least for the present.

The Court's handling of *Minnick*, like its handling of *DeFunis*, clearly communicates a sense of uncertainty. In terms of the Court as a whole, it might also be thought to communicate ambivalence. Neither the grant of certiorari nor the dismissal was inevitable. The net result of both appears to be a studied avoidance of even implied approval or disapproval of a wide range of affirmative action plans. Whether or not that impression is accurate, *DeFunis* and *Minnick* can be read as revealing the difficulties encountered by a conscientious Court—or, rather conscientious Justices—in trying to deal with one of our society's intractable problems. One can readily infer that for a number of the Justices the problem involves not merely uncertainty but the ambivalence that goes with recognition that there are strong claims, strong moral claims, on both sides.

The opinions and positions in *Fullilove*, as well, may be seen as sending relatively conventional signals of uncertainty that reflect ambivalence. But *Fullilove* followed *Bakke*. Its holding made clear what might only have been guessed or inferred previously: a majority of the Court could be found to uphold at least some race-conscious affirmative action programs justified as remedying the lingering effects of past societal discrimination.³⁶ The techniques which the *Fullilove* decision used to communicate caution, uncertainty, or ambivalence were not unusual techniques for narrowing a holding and stressing that narrowness.

Bakke had made clear that there were four votes willing to sustain

³⁵ 452 U.S. 105 (1981). Justice Stevens wrote the opinion of the Court; Justices Rehnquist and Brennan each concurred separately in the dismissal; Justice Stewart dissented.

³⁶ Between *Bakke* and *Fullilove* the Court decided *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979). There Justice Brennan delivered the opinion of the Court, holding that a collective-bargaining agreement reserving 50% of the openings in craft-training programs for black employees, until the percentage of black craftworkers in a plant equaled that in the local labor force, did not violate Title VII of the Civil Rights Act of 1964. In upholding the affirmative action plan, the Court relied on the fact that its purposes mirrored those of Title VII in that both aimed to break old patterns of racial segregation and open new employment opportunities for blacks. *Id.* at 208. Justices Stewart, White, Marshall, and Blackmun joined Justice Brennan's opinion, Justice Blackmun also concurring separately. Justice Rehnquist dissented, joined by Chief Justice Burger, who also filed a dissenting opinion. Justices Powell and Stevens did not take part in the decision.

the general range of moderate affirmative action programs as remedies for societal discrimination. It also made clear that there were several other Justices who might vote to sustain certain race-conscious programs, but who were neither overtly nor broadly committed to doing so. Justice Powell made that clear as to himself by a separate opinion. The exquisitely narrow scope of the opinion by Justice Stevens³⁷ (speaking for the four who joined in holding the Davis program invalid) strongly suggested, in my judgment, that one or more of those who signed that opinion (including Chief Justice Burger as well as Justices Stewart, Rehnquist, and Stevens) might hold such a view. In fact, the opinions of the Chief Justice and Justice Powell in *Fullilove* established that they were both willing to sustain some generally remedial race-conscious measures—at least when enacted by Congress. Both opinions, and the Chief Justice's in particular, by explicitly stressing a narrow view of the facts that may be seen as peculiar to the particular case, clearly signaled, in a fairly usual common law manner, incremental movement and an unwillingness to commit to a broad rule or principle of law.³⁸

Bakke was different. There the stance of the Court as a whole amounted to a proclamation of ambivalence that dramatically recognized and proclaimed the existence of legitimate moral and constitutional claims on both sides of the issue. By the time the *Bakke* case came before the Supreme Court, it seemed that a choice would have to be made, ineluctably, between the concept of colorblindness as a well-nigh universal requirement, presently as well as in the long run, and the perception that remedial race-conscious programs are necessary means to achieve real equality.³⁹ Almost needless to say, each of these polar positions was held with deep conviction and deeply felt emotion

³⁷ See *infra* text accompanying notes 40-42.

³⁸ Justice Stevens' separate dissenting opinion in *Fullilove*, 448 U.S. at 532, which took as its lodestar a judicial judgment about the adequacy of Congress's deliberation and address of the issue, was unique because of its relatively unconventional analysis. Nevertheless, since he concluded that the congressional processes underlying the "minority business enterprise" set-aside were not sufficient to sustain its validity, he clearly signalled his hesitancy in sustaining any race-conscious plans.

³⁹ The hope (and convenient belief) that absolute colorblindness and real racial equality were not inconsistent in the short run may have been tenable at earlier points. See, e.g., the opinions of Justice Douglas in *DeFunis*, 416 U.S. at 336-37, 343-44, and of Justice Mosk in *Bakke v. Regents of the Univ. of Cal.* in the California Supreme Court. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976). In my judgment, however, it really could not survive the substantial amount of relevant data that was released by the law and medical school testing groups after the United States Supreme Court granted certiorari in *Bakke*. See Evans, *Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976*, 3 REPORTS OF LAW SCHOOL ADMISSIONS COUNCIL SPONSORED RESEARCH 551 (1977); B. Waldman, *Economic and Racial Disadvantage as Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U. S. Medical Schools* (Ass'n. Am. Med. Colleges 1977).

that reflected belief that it was morally and righteously based. Yet in *Bakke*, Justice Powell, with the acquiescence if not the active cooperation of at least several of his colleagues, managed to mark out a position that served to heal wounds and to defuse emotion.

In some ways the action is reminiscent of the old story of the religious dispute in a Jewish ghetto. After much argument and heating of tempers, both parties to the argument went to seek out the rabbi. They found him, and the first volubly poured out his argument. When he stopped, the rabbi said, "You're right." At that point the antagonist protested that the rabbi had not heard his side, and the rabbi let him proceed to state it. When he concluded, the rabbi said, "You're right." At that point one in the crowd that had gathered intervened, saying, "But Rabbi, they can't both be right." To which the rabbi responded, "You're right too." Yet, in *Bakke*, somehow it worked. The emotion that had grown and swept the country, that had sharply divided former allies, and that seemed to threaten complete irreconcilability, began to resume manageable proportions.

The principal author of this solution appears to be Justice Powell. It was his vote, and even more, his singular (in both senses) opinion, that produced what has been called the "Solomonic" result in *Bakke*. I said earlier that I thought this was brought about with at least the acquiescence of one or more of his colleagues. That is, of course, purely speculative on my part. I recognize that the Court comes together to plan a joint strategy only in the rarest circumstances. While *Bakke* may well have been a sufficiently important case to warrant the development of a concerted strategy and tactic, my speculation does not go that far. It is rather that I am struck by the extraordinary silence of those who joined in the exceedingly narrow opinion by Justice Stevens.⁴⁰ That opinion contained not one word suggesting that the Constitution embodies a requirement of colorblindness. Considering the ready availability of the rhetoric to express that position—some of which was even incorporated by Justice Powell in his opinion⁴¹—the omission could hardly be accidental. We know from later cases and opinions that Justices Stewart and Rehnquist do generally espouse the principle of a colorblind Constitution.⁴² The fact that neither of them, nor any other Justice, wrote an opinion along those lines seems quite significant. An eloquent statement of that position—and a strong rhetorical attack on

⁴⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 408-21 (Stevens, J., concurring in the judgment in part and dissenting in part).

⁴¹ *E.g.*, *id.* at 289-91.

⁴² *See, e.g.*, *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 127 (1981) (Rehnquist, J. concurring); *id.* at 128-29 (Stewart, J. dissenting); *Fullilove v. Klutznick*, 448 U.S. 448, 522-26 (1980) (Stewart, J. dissenting, joined by Rehnquist, J.).

the majority holding that properly designed race-conscious admissions programs were valid—might well have nullified the peace-making and calming effect of the Powell position.

Of course, even if this is so, it does not follow that the other Justices refrained from separate statement for that reason. But one cannot help wondering. It is true that the result could have been brought about through negotiation by only one of those who signed the Stevens opinion. One Justice might have insisted as a condition for his joinder that that narrow opinion be the exclusive forum for that side of the case; such arrangements as to the scope of opinions, in exchange for joinder, are neither unusual nor improper. The question remains, however, why the others on that side of the issue would agree to silence. Many possibilities exist, including the desire not to force an uncertain colleague to an undesired resolution of the broad issue. Instead, it could have reflected a tactical judgment that a "colorblindness" position conspicuously espoused by only one or two members, which others clearly refrained from joining, might signal weakness more than silence would. It is not inconsistent with that perception, and entirely possible in my view, that the agreement on a single, narrow opinion to speak exclusively for all four may have been influenced by conscious participation in a pattern that would communicate for the Court an overall note of ambivalence.

The four who favored clear upholding of race-conscious affirmative action programs—Justices Brennan, White, Marshall, and Blackmun—did not restrict themselves to one opinion. But on the central core issue they not only joined in a single opinion but took the very unusual step of naming each of them as a full coauthor (rather than merely joining a singly authored opinion). This served to fill out the Court's ambivalent stance.⁴³

While the cooperation of others may have been helpful, and perhaps even necessary, to bring about the desired effects, the principal architect of the *Bakke* disposition appears to have been Justice Powell. His was, in any event, the pivotal position. To understand how this came about it is necessary to consider first the positions taken by the other Justices.

The opinion by Justice Stevens was, as I noted, exceedingly nar-

⁴³ The general point may be sharpened by considering the available alternatives. These four Justices might conceivably have concurred narrowly in Justice Powell's specific position sustaining academic special admission programs on "diversity" grounds. The outcome of the *Bakke* case would have been unchanged, but the effect would have appeared more one-sidedly a vindication of Mr. Bakke's position and would have carried much less recognition of the justification for affirmative action programs generally. The note sounded then would have been uncertain or equivocal, but not clearly one of ambivalence.

row. It viewed the record below in a most constricted fashion, as presenting only the issue of Allan Bakke's right to admission, and thus the validity of the Davis Medical School program only as regarded his application; the opinion contended that the case did not pose any issue regarding the general validity of race-conscious programs.⁴⁴ In addition, it refrained from addressing the constitutional issue even as regards Mr. Bakke and placed its holding instead exclusively on Title VI of the Civil Rights Act of 1964.⁴⁵ The opinion was no broader than absolutely essential to decide the particular case and, as I have noted, no Justice who joined that opinion wrote separately.

The other opinion that spoke for four was, as I noted, jointly authored by Justices Brennan, White, Marshall, and Blackmun. This group held, first, that the substantive prohibitions of Title VI were co-extensive with those of the equal protection clause of the fourteenth amendment, serving to extend its requirements to private recipients of federal funds.⁴⁶ They then addressed the constitutional question, concluding after extended consideration that race-conscious affirmative action programs are valid so long as they are substantially related to an important governmental interest.⁴⁷ They held that the state interest in remedying the continuing effects of past discrimination was sufficiently important to justify race-conscious special admissions programs in universities—including the program at the Davis Medical School.⁴⁸

Justice Powell, of course, wrote for himself alone. He joined the Brennan group in holding that Title VI barred no more than did the fourteenth amendment,⁴⁹ but disagreed with them on the appropriate standard under that amendment. In his view, any race-conscious program had to survive "strict scrutiny," defined as necessary to further a substantial state interest.⁵⁰ Examining the various justifications proffered by the University, he concluded that the only one he considered acceptable in this case was the academic freedom of universities to select their own students combined with the academic interest in having a diverse student body.⁵¹ He considered that interest to be of constitu-

⁴⁴ *Bakke*, 438 U.S. at 408-11.

⁴⁵ *Id.* at 411-12, 421.

⁴⁶ *Id.* at 328.

⁴⁷ *Id.* at 361-62.

⁴⁸ *Id.* at 369.

⁴⁹ *Id.* at 287.

⁵⁰ *Id.* at 291, 305.

⁵¹ *Id.* at 307-12. He ruled out the rectification of societal discrimination on the grounds that the Regents of the University of California were not authorized to make a determination regarding such discrimination. *Id.* at 307-10. He thus reserved the possibility that such justification would be sufficient if found and acted upon by a body charged with general responsibility for dealing with such issues and, under those conditions, could support numerical set-asides. As mentioned previously, he found those conditions satisfied by Congress acting in the statute challenged in *Fullilove*.

tional dimension, invoking the first amendment.

Much scholarly attention has been focused on the difference in standards of validity articulated by Justice Powell and by the group of Justice Brennan *et al.*⁵² Though of course significant,⁵³ that was not the cardinal difference between them. It was, rather, Justice Powell's exclusive reliance upon the justification of academic diversity. He found that interest "compelling," but said that it would only support giving minority applicants a "plus" in an admissions process in which each applicant was compared with every other.⁵⁴ In his view, it would not support a program with a definite set-aside of places for minority students, nor one where minority applications were considered separately from all others; those features were not "necessary" for the goal.⁵⁵ The Davis Medical School program, of course, had the latter features. On this basis, he found that program invalid and cast the fifth and deciding vote that affirmed the order admitting Mr. Bakke to the Davis Medical School.⁵⁶ At the same time, since his position explicitly recognized the validity of a race-conscious admissions program that did not contain the objectionable features, he cast the fifth and deciding vote for an explicit holding of the Court that race-conscious programs of appropriate design were valid.⁵⁷

Justice Powell's stance gave a victory to each side of the heated dispute. It did so at the very least on the symbolic level. The newspaper headlines and television news summaries that ended the public's suspense about the case shouted that "Bakke wins" but were immediately accompanied by a further headline that race-conscious programs were not unconstitutional.

That symbolic posture was important in defusing and calming the intense emotional division that had seized the nation on this issue. Its success was not a result of giving each party an equal half of the loaf. I do not think it is partisanship that leads me to say that the principal effect of the *Bakke* decision, by far, was to sustain race-conscious spe-

See *supra* text accompanying notes 25-26.

⁵² See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (Supp. 1979) 89-92; Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 105-14 (1979); O'Neil, *Bakke in Balance: Some Preliminary Thoughts*, 67 CALIF. L. REV. 143, 145-50 (1979).

⁵³ The opinion of Justices Brennan, White, Marshall, and Blackmun, while characterizing their standard as a "strict" one, required only that race-conscious affirmative action be *substantially* related to an important state interest. 438 U.S. at 359.

For a careful analysis of these and the other positions in this entire line of cases, see Choper, *The Constitutionality of Affirmative Action: Views from the Supreme Court*, 70 KY. L.J. 1 (1981-82).

⁵⁴ *Bakke*, 438 U.S. at 315-18.

⁵⁵ *Id.*

⁵⁶ *Id.* at 320.

⁵⁷ *Id.*

cial admissions programs throughout the nation. Most of these programs did not contain the set-aside or separate channel features that Justice Powell found objectionable, and those that did were easily revised to meet his demands. The experience following the *Bakke* decision was that the vast range of race-conscious programs of special admissions to universities continued in full force and effect. Despite initial dire forecasts that the decision would result in sharply reduced applications and admissions to professional schools, the actual results showed no such diminution.⁵⁸ Moreover, although Mr. Bakke was admitted to medical school, it is hard to find any other persons who were ordered admitted to universities as a result of the case. Indeed, I know of only one appellate court decision of a *Bakke*-like suit filed after the Supreme Court decision—and the plaintiff in that did not succeed.⁵⁹

What I believe made Justice Powell's ambivalent stand effective, and what made the symbolism important, was not any equal or near-equal division of outcomes. Although that may have been the initial impression, I do not believe it has been the lasting one; the continued existence of affirmative action programs is too evident on all sides. The reasons for success in healing the nation's wounds, in my judgment, lay in a different direction altogether. It was rather that the stance taken by the Supreme Court as a result of Justice Powell's position both symbolically and actually recognized the legitimacy of deeply held moral claims on both sides. To those who supported the race-conscious programs, its holding that they might generally continue certainly did that. Though Mr. Bakke's specific victory exerted a powerful impact initially, it did not take long for supporters of those programs to realize how much of what they sought had been validated.⁶⁰ To those who

⁵⁸ An article written a year after the *Bakke* decision was handed down and based on the judgments of a number of educational and professional organizations monitoring reaction to the decision, concluded that "the Supreme Court's *Bakke* decision has had virtually no effect on minority-group enrollments at most colleges and universities." Middleton, *Bakke Ruling Seen Having Little Effect*, CHRON. HIGHER EDUC., July 30, 1979, at 1. Figures on minority group enrollment in United States medical schools compiled by the Association of American Medical Colleges corroborate these conclusions. They show selected minorities increasing from 8.8% of total first year enrollment in 1978-79 to 9.1% in 1979-80, the first year (and therefore likely the principal one) in which the *Bakke* decision would have been reflected in admission totals. ASSOCIATION OF AMERICAN MEDICAL COLLEGES, MEDICAL SCHOOL ADMISSION REQUIREMENTS 1983-84: UNITED STATES AND CANADA 49, table 7-A (1982). Law school figures similarly fail to show any significant drop in minority admissions coincident with *Bakke*. Thus, an ABA survey of minority group students enrolled in J.D. programs in approved law schools shows 9,922 such students, or 8.16% of the total, enrolled in 1978-79; 10,008, or 8.15% of the total enrolled in 1979-80. (Available later figures show some increases: 10,574, or 8.43%, in 1980-81; and 11,130, or 8.74% of the total, in 1981-82.) AMERICAN BAR ASSOCIATION, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 1981-82: LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS 51, 53 (1981).

⁵⁹ *Doherty v. Rutgers School of Law-Newark*, 651 F.2d 893 (3d Cir. 1981) (plaintiff did not meet criteria for acceptance for any of places thus not injured by the plan).

⁶⁰ Indeed, there was a specific section in the Powell opinion that was joined explicitly by

strenuously opposed such programs, the publicly heralded victory of Mr. Bakke itself implicitly legitimated their position. In addition, Justice Powell's opinion expressed clear support for the view that racial or ethnic lines are inherently constitutionally suspect. (As noted earlier, although the Stevens opinion did not in terms substantially reinforce this position, its expression in the Powell opinion went undiminished by anything said by the Justices joining the Stevens position.) Further, the result reached by the Court effectively required the abandonment of explicit numerical set-asides or other rigid features that evoked memories of exclusionary quotas or other traditional instruments of hostile and invidious discrimination.

It is striking how effective the *Bakke* disposition was in reducing the level and intensity of heat surrounding the issue of race-conscious affirmative action. Such reduction in tensions is by no means an inevitable result of a Supreme Court decision on a major constitutional issue. One need only think of the abortion cases to illustrate that a Supreme Court decision may indeed have the opposite effect.⁶¹ The experience with the abortion issue may also help cast further light.⁶² In the first abortion cases⁶³ the Court unequivocally took a stance on one side of the issue. Because of the status and role of the Supreme Court in our system, such a decision by the Court tends to carry with it a note of morality; the holding that a woman has a constitutional right to an abortion is to an important degree taken as implying that those who oppose it are morally wrong. That implication, or overtone, is likely to breed resentment and a strong emotional counterreaction. One need only contrast the relatively quiet acceptance by the "right to life" forces of ordinary legislative defeats (which had occurred) with the intensely emotional response to the Supreme Court's actions. Other factors may, of course, play a part, including the very real difference in the obstacles to overturning the defeat. But I think the element of moral condemnation, and the resentment it understandably engenders, is a real and important phenomenon. Justice Powell's pivotal stance in the *Bakke* case enabled the Court to avoid that phenomenon.

Justice Powell's vehicle for accomplishing this feat was acceptance of the importance of "diversity" in the academic setting. The use of the "academic diversity" justification had a number of effects. It by-passed

Justices Brennan, White, Marshall, and Blackmun—thus constituting it an official Opinion of the Court—which recognized that a state may validly have "a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Bakke*, 438 U.S. at 272 n.1, 320.

⁶¹ See *infra* text accompanying note 79.

⁶² See *infra* text accompanying note 82.

⁶³ *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

the issue of whether undoing the effects of societal discrimination would be a sufficient justification for a set-aside enacted by a general legislature, and thus avoided any commitment (even by implication) regarding affirmative action programs in employment or other nonacademic areas. It tended to equate race with other variables (such as athletic ability, geographic origin, or alumni relations) that seem more acceptable generally and do not carry the same emotional freight as racial or ethnic lines do. Justice Powell capitalized on this tendency by stating that a program based upon academic diversity could not on its face make race a separate determinative criterion.⁶⁴ He took the position that the goal of diversity could only support the use of race as a "plus" factor in a selection process in which various elements (academic and other) are weighed and in which each applicant is compared to all others. He held, further, that it could not be used to justify numerical targets, "quotas," or set-asides.⁶⁵ The last two requirements were crucial to his position that the Davis Medical School program was invalid, and that Bakke, therefore, had to be admitted, while the general run of race-conscious special admissions programs either were valid or could be made so with relative ease.

Justice Powell's position produces a result that makes a good deal of intuitive sense. But its justification on a principled, constitutional level is more problematic. The rationale advanced in the opinion proceeds from the principle that academic freedom, protected by the first amendment, encompasses selection of students. Justice Powell then advances an interest in diversity of students as *the* acceptable "compelling" academic interest required by strict scrutiny standards. One may question why academic freedom allows only a choice of diversity as a goal. In terms of first amendment concerns, why should a university have less constitutional freedom to opt for homogeneity in particular respects—e.g., to select for specific programs only those with certain majors or interests, or particular career objectives, or only urban—or rural—residents? As long as the operative criterion is not racial or ethnic,⁶⁶ there would seem to be no problem with homogeneity as a goal. If a racial criterion is applied, however, then it may well be doubted that the action would be upheld as constitutional. But then it may be questioned whether a university's choice for diversity of students can rise any higher.

On one level, Justice Powell's opinion apparently accepts that it cannot. He takes the position that a special admissions program in

⁶⁴ *Bakke*, 438 U.S. at 318.

⁶⁵ *Id.* at 315-18.

⁶⁶ Or any other that invokes special scrutiny, such as religious or political criteria.

which race is explicitly determinative is invalid, and cannot be justified on the basis of achieving a diversity objective. At the same time, he upholds the use of race as a "plus" factor on that very basis, saying:

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.⁶⁷

With all respect, I believe it is open to question whether the reasoning and "principle" contained in this passage could be applied generally. There would seem to be no *a priori* reason why a "minus" should be treated differently from a "plus" factor—used in precisely the same sort of calculus—and yet I consider it most unlikely that the Court (or Justice Powell) would uphold a program seeking diversity by assigning such a "minus" to membership in a racial or ethnic group considered to be overly represented in a student body chosen to achieve "diversity."

The difference may lie in acceptance of the proposition that giving affirmative consideration to race is in fact a necessary means of including significant numbers of minority members in the student bodies of highly selective medical, law, or other university schools.⁶⁸ There was substantial demonstration of this in the *Bakke* briefs and, although that conclusion is not expressly articulated, it seems a fair reading of Justice Powell's opinion to view it as predicated on that necessity.⁶⁹

Once that objective, and necessity for its achievement, is accepted as sufficient justification, the question arises why an explicit race-determinative or even "set-aside" type of program is unacceptable. Such a program may surely be an effective way to reach the desired objective. Indeed, it may be the most efficient way. Consider a not atypical situa-

⁶⁷ *Bakke*, 438 U.S. at 318.

⁶⁸ This would also be consistent with the expectation that Justice Powell (and a majority of the Court) would not be likely to uphold a program meeting the quoted description which used so high a "plus" that specific minorities were disproportionately heavily represented.

⁶⁹ Certainly his position explicitly rests upon acceptance of educators' judgment that additional racial and ethnic representation must be actively sought if desired diversity is to be achieved. See *Bakke* at 311-15, 324 (appendix to opinion of Powell, J.).

tion. Assume that a law school finds that the use of strictly academic criteria (e.g., college record and test scores) will actually produce a widely diverse student body, and that over the years this method has produced a quite varied and broad-spectrum student group—with one very notable exception: the group is virtually all white. (This is far from fictitious.) Under these circumstances, efforts to achieve greater diversity need call for nothing more than a special admissions program on race-conscious lines alone. Indeed, that would be the simplest, most efficient, and least costly system.⁷⁰

It seems unlikely that such a program would be upheld under *Bakke* as decided. The language of Justice Powell's opinion does not absolutely preclude the possibility, but its major thrust would seem to rule out any program framed explicitly in terms of race (or ethnic background) as the sole preferential factor. This would seem beyond question if the program were set up in terms of a separate, explicitly race-based channel for passing on applications and a set-aside of a stated number of places. Justice Powell maintained that such explicitly race-based programs are not justifiable as "necessary" to a compelling interest because the more indirect kind of program, that he would uphold, assures individual consideration of each person.⁷¹

Yet, this must to the largest degree be a matter of form rather than substance. There is, after all, no objective way to compute the "edge" to be given to race or ethnic background as compared to any other factor. If an admissions committee is allowed to give a "plus" for race as a means of achieving diversity in the student body, that "plus" must be large enough to make a difference in the outcome in some cases. But if that is so, isn't it clear that the size of the "plus" will determine the number of minority students admitted? In those circumstances, it is virtually inevitable that the authorities that determine the size of the "plus" will set that size in terms of the number of minority students likely to be produced at the level set. Since that is so, the use of a "plus" may simply be a slightly less precise, and less direct, method of determining the proportion of minority students who will be given preferential admission.⁷² The choice of one method or the other may make a difference in the marginal case; for 'the last available seat' (assuming selection proceeds in that fashion), the use of a "plus" approach may produce a "gestalt" or overall "squint" comparison of the top-ranked unadmitted majority and minority candidates. But for the vast bulk of

⁷⁰ In these circumstances, it could not be said that a program "focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." 438 U.S. at 315.

⁷¹ 438 U.S. at 318 & n.52.

⁷² See *id.* at 378-79 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

applicants, the concept of direct individual comparison will inevitably be unreal.⁷³

Justice Powell's opinion spoke to a related point; in the paragraph immediately following the passage quoted above, he continued:

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod v. Dilworth*, 322 U.S. 327, 329 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system.⁷⁴

But this statement does not explain why an explicitly announced "plus" for membership in a racial or ethnic group does not in this context present a "facial intent to discriminate" or a "facial infirmity." The fact that the announcement may equate race with other, generally acceptable factors cannot be the answer. It is certainly hard to consider such a policy "facially nondiscriminatory"—and it would surely not be so considered in the general run of circumstances. Yet there can hardly be doubt that Justice Powell's position would uphold the validity of a special admissions program so conceived and so described.⁷⁵

The crucial difference appears to be that explicit "set-aside" programs are not considered "necessary" when more indirect programs will serve. The former are deemed to require more justification than the latter. In my judgment, there is a sound basis for this. The use of a "plus" is not the same as a "quota" or a "set-aside". Even when the

⁷³ The point here is not that a "plus"-type system may be used as a subterfuge, but that the system will inevitably work in the vast majority of cases without significant difference from the "set-aside" format.

⁷⁴ 438 U.S. at 318.

⁷⁵ The "Harvard program" advanced by him as an acceptable model contains explicit reference to race. It also expressly avows a goal of enrolling significant numbers of minority students. The statement, which is attached as an appendix to Justice Powell's opinion, *id.* at 321-24, does equate race with other factors to be considered in achieving a diverse class. But such description would surely not save from invalidity the use of race as a "plus" (or "minus") in any program that was not to be upheld in any event for other reasons.

net operative results may be the same, the use of euphemisms may serve valuable purposes; as do legal fictions, they may facilitate the acceptance of needed measures.⁷⁶ The indirectness of the less explicitly numerical systems may have significant advantages, not so much in terms of the processes of consideration as in the felt impact of their operation over time. The description of race as simply "another factor" among a lot of others considered in seeking diversity tends to minimize the sense that minority students are separate and different and the recipients of special dispensations; the use of more explicitly separate and structured systems might have the opposite effect. These perceptions can have important consequences for the schools and their students, both majority and minority. They can facilitate or hamper the development of relationships among individuals and groups; they can advance or retard the educational process for all—including, particularly, minority students whose self-image is most crucially involved.

Indirectness may also have significant advantages in muting public reactions to, and possible resentment of, the granting of preference on racial lines. The use of overt numbers, whether stated as literal quotas or as "set-asides" for qualified applicants, greatly tends to trigger the symbolism of the infamous "numerus clausus" and other exclusionary devices of past invidious religious, ethnic, and racial discrimination. The incorporation of such features in an institutional admissions program continuing indefinitely from year to year, tends continually to keep alive consciousness of the program and the relevance of race therein; it tends to maintain and exacerbate latent and overt hostility to these efforts to overcome the effects of past racial discrimination. A program formulated along the lines Justice Powell's opinion approves would, by the very lack of "sharp edges," avoid such visibility in its operations and tend to enhance the acceptability of the program.

I believe these points are sound, and provide substantial reason for finding more subtle programs more widely acceptable than those containing more explicit and obtrusive features. I also recognize that wise and effective government may at times require such indirection and less-than-full candor. But one can hardly proceed by proclaiming in a Supreme Court opinion that this is what is happening. It might be arguable that considerations of the sort described could be founded in principle rather than prudence or expediency. But they surely do not lend themselves to formulation into an articulable principle to be announced by the Supreme Court—particularly one to be applied across

⁷⁶ Professor Jerome Michael's example still seems persuasive: Most of us would balk at government orders to rise an hour early, go to work an hour early, dine and go to bed an hour early. But few have difficulty accepting Daylight Savings Time every year.

the board to all cases that fall within its terms.

I do not make these points to be captious. I do so because they pose for me a difficult conflict at an elemental level. As I have indicated, I do not believe that the position taken by Justice Powell—and thus the net outcome in the *Bakke* case—can be supported by articulated principle. By this I am not referring to the kind of exalted “neutral principle” that Professor Wechsler spoke of.⁷⁷ I am using, rather, the much simpler notion of principle as that which transcends the particular case, is rationally defensible in those general terms, and is analytically adequate to support the result.

At the same time, I consider the Court’s stance in *Bakke*—the ambivalent posture made possible by Justice Powell’s opinion (perhaps with support of others)—to be a wise and politic resolution of an exceedingly difficult social problem. The Court took what was one of the most heated and polarized issues in the nation, and by its handling defused much of that heat. To lower the boil in the intense cauldron of race issues was, in my judgment, no mean nor easy achievement. But I think the accomplishment went further than that.

Let us consider the implications of the position I have advanced, which is that the justification of academic diversity would support even the Davis form of special admissions program.⁷⁸ If Justice Powell had taken this position, he would not have joined the opinion of Justices Brennan, White, Marshall, and Blackmun, but he would have voted with them. The result then would have been complete rejection of the claim advanced by Mr. Bakke and his supporters. For reasons sketched earlier, that rejection would likely have engendered deep resentment, and possibly even a sense of betrayal. That reaction, in turn, could well have begotten a legislative backlash,⁷⁹ such as we have seen in other highly charged areas of Court decision. Significantly, unlike those other areas, there is legislative power to undo affirmative action programs,

⁷⁷ See H. WECHSLER, *supra* note 3.

⁷⁸ There is the theoretical possibility that, forced to choose between sustaining explicitly structured special admissions programs (including Davis’) or invalidating all race conscious programs, Justice Powell would have elected the latter course. My own view is that such an outcome would have produced a disastrous setback in race and other relations in our society generally, and I doubt that Justice Powell would have chosen that course. (I recognize that I may be projecting, but it is also an axiom for interpreting court precedents that judges decide outcomes more surely and more reliably than they provide reasons.) More to the present point, if the driving force for reconsideration here is the demand for principle, the analysis I have advanced would not lead to general invalidation of special admissions. As indicated in the text, the academic diversity justification once accepted could, and should, sustain all forms of special admissions programs designed to achieve that objective.

⁷⁹ I am not alone in considering such a legislative backlash a real possibility. See Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 27-29 (1979). It is also true that, even if such a backlash ultimately failed, the pitched battle precipitated thereby could have had disastrous effects.

even after the Court has upheld such programs as valid.⁸⁰ The result then might be a return to essentially all-white professional schools, and possibly also inhibition or even ending of employment programs. That would in my view represent a clear setback not only in race relations but in the general conditions of our democratic polity.

Thus, my dilemma. Candor compels me to say that I cannot bring myself to condemn the net result reached in *Bakke*. Indeed, I consider it a major, successful accomplishment. Yet, if I cannot find an analytically sound principle to support that result, what justification do I have to support such action by the Supreme Court? In theory, at least, the Court—as distinguished from other agencies of government—must rest its decision on an analytically sound principle.

This dilemma is less acute than it would be were Justice Powell's opinion that of a majority, for then his analysis would have stood as precedential authority. As it is, his opinion spoke only for himself, and so does not bind the future. That the crucial opinion, and hence the disposition as a whole, should thus avoid determining the larger issue of principle, while yet resolving its competing claims in the moment, was from one aspect itself a masterful stroke of diplomacy. Yet the issue of principled justification for Supreme Court action remains.

I am not so absolute or so unworldly as to say that results may not at times be a sufficient justification. Certainly, if the total security of the nation depended upon a particular Supreme Court result, I would not think the Court should be deterred from that result if it were unable to articulate at the time a satisfactory supporting principle. That is in one sense an essential element in successful government. But it is at the same time an exceedingly dangerous one. Unless cabined, it is an argument that will always justify desired social outcomes regardless of principled justifications.

But how could it be cabined here? I cannot assert that I believe the safety of the United States depended on one outcome or the other in *Bakke*. I can say that the case was an extraordinary one, in terms of public awareness and concern⁸¹ as well as in terms of the importance and difficulty of the issues. But such "extraordinary" cases are not so

⁸⁰ Cf. *Crawford v. Board of Educ.*, 102 S. Ct. 3211 (1982) (upholding an amendment to the state constitution which cut back on state court-ordered busing plans to achieve integration). But see *Washington v. Seattle School Dist.*, 102 S. Ct. 3187 (1982) (invalidating the result of a statewide initiative which would have prevented school boards from busing for integrative purposes).

⁸¹ It hardly seems necessary to document this statement, but if need be, support may be found in the extraordinary number of amicus briefs filed in the Supreme Court (a record number), *Bakke*, 438 U.S. at 268-70, the fact that the formulation of the amicus position of the government became headline news in *The New York Times*, see N.Y. Times, Sept. 20, 1977, at 34, col.1, and the extent of media coverage of the decision in both daily and more extended periodicals. See, e.g., N.Y. Times, June 29, 1978, at A1, col.6.

uncommon on the dockets of the United States Supreme Court,⁸² and the line between them and the run of other cases is by no means easily demarcated or maintained. It is true that in *Bakke* racial relations were importantly under stress. It is also true that race relations are our most durable domestic crisis. Is it therefore sufficient to limit the "exception" to racial matters? Is it justifiable?

The manifest ambivalence and incertitude projected in this entire line of cases, and in particular the absence of any official "Opinion of the Court" addressing the merits, may mute these questions. But they do not obviate them. I have tried but I have not been able to come to resolution. That may be an unorthodox way to conclude a formal lecture. But that is how I must, and do, conclude this one.

⁸² *United States v. Nixon*, 418 U.S. 683 (1974), posed equally unusual problems. See Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 U.C.L.A. L. REV. 76 (1974). It too was unquestionably an "extraordinary" case. But can one characterize the first abortion decisions that way? See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).