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Bakke v. Regents of the University of California: The Need for a New Standard of Review

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BAKKE v. REGENTS OF THE UNIVERSITY OF CALIFORNIA: THE NEED FOR A NEW STANDARD OF REVIEW

I. INTRODUCTION

The constitutionality of remedial admissions programs[1] was initially presented for adjudication before the United States Supreme Court in *DeFunis v. Odegaard.*[2] Unfortunately, since the Court determined that the case was moot,[3] the important constitutional issue was left unanswered. *Bakke v. Regents of the University of California*[4]—a case very similar to *DeFunis*[5]—will provide the Supreme Court a second opportunity to consider this significant constitutional question. Hopefully, the Court will reach the merits of *Bakke*[6] and thus achieve some finality in this area of constitutional law.

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1. These programs have been variously labeled "benign discrimination," Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 328 n.2, 348 N.E.2d 537, 540 n.2, 384 N.Y.S.2d 82, 84 n.2 (1976), "reverse discrimination," *id.*, and "preferential admissions," O'Neil, *Perferential [sic] Admissions: Equalizing the Access of Minority Groups to Higher Education,* 80 YALE L.J. 699 (1971). However, it is this author's belief that the most accurate description of these programs is "remedial admissions" since their immediate objective is to "remedy" the effect of past racial discrimination which has resulted in virtually complete segregation in our nation's schools.

2. 507 P.2d 1169 (Wash. 1973), *vacated as moot,* 416 U.S. 312 (1974). After Marco DeFunis was twice denied admission to the University of Washington Law School, he filed suit in Washington Superior Court alleging that the school's minority admissions program violated the fourteenth amendment of the United States Constitution. *Id.* at 1178. Since the law school classified and treated applicants on the basis of race, the trial judge found the program to be unconstitutional per se. *Id.* On appeal however, the Washington Supreme Court reversed the judgment; the special admissions program was held to be constitutional since it furthered the compelling state interest of expanding educational opportunities for minorities who had been previously underrepresented in the law schools as well as in the legal profession. *Id.* at 1184. However, the United States Supreme Court declared the case technically moot because DeFunis, who had been tentatively admitted pending final judicial resolution of his claim, was scheduled to complete law school that term. 416 U.S. 312, 319-20 (1974).

3. 416 U.S. at 319-20.

4. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680, *modified,* 18 Cal. 3d 252b (1976), *cert. granted,* 97 S. Ct. 1098 (1977).

5. The major distinguishing feature of the two cases is the type of school involved. DeFunis sought judgment against the University of Washington Law School, 507 P.2d at 1171-72; Bakke's suit is against the University of California at Davis, Medical School, 18 Cal. 3d at 38, 553 P.2d at 1155, 132 Cal. Rptr. at 683.

6. In a modification of its original opinion, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), the California Supreme Court ordered that Allan Bakke be admitted to the Davis Medical School. Bakke v. Regents of the University of California, 18 Cal.

Following a discussion of the facts, decision and rationale of *Bakke*, this comment will demonstrate that remedial admissions programs are constitutionally permissible under traditional equal protection analysis; either strict scrutiny or minimal scrutiny. However, it will then assert that such criteria are inappropriate and will posit a new approach to solving the equal protection problems created by remedial admissions programs.

II. *Bakke*—THE FACTS AND DECISION

Plaintiff Allan Bakke, a Caucasian, applied for admission to the University of California's Medical School at Davis for the academic years 1973 and 1974. Upon denial of the applications, Bakke brought suit[7] against the University seeking mandatory, injunctive, and declara-

3d 252b (1976). This factor places *Bakke* in a situation similar to that for which *DeFunis* was declared moot. *See* note 2 *supra*.

7. A recent newspaper article revealed that an admissions officer encouraged Allan Bakke to file suit against the Davis Medical School in order to challenge the constitutionality of its special admissions program. L.A. Times, Feb. 4, 1977, Pt. II, at 1, col. 5. Whether that same officer would have been able to personally challenge the constitutionality of the school's admission procedure presents an intriguing question.

The starting point for analysis in this area is the distinction between "standing to sue" and "standing to assert." Standing to sue requires the plaintiff to be "injured in fact"; a clear adversity between the parties usually indicates the existence of case or controversy jurisdiction pursuant to U.S. CONST. art. III. Singleton v. Wulff, 428 U.S. 106, 112-14 (1976). Standing to assert, on the other hand, requires the plaintiff to be a proper proponent of the legal rights asserted in the suit. *Id.*

The right to assert a constitutional challenge on the ground of jus tertii, *i.e.*, asserting the rights of a third party, originates from a judicially imposed rule of restraint—one may not claim standing to assert the constitutional rights of a third party. Craig v. Boren, 429 U.S. 190, 193 (1976); Singleton v. Wulff, 428 U.S. 106, 113-16 (1976); Barrows v. Jackson, 346 U.S. 249, 255, 257 (1953). But since the Court has created so many exceptions to the general rule, its current validity as a hard-and-fast standard is questionable. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Barrows v. Jackson, 346 U.S. 249 (1953). The Court has singled out two factors as pertinent when seeking to establish an exception to the general rule against raising the rights of third parties. The first factor which the Court considers is the relationship of the litigant to the individual whose right he seeks to vindicate. 428 U.S. at 114. In *Singleton*, the Court stated that the enjoyment of the right must be "inextricably bound up with the activity the litigant wishes to pursue," *id.*, and that the relationship between the litigant and third party must be such that the litigant is as effective a proponent of the right as the third party. *Id.* at 115. Most instances in which the Court has upheld the required relationship have involved cases where a liaison of a confidential nature was present. *See, e.g.*, Doe v. Bolton, 410 U.S. 179 (1973) (physician-patient); Griswold v. Connecticut, 381 U.S. 479 (1965) (physician-patient); *cf.* Barrows v. Jackson, 346 U.S. 249 (1953) (granting standing to an owner of real estate to challenge a racially restrictive covenant). The second factor which the Court assesses is the third party's ability to assert his own right. 428 U.S. at 115-16. A genuine obstacle to such an assertion is usually required. *Id.* at 116.

A recent case upholding the applicability of jus tertii standing is Craig v. Boren, 429

tory relief. His complaint alleged that his application to the medical school would have been accepted but for the University's special admissions program.[8] Bakke claimed this program discriminated against him because of his race, in violation of the equal protection clause of the fourteenth amendment of the United States Constitution.[9] The Univer-

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U.S. 190 (1976). Appellant Craig, a male who was at the time of the institution of the suit between 18 and 21 years old, and appellant Whitener, a vendor of 3.2 percent beer, brought an action seeking declaratory and injunctive relief. They alleged that an Oklahoma statute which prohibited the sale of "non-intoxicating" 3.2 percent beer to males under the age of 21 and to females under the age of 18 violated the equal protection rights of the males between the ages of 18-20 years. The Court held that since only declaratory and injunctive relief were sought, the controversy was moot as to Craig since he turned 21 after commencement of the suit. *Id.* at 192. However, the Court held that the beer vendor did have jus tertii standing. She suffered "injury in fact" by either obeying the statutory provisions and incurring economic loss or disobeying the statute and suffering sanctions. *Id.* at 194. Additionally, the vendor had standing to assert the rights of third parties since defeat of her suit and the continued enforcement of the state statute would " 'materially impair the ability of' the males 18-20 years of age to purchase 3.2 percent beer." *Id.* at 196 (*quoting* Eisenstadt v. Baird, 405 U.S. 438, 446 (1972)).

In the Los Angeles Times article, the officer stated that as a result of the disclosure of his part in the Bakke suit, he was relieved of practically all of his admissions responsibilities and assigned to meaningless jobs. L.A. Times, Feb. 4, 1977, Pt. II, at 1, col. 5, 6. He thus suffered "injury in fact." Furthermore, the type of injury suffered by the officer is sufficient to invoke constitutional protection, as allegations of non-economic injury have been sufficient to provide standing in cases brought to benefit the public. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); *cf.* Sierra Club v. Morton, 405 U.S. 727 (1972) (denied standing to an organization because none of its members alleged any specific injury).

However, the admissions officer would only be able to satisfy one of the two factors required to establish standing to assert. Arguably the third party, the applicant, would be unable to assert his own rights. A barrier to the assertion of the unconstitutionality of a school's admissions program is the imminent mootness of the applicant's claim. *See* Craig v. Boren, 429 U.S. 190 (1976); DeFunis v. Odegaard, 416 U.S. 312 (1972). Nevertheless the relationship between the officer and the applicant is not such that the officer would be as effective a proponent of the right as the applicant. Singleton v. Wulff, 428 U.S. 106, 115 (1976).

Therefore, application of the jus tertii standing principle to a potential suit by an officer of a university challenging the school's admission procedure may fail as a result of the lack of standing to assert.

8. The University allots 100 new places each year for the entering class at the Davis Medical School. Of those 100 spaces, 16 are reserved for minority students admitted through the school's special admissions program. The school received 2,644 applications for the 1973 academic year and 3,737 in 1974. 18 Cal. 3d at 38, 553 P.2d at 1155, 132 Cal. Rptr. at 683.

9. Bakke alleged that the special admissions program applied preferential standards of admission to members of racial minorities resulting in the acceptance of less qualified minority applicants. *Id.*

10. In the cross-complaint the University alleged that the minority status of an applicant is only one factor in its overall selection process. It added that the special admis-

sity cross-complained for declaratory relief, seeking a determination of the validity of its special admissions program.[10]

The trial court found, on the University's cross-complaint, that the remedial admissions program violated the fourteenth amendment.[11] However, the court declined Bakke's request for injunctive relief upon the determination that Bakke would not have been accepted for admission in either 1973 or 1974, even if there had been no special admissions program.[12] Both parties appealed from the judgment and because of the importance of the issues involved, the California Supreme Court immediately accepted the case, bypassing the court of appeal.[13]

The California Supreme Court affirmed that portion of the lower court opinion declaring the University's special admissions program unconstitutional.[14] It framed the issue as "whether a racial classification which is intended to assist minorities, but which also has the effect of depriving those who are not so classified of benefits they would enjoy but for their race, violates the constitutional rights of the majority."[15]

The court commenced its inquiry by surveying the various standards of review utilized in the equal protection area. Rejecting the more lenient rational basis test[16] urged by the University, the court applied the strict scrutiny standard.[17] The majority reasoned: classification by

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sions program was formulated to "promote diversity in the student body and the medical profession, and to expand medical education opportunities to persons from economically or educationally disadvantaged backgrounds." *Id.* at 39, 553 P.2d at 1155, 132 Cal. Rptr. at 683.

11. *Id.*

12. *Id.*

13. *Id.* The procedure was based on CAL. CONST. art. VI, § 12 and rule 20 of the California Rules of Court. 18 Cal. 3d at 39, 553 P.2d at 1155, 132 Cal. Rptr. at 683.

14. *Id.* at 64, 553 P.2d at 1172, 132 Cal. Rptr. at 700.

15. *Id.* at 48, 553 P.2d at 1162, 132 Cal. Rptr. at 690. The court further divided the issue into "two distinct inquiries"; (1) the appropriate test to be used in the determination of whether the program violates the equal protection clause, and (2) whether the program satisfies the requirements of the applicable test. *Id.* at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690.

16. The court stated that the general rule of the rational basis test is that classifications instituted by government regulations are presumed valid so long as " 'any state of facts reasonably may be conceived' in their justification." *Id.* (*quoting* McGowan v. Maryland, 366 U.S. 420, 426 (1966)). The use of the rational basis test usually means that a reviewing court will strain to find a legitimate or permissible state purpose in order to uphold the legislation. *Id.* *See* notes 65-73 *infra* and accompanying text.

17. Strict scrutiny is triggered whenever a "fundamental interest" or "suspect classification" is involved. *See* notes 74-84 *infra* and accompanying text. When either a fundamental interest or a suspect classification is present, the burden shifts to the state to establish a "compelling interest" which justifies the statutory interference. In practice,

race traditionally has required a more stringent standard of review; it is irrelevant that the non-minority rather than the minority is the focus of the discrimination.[18]

Satisfied that the strict scrutiny standard was the applicable test, the majority then proceeded to determine whether the University's special admissions program met that test. The Regents' assertion that the program was compelling on the ground that minorities would have greater rapport with physicians of their own race was summarily rejected.[19] The court was also not convinced that the two major goals of the program—to integrate the student body and to improve medical care for minorities—could not be achieved by means "less detrimental to the rights of the majority."[20] Less burdensome alternatives were proposed by the court: flexible admission standards,[21] aggressive recruitment programs for disadvantaged students of all races,[22] and expansion of student enrollment in medical schools.[23]

Finally, the cases in the employment area which granted a preference to minorities were found to be unpersuasive.[24] The majority

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however, these requirements have been construed in such a way as to effectively guarantee a finding of unconstitutionality once strict scrutiny is applied. Chief Justice Burger recently stated: "So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard and I doubt one ever will, for it demands nothing less than perfection." Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

18. 18 Cal. 3d at 50, 553 P.2d at 1163, 132 Cal. Rptr. at 691.

19. *Id.* at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693.

20. *Id.*

21. *Id.* at 54, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

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

23. *Id.*

24. *Id.* at 57, 553 P.2d at 1168; 132 Cal. Rptr. at 696. The court stated:

> [A]bsent a finding of past discrimination—and thus the need for remedial measures to compensate minorities for the prior discriminatory practices of the employer—the federal courts, with one exception, have held that the preferential treatment of minorities in employment is invalid on the ground that it deprives a member of the majority of a benefit because of his race.

Id. at 57-58, 553 P.2d at 1168, 132 Cal. Rptr. at 696.

The one exception mentioned by the court is Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970). In *Porcelli*, the court of appeals approved a public school board plan which would increase the number of black administrators by disregarding the regular promotion schedule. The constitutional challenge made by white administrators who ranked above the blacks and were thus denied employment as a result of board policy was rejected. The court not only found that the school board was permitted to prefer minority applicants, but indicated that the board may have had an affirmative duty to do so in order to integrate school faculties. *Id.* at 1257-58.

The California Supreme Court, while admitting that *Porcelli* could not be harmonized with other federal court decisions in the employment area, found its reasoning unpersuasive. The error, as perceived by the court, was the failure to recognize "the distinction between a classification which grants a benefit to one race at the expense of another

noted that the employment cases involved evidence of prior discriminatory conduct while similar evidence was not offered in *Bakke*.[25]

Justice Tobriner registered a strong dissent in *Bakke* emphasizing "two fundamentally flawed premises" from which the majority proceeded.[26] First, the court failed to distinguish between invidious racial classifications and remedial or benign racial classifications.[27] Second, the court incorrectly asserted that the minority students who entered under the special admissions program were "less qualified" than the non-minority students.[28]

Historically, racial classifications have had the effect of stigmatizing or according inferior treatment to minorities.[29] Justice Tobriner asserted, however, that the majority erred in judging the present case[30] under the same standards utilized to resolve challenges of invidious racial discrimination.[31] Recent cases in the school desegregation[32] and employment areas[33] have repeatedly approved of the use of racial classifications to arrive at adequate minority representation.[34] The

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and one which does not have that effect." 18 Cal. 3d at 57-59 n.27, 553 P.2d at 1168-69 n.27, 132 Cal. Rptr. at 696-97 n.27.

25. 18 Cal. 3d at 57, 553 P.2d at 1169, 132 Cal. Rptr. at 697.

26. *Id.* at 65, 553 P.2d at 1173, 132 Cal. Rptr. at 701.

27. *Id.*

28. *Id.*

29. *Id.* at 67-68, 553 P.2d at 1174-75, 132 Cal. Rptr. at 702-03.

30. The racial classifications at issue in *Bakke* were designed to promote integration as well as to remedy the continuing effects of historical discrimination. *Id.* at 68, 553 P.2d at 1175, 132 Cal. Rptr. at 703.

31. *Id.* at 69, 553 P.2d at 1175, 132 Cal. Rptr. at 703. No authority can be cited for the majority's position. *Id.* Quoting from the United States Supreme Court decision of Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), Justice Tobriner emphasized that the Supreme Court recognized the constitutionality of a program based on racial classification to achieve school integration. Moreover, the dissent noted that it was within the broad discretionary powers of school authorities to voluntarily institute such a program. 18 Cal. 3d at 70, 553 P.2d at 1177, 132 Cal. Rptr. at 705.

32. *See, e.g.*, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971); Offerman v. Nitkowski, 378 F.2d 22 (2d Cir. 1967); Wanner v. County School Bd., 357 F.2d 452 (4th Cir. 1966); Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965), *cited in* 18 Cal. 3d at 70 n.4, 553 P.2d at 1177 n.4, 132 Cal. Rptr. at 705 n.4.

33. *See, e.g.*, United States v. Wood, Wire & Metal Lath, Int'l, Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Local 212, 472 F.2d 634 (6th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971), *cited in* 18 Cal. 3d at 71 n.5, 553 P.2d at 1177 n.5, 132 Cal. Rptr. at 705 n.5.

34. To counter the majority's assertion that "all . . . racially 'non-neutral' efforts are presumptively unconstitutional," Justice Tobriner pointed to the recently decided case of Washington v. Davis, 426 U.S. 229 (1976), which explicitly approved of the use of aggressive affirmative action to recruit black police officers. 18 Cal. 3d at 72, 553 P.2d

majority attempted to distinguish such cases on the theory that none imposed a "detriment" on non-minorities;[35] the dissent attacked that misconception with vigor. The employment cases indicate that whenever a certain percentage of minorities is required to be hired, there is some displacement of non-minorities.[36] In the area of education, the magnet school concept[37] is illustrative. Since the aim of the magnet school is to encourage integration,[38] admission is not based solely on objective criteria such as grades or test scores.[39] Despite the fact that there is some racial preference inherent in such a concept and that some students may be excluded although arguably "better qualified," courts have repeatedly upheld the constitutionality of such programs.[40]

Focusing on the circumstances in *Bakke*, Justice Tobriner declared that implementation of a special admissions program by the University does *not* require proof of its past discrimination.[41] Acceptance of such a rule would penalize the wrong institutions.[42] Furthermore, it cannot be maintained that the Constitution would preclude voluntary integration programs.[43]

Since the University adopted the special admissions program to promote the constitutionally permissible goal of integration, Justice Tobriner suggested that the rational basis test[44] rather than the com-

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at 1178, 132 Cal. Rptr. at 706. In fact, the *Davis* court relied on those affirmative efforts to dispel the accusation that the police department had discriminated on the basis of race. 426 U.S. at 246.

35. 18 Cal. 3d at 73, 553 P.2d at 1178-79, 132 Cal. Rptr. at 706-07.

36. *Id.* *See* note 33 *supra.*

37. A magnet school is one which offers a variety of subjects and special equipment unavailable at other schools in the district. It is often set up in a minority school as an inducement for non-minority students to voluntarily transfer to the location. 18 Cal. 3d at 74, 553 P.2d at 1179, 132 Cal. Rptr. at 707.

38. *See* note 37 *supra.*

39. 18 Cal. 3d at 74-75, 553 P.2d at 1180, 132 Cal. Rptr. at 708.

40. *See, e.g.*, Hart v. Community Bd. of Educ., 512 F.2d 37, 42-43, 54-55 (2d Cir. 1975).

41. 18 Cal. 3d at 76, 553 P.2d at 1180, 132 Cal. Rptr. at 708. *See* notes 110-16 *infra* and accompanying text regarding the requirement of proof of past discrimination. One of the major difficulties in producing evidence of past discriminatory conduct by the Davis Medical School was the fact that the "real parties in interest," the minority students, were not represented in the suit. Understandably, counsel for the Medical School would be reluctant to present evidence of prior racial discrimination by the school since to do so would open it up to further suits based on that prior discriminatory conduct. Thus, evidence to sustain a charge of past discrimination by the school was lacking.

42. 18 Cal. 3d at 76, 553 P.2d at 1181, 132 Cal. Rptr. at 709.

43. *Id.*

44. *Id.* at 80, 553 P.2d at 1184, 132 Cal. Rptr. at 712. For a definition and explanation of this test *see* notes 65-73 *infra* and accompanying text.

pelling state interest test[45] was a more appropriate standard of review. He noted that prior to the institution of the program, the medical school relied heavily on such criteria as Medical College Aptitude Test (MCAT) scores and undergraduate grades.[46] But this approach effectively excluded almost all qualified minority applicants, resulting in a largely segregated institution.[47] In order to remedy this situation, the medical school initiated its special admissions program.[48]

Justice Tobriner emphasized, however, that the program did not sanction the admission of unqualified minority applicants.[49] Accepting minority students with lower grade point averages (GPA) and lower MCAT scores than non-minorities should not imply that the minority admittees are less qualified, and therefore that the program is discriminatory.[50] It is entirely reasonable for the medical school to de-emphasize such objective criteria for numerous studies have cast doubt on the validity of the correlation between such criteria and subsequent performance in medical school.[51]

The Regents listed several objectives of the special admissions program: to promote diversity in the medical school,[52] to alleviate the

45. *See* note 17 *supra.*

46. 18 Cal. 3d at 81, 553 P.2d at 1184, 132 Cal. Rptr. at 712.

47. *Id.*

48. *Id.* at 82, 553 P.2d at 1184, 132 Cal. Rptr. at 712.

49. *Id.* at 82, 553 P.2d at 1185, 132 Cal. Rptr. at 713.

50. *Id.*

51. *Id.* at 83-84, 553 P.2d at 1186, 132 Cal. Rptr. at 714.

A plethora of studies have recently surfaced indicating little or no correlation between scores achieved on the MCAT and subsequent performance in medical school. *Id.* at 84 nn.13-14, 553 P.2d at 1186-87 nn.13-14, 132 Cal. Rptr. at 714-15, nn.13-14.

What the studies disclose, in essence, is that the value of MCAT scores as a predictor of academic and professional success is at best uncertain and possibly nonexistent. *See* Haley & Lerner, *The Characteristics and Performance of Medical Students During Preclinical Training*, 47 J. MED. ED., June, 1972 at 446, where the authors found a *negative* correlation between MCAT scores and subsequent performance in medical school. In light of such findings, the majority's reliance on Washington v. Davis, 426 U.S. 229 (1976), becomes inapposite. 18 Cal. 3d at 59, 553 P.2d at 1169, 132 Cal. Rptr. at 697. In *Davis*, the United States Supreme Court held that absent a racially discriminatory motive, a test is not invalid solely because it has a racially disproportionate impact. 426 U.S. at 245-46. However, at no point in *Davis* did plaintiffs demonstrate the complete lack of correlation between the test and what it purported to measure. The studies conducted on the MCAT have in fact shown that it is invalid when used to compare minority and non-minority applicants. *See* Amicus Brief of the NAACP, Appendix B, Table 2, Bakke v. Regents of the University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 97 S. Ct. 1098 (1977).

52. 18 Cal. 3d at 85, 553 P.2d at 1187, 132 Cal. Rptr. at 715. Quoting from Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), Justice Tobriner noted that the United States Supreme Court had explicitly approved of programs designed to achieve

underrepresentation of minorities in the medical profession,[53] to increase adequate medical services to minority communities,[54] and to promote the greater goal of an integrated society.[55] Justice Tobriner found all of these objectives compelling.[56] The majority, on the other hand, suggested that these goals could be achieved just as effectively by allowing disadvantaged students of all races to enter under the special admissions program.[57] However, the dissent noted, the aim of the medical school is to achieve a racially and ethnically integrated student body, not an economically diverse one.[58] Thus, any nonracial classification will achieve the school's objectives only to the extent that such a classification coincides with a minority race or ethnic background.[59]

In conclusion, Justice Tobriner declared that the recent implementation of "affirmative action" programs hopefully introduced the expunction of this country's heritage of racial discrimination.[60] Yet, he reflected: "It is anomalous that the Fourteenth Amendment that served as the basis for the requirement that elementary and secondary schools could be *compelled* to integrate, should now be turned around to *forbid* graduate schools from voluntarily seeking that very objective."[61]

A major premise on which the *Bakke* majority and dissent disagreed was the appropriate standard of review to be applied to remedial admissions programs. While the majority declared the strict scrutiny standard applicable, Justice Tobriner selected a less rigorous test. An ex-

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racial balance in the schools so that students may be prepared to live in a pluralistic society. 18 Cal. 3d at 85, 553 P.2d at 1187, 132 Cal. Rptr. at 715.

53. *Id.*

54. *Id.* at 86, 553 P.2d at 1187-88, 132 Cal. Rptr. at 715-16. The serious disparities existing between white and nonwhite infant mortality and life expectancy tables emphasize "the need to improve the availability and quality of health care" for minorities. The minority infant mortality rate in the United States is comparable to the infant mortality rate in many developing nations. Reply Brief of the Regents of California at 13, Bakke v. Regents of the University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 97 S. Ct. 1098 (1977). Justice Tobriner observed that it was neither "unreasonable nor improper" for the school to conclude that perhaps one of the reasons for this deplorable situation is the shortage of minority physicians. 18 Cal. 3d at 86, 553 P.2d at 1188, 132 Cal. Rptr. at 716.

55. *Id.* at 87, 553 P.2d at 1188, 132 Cal. Rptr. at 716.

56. *Id.*

57. *Id.* at 54-55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

58. *Id.* at 89-90, 553 P.2d at 1190, 132 Cal. Rptr. at 718.

59. *Id.* at 90, 553 P.2d at 1190, 132 Cal. Rptr. at 718.

60. *Id.* at 91, 553 P.2d at 1191, 132 Cal. Rptr. at 719.

61. *Id.* at 92, 553 P.2d at 1191, 132 Cal. Rptr. at 719.

amination of the development of the equal protection concept should illuminate the basis for disagreement between the two opinions.

III. EQUAL PROTECTION: BACKGROUND

The modern era of equal protection interpretation began in 1938 with a footnote in an opinion of Justice Stone[62] foreshadowing a two-tier approach to equal protection cases. Justice Stone suggested that the appropriate standard might vary according to the nature and importance of the interests at stake. He noted, in particular, a distinction between "regulatory legislation affecting ordinary commercial transactions"[63] for which a relatively relaxed standard of review might be appropriate and "statutes directed at particular religious or national or racial minorities" which might summon a "more searching judicial inquiry."[64]

A. The Two-Tier Approach

The basic standard of review is that variously known as "traditional," "restrained" or "passive" review.[65] The court begins with a presumption of the constitutionality of the legislation and merely requires that the distinctions drawn by it bear some rational relationship to a legitimate state purpose.[66] The challenger has the burden of demonstrating otherwise—a burden rarely met.[67] Under the traditional standard of review, the court must first be satisfied that a legitimate or permissible state purpose exists. This is to insure that the legislation is within the state's constitutional competence to pursue.[68] While the courts have sometimes made an elaborate inquiry into the motives of legislators, they have more often rested content with the assertion of some conceiv-

62. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

63. *Id.* at 152.

64. *Id.* at 152-53 n.4 (citations omitted).

65. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077 (1969) [hereinafter cited as *Developments*].

66. Dandridge v. Williams, 397 U.S. 471, 485 (1970); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949). *See also Developments, supra* note 65, at 1081.

67. Because of the heavy presumption in favor of the proponent of the legislation under the rational relation standard, there have been only a few successful challenges. *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305 (1966); Morey v. Doud, 354 U.S. 457 (1957).

68. Note, however, that under this very lax standard of review a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). *See also* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); *Developments, supra* note 65, at 1078.

able legitimate purpose, even if this involved rejecting the most probable purpose.[69]

Once a permissible state objective is shown, the rationality between the classification and its purpose must be established.[70] Strict rationality would demand not only that the law have some reasonable basis, but that the classification include all those similarly situated with respect to the particular purpose, that is, that there be neither under-inclusion nor over-inclusion.[71] In practice, however, the courts have not abided by the above criteria.[72] The traditional standard of review has been applied primarily in the context of challenges to economic and business regulations, and rarely has a significant regulatory measure been found to violate equal protection.[73]

The alternative approach to equal protection cases is "strict scrutiny" which employs an "active" standard of review.[74] Strict scrutiny is triggered whenever there is a "fundamental interest" or "suspect classification" involved. Fundamental interests have been held to include procreation,[75] travel,[76] voting,[77] and certain rights with respect to crimi-

69. *Developments, supra* note 65, at 1078. An example is the case of Goesaert v. Cleary, 335 U.S. 464 (1948). In *Goesaert,* the United States Supreme Court upheld a Michigan statute which denied bartending licenses to all women except the wives and daughters of male bar owners. *Id.* at 467. The probable purpose was to retain these jobs for men, but the Court attributed to the legislature the conceivable but unlikely purpose of avoiding social and moral problems which might occur upon having women serve in bars, at least those women who were not tainted by their family associations in the trade. *Id.* at 466.

70. Smith v. Cahoon, 283 U.S. 553, 567 (1931). *See also Developments, supra* note 65, at 1081.

71. A law is over-inclusive when it includes not only those who are similarly situated with respect to the purpose of the measure, but also others who are not so situated. Conversely, under-inclusion occurs when a classification does not include all those who are similarly situated with respect to the purpose of the measure. *Developments, supra* note 65, at 1084, 1086. For an example of over-inclusion see Kahn v. Shevin, 416 U.S. 351 (1974) (Brennan, J., dissenting). *See also* note 84 *infra.*

72. Under-inclusion, in particular, has been justified by courts saying that "the legislature is free to remedy parts of a mischief or to recognize degrees of evil and strike at the harm where it thinks it most acute." *Developments, supra* note 65, at 1084. *See also* Williamson v. Lee Optical Co., 348 U.S. 483, 488-89 (1955).

73. Morey v. Doud, 354 U.S. 457 (1957). The Illinois statute struck down by the Court required licenses from firms issuing money orders, but expressly exempted the American Express Company.

74. *Developments, supra* note 65, at 1087-88. Strict scrutiny began with the opinion of Justice Douglas in Skinner v. Oklahoma, 316 U.S. 535 (1942), in which the Court held that a statute selectively providing for sterilization of felons could not be justified; procreation was "one of the basic civil rights of man." *Id.* at 541.

75. 316 U.S. 535 (1942).

76. Shapiro v. Thompson, 394 U.S. 618 (1969).

77. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

nal procedure.[78] Suspect classifications have embraced such categories as race,[79] alienage,[80] and discriminatory treatment of the poor when associated with the denial of some other fundamental right.[81] When either a fundamental interest or a suspect classification is involved, the state bears the burden of establishing a "compelling interest" which justifies the law.[82] In practice, however, once strict scrutiny is applied this requirement has been construed in such a way as to effectively guarantee a finding of unconstitutionality.[83] The only indication of what the Supreme Court might regard as an overriding compelling interest was provided in two cases which arose during the Second World War. Notwithstanding the fact that a suspect classification was involved, and that the legislation was both over- and under-inclusive, the interests of national security were held to be paramount.[84]

In a series of cases decided during the 1971-72 term, the Supreme Court began to reject the rigidity of the two-tier standard in favor of a more flexible approach to equal protection problems. Among the more significant cases were *Reed v. Reed*[85] in which the Court invalidated a statute discriminating against women as estate executors without specifying sex as a suspect class; *Weber v. Aetna Casualty and Surety Company*[86] in which the Court ruled in favor of illegitimate children who were denied access to workmen's compensation benefits without desig-

78. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

79. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

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

81. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).

82. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

83. *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting). *But see* Burns v. Fortson, 410 U.S. 686 (1973); Marston v. Lewis, 410 U.S. 679 (1973); *cf.* Morton v. Mancari, 417 U.S. 535 (1974) in which a unanimous Court applied the rational relation test although the classification was clearly based on a racial preference (native Americans). Justice Blackmun explained, however, that this "long standing Indian preference" was not a "racial" preference but rather "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 553-54.

84. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). In these cases American citizens of Japanese ancestry were forced to evacuate from the West Coast. The legislation was over-inclusive because it was never supposed that all such citizens were disloyal and under-inclusive because no similar restrictions were imposed on Americans of German or Italian ancestry, who were equally subject to divided loyalties.

85. 404 U.S. 71 (1971).

86. 406 U.S. 164 (1972).

nating the classification suspect; and *Eisenstadt v. Baird*[87] in which the Court upheld the right of single persons to acquire contraceptives without deeming that right to be fundamental. In both *Reed* and *Eisenstadt*, the Court cited a passage from the 1920 case of *Royster Guano v. Virginia*[88] which stated that a classification must have a "fair and substantial" relation to the purpose of the legislation, not merely a "rational" relation.[89]

Although the Supreme Court appeared to be moving toward a middle ground,[90] that glimmer of hope temporarily faded with *San Antonio Independent School District v. Rodriguez*.[91] In *San Antonio*, the Court set aside a challenge to the property tax method of financing Texas public schools, a challenge founded on discrimination against poorer areas. The majority opinion retreated to language reminiscent of the the two-tier approach. The argument that education is a fundamental interest or that wealth (at least in the circumstances of this case) can be regarded as a suspect classification was rejected, thereby rendering strict scrutiny inappropriate.[92] After a very cursory analysis, however, the majority concluded that the finance system bore "some rational relationship to a legitimate state purpose."[93] The significance of this opinion for present purposes is not the validity or invalidity of the merits but rather the method by which the Court reached its conclusion. It appears that the Supreme Court has returned to safe and familiar ground after a brief flurry of experimentation.[94]

87. 405 U.S. 438 (1972).

88. 253 U.S. 412 (1920).

89. *Id.* at 415.

90. There has been disagreement among commentators in the description of the new approach. Professor Gunther sees the recent decisions moving towards a "means-focused" model, under which the Court would concern itself solely with means, not with ends, and where "[t]he yardstick for the acceptability of the means would be the purposes chosen by the legislatures, not 'constitutional' interests drawn from the value perceptions of the Justices." Gunther, *Foreward: In Search of Evolving Doctrine of a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972). In contrast, others interpret the decisions moving towards a sliding-scale scrutiny where "as the impact of the statute becomes more detrimental to the members of the class, the scrutiny required becomes more intense." *Equal Protection in Transition: An Analysis and a Proposal*, 41 FORD L. REV. 605, 627 (1973).

91. 411 U.S. 1 (1973).

92. *Id.* at 28.

93. *Id.* at 44.

94. Although a new standard of review is evolving in the equal protection area, a final product has not emerged. Some opinions continue to apply the two-tier analysis, *e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974), although the Court appears to be reluctant to reaffirm that approach by declaring more classifications suspect or more interests fundamental.

B. *Bakke Within the Two-Tier Approach*

One of the principal reasons the United States Supreme Court has held racial classifications to be suspect, and thus subject to strict scrutiny, is that race is rarely related to a legitimate state goal.[95] Under strict scrutiny, a racial classification is constitutional only if the classification is necessary to serve a compelling state interest.[96] Remedial admissions programs in medical schools seek to achieve two interrelated objectives: (1) integration of the student body and (2) improvement of medical care for minorities.[97] Subsumed under these broad goals are such sub-categories as creating racial diversity in the student body, providing role models for minority youngsters, developing awareness of the medical problems of minority communities, and increasing the number of doctors willing to serve in minority communities.[98] Few goals can be said to be more compelling.[99]

In *Bakke*, the California Supreme Court found a suspect classification—race—and required Davis Medical School to justify its program by showing a compelling interest.[100] However, unlike the classification in *Bakke*, the racial classifications which the Supreme Court has held unconstitutional have either stigmatized or accorded inferior treatment

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The Court has repeatedly found classifications based on illegitimacy a violation of equal protection. *See* Gomez v. Perez, 409 U.S. 535 (1973) (per curiam); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968). *But see* Labine v. Vincent, 401 U.S. 532 (1971). Yet, the Court has never explicitly held that illegitimacy is a suspect classification. In the recent case of Jiminez v. Weinberger, 417 U.S. 628 (1974), the Court, in deciding the validity of Social Security legislation which discriminated against illegitimate children, declined to rule on the question of the applicable standard of review. Similarly, in Lindsey v. Normet, 405 U.S. 56 (1972), the Court declined to hold that the need for housing is a fundamental interest; and, in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), it rejected a comparable claim regarding education.

In opinions purporting to apply the rational relation test, the Court appears to scrutinize the merits more carefully than in prior decisions. Statutory classifications which failed to meet that test were invalidated, *e.g.*, Jiminez v. Weinberger, 417 U.S. 628 (1974); Department of Agriculture v. Moreno, 413 U.S. 528 (1973). Even where such classifications were sustained, the Court applied an enhanced standard of review. Johnson v. Robison, 415 U.S. 361 (1974); McGinnis v. Royster, 410 U.S. 263 (1973).

95. *See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

96. *See* notes 74-84 *supra* and accompanying text.

97. 18 Cal. 3d at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693.

98. *Id.* at 52, 553 P.2d at 1164-65, 132 Cal. Rptr. at 692-93.

99. *See* note 54 *supra.*

100. 18 Cal. 3d at 50, 553 P.2d at 1163, 132 Cal. Rptr. at 691. *See also* text accompanying note 16 *supra.*

to racial minorities.[101] These cases, in other words, have involved discrimination *against* already-victimized racial minorities.

Another characteristic of a suspect classification is that it is used to *disadvantage* a minority group which has been subjected to a history of discrimination.[102] Under the constitutional provision for judicial review, courts generally presume that the acts of other popularly controlled bodies are constitutional;[103] most groups complaining of alleged discrimination are afforded access to responsible governmental bodies and thus sufficient opportunity to defend themselves through the normal political process.[104] However, such is not the case with "discrete and insular minorities"[105] particularly those burdened with disabilities resulting from a history of discrimination.[106] When they are subjected to inferior treatment or stigmatization, it cannot be justly assumed that "the operation of those political processes ordinarily to be relied upon to protect minorities"[107] provides a meaningful alternative to judicial review.

Where the purpose of a policy is to further a legitimate objective rather than to stigmatize a minority group, the classification is subject to the rational basis test.[108] Therefore it would appear that the proper standard of review in remedial admissions programs should be the rational basis test since the goal of the state's policy is to further integration and not to stigmatize a minority.[109]

There is no requirement that a state or local body using a remedial classification show that it has discriminated in the past.[110] Voluntary measures to end de facto school segregation have been consistently up-

101. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). *See generally* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

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

103. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140-42 (1893).

104. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

105. *Id.*

106. *Id.*

107. *Id.*

108. *See* notes 65-73 *supra* and accompanying text.

109. *See* notes 52-55 *supra* and accompanying text.

110. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). In *Swann*, which dealt with intentional discrimination, the Court declined to consider the question of whether de facto segregation was a constitutional violation which necessitated broad remedial action. *Id.* at 23. The term "de facto" when used to characterize segregation means segregation which is not sanctioned by law but which nevertheless exists, as opposed to de jure segregation which has the approbation of law. BLACK'S LAW DICTIONARY 479 (4th ed. 1968).

held by both federal and state courts, even though racial classifications are involved. For instance, in *Jackson v. Pasadena City School District*,[111] the California Supreme Court ordered the desegregation of the district schools even without a showing of prior discriminatory intent.[112] Similarly, in *Tometz v. Board of Education*,[113] the Illinois Supreme Court upheld state legislation which ordered local school boards to take affirmative action to end de facto school segregation. The court characterized the applicable test as "one of reasonableness" and noted that a court could not presume "that the legislature acted arbitrarily and without a reasonable basis in so directing the school boards of this State."[114]

Of course, it is easier to identify and assess the de facto segregation of a school district than the de facto exclusion of minorities from a medical school since most professional schools attract students from many parts of the country, not just one geographic area. But a situation that might discourage judicial interference with a medical school's admissions policy need not prevent the medical school from revising that policy. Without finding a constitutional violation, a court may not order a remedy based on racial classification; however, it is within the broad discretionary powers of school authorities to order such a remedy.[115] Stated differently, even if de facto segregation is not constitutionally prohibited, the fourteenth amendment clearly contemplates and permits affirmative remedial efforts to eradicate such discrimination. Thus, if the fourteenth amendment does not *require* a court to order

111. 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

112. *Id.* at 881, 382 P.2d at 881, 31 Cal. Rptr. at 609.

113. 237 N.E.2d 498 (Ill. 1968).

114. *Id.* at 502. *See also*, McDaniel v. Barresi, 402 U.S. 39 (1971); Katzenbach v. Morgan, 384 U.S. 641 (1966). In *Katzenbach*, application of the rational basis test to a suspect classification was sustained since the legislative purpose was found to be remedial.

115. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). The Court held that school officials may assign minority students to a particular school in order to ensure that the ratio of the minority student body is proportional to that of the minority population of the district as a whole. *Id.*

Courts have long recognized that establishing standards for the composition of a student body is a function primarily within the discretion of the university officials. This discretion, which is rooted in the California Constitution, CAL. CONST. art. IX, § 9, gives the Regents "full powers of organization and government" over the University of California. Hamilton v. University of California, 293 U.S. 245, 255 (1934). However, even in the absence of constitutional powers, courts have held that decisions by college and university officials concerning the makeup of the student body are final and nonjusticiable provided they were not made arbitrarily or capriciously. *See* Wright v. Texas S. Univ., 392 F.2d 728 (5th Cir. 1968).

a medical school to consider race in establishing its admission policy, that same amendment should not be able to *preclude* the medical school from doing so voluntarily.[116]

While it appears that the constitutionality of remedial admissions programs may be upheld under either the strict scrutiny or the rational basis standard of review, arguably, neither approach is appropriate. An intermediate level of review, one which carefully weighs competing interests, is the suggested alternative.

IV. WEIGHING OF INTERESTS: PROPOSAL FOR A NEW STANDARD IN EQUAL PROTECTION CASES

The acute need for a new standard of review in equal protection cases is clearly illustrated by the cases dealing with admissions programs. While the California Supreme Court in *Bakke* was correct in reading its cited decisions to mean that race has always been considered a suspect criterion, it failed to appreciate that all of those cases were decided in the context of invidious discrimination against minorities.[117] This is not to say that the entire group of suspect classification cases should automatically be distinguished on the facts; but, the unique factual situation in *Bakke* certainly requires an initial inquiry to determine whether the factors which have made racial classifications suspect in the past are characteristic of remedial admissions programs. If these factors do not exist, the Supreme Court should eschew the application of a ritualistic approach which may actually thwart the purposes for which it was developed.[118]

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116. In *Bakke*, the Regents argued that the special admissions program instituted by the University was within their broad discretion based on their responsibility to select students who will best serve the interests of the school and the medical profession. *See* Brief for Appellant at 7, Bakke v. Regents of the University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 97 S. Ct. 1098 (1977). The Regents noted that most colleges and universities operate under some type of "preference" system. For example, special consideration may be given to certain students who have specific talents or skills which the school deems desirable, and at many public institutions preference is required to be given, by statute or regulation, to residents of a state. *See, e.g.*, Clarke v. Redeker, 406 F.2d 883 (8th Cir.), *cert. denied*, 396 U.S. 862 (1969).

117. Neither the United States Supreme Court nor (prior to *Bakke*) the California Supreme Court has ever held or even implied that racial classifications designed to integrate the races are to be analogized to racial discrimination directed against minorities. Both Courts have indicated that racial classifications designed to assist minorities are permitted. *See* Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 16 (1971); San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 950-51, 479 P.2d 669, 676-77, 92 Cal. Rptr. 309, 316-17, *cert. denied*, 401 U.S. 1012 (1971).

118. *See* The Slaughter-House Cases, 83 U.S. 36 (1873). Courts must be wary of

For this reason a weighing of interests approach presents a reasonable and viable alternative. This approach would involve a balancing of competing interests at the outset rather than an immediate categorization followed by a search for appropriate rationales to sustain or invalidate the legislation. The weighing of interests approach would require a two-step process: First, the court would survey the composition of the classification to determine its relevance and necessity in achieving the purported state goal. The actual or articulated aims embodied in the proposal would be scrutinized; no longer would the court hypothesize or superimpose its own will.[119] Second, the court would examine the importance of the individual interest which is being burdened or denied.

A. Weighing of Interests as Applied to Equal Protection

The weighing of competing interests is not new to the United States Supreme Court; the Court has utilized this approach for over a decade. Justice Douglas' majority opinion in *Harper v. Virginia Board of Elections*[120] is an early example of balancing equities. He began his analysis with language reminiscent of the strict scrutiny standard: "Lines drawn on the basis of wealth or property like those of race . . . are traditionally disfavored."[121] However, he then invoked the language of the rational basis test by stating that "[t]o introduce wealth . . . is to introduce a capricious or irrelevant factor."[122] But the analysis faltered when Justice Douglas cited his earlier opinion in *Skinner v. Oklahoma*[123] as dispositive, for that case involved a fundamental interest.[124]

The more recent case of *Reed v. Reed*[125] also illustrates a retreat

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the inappropriate application of sweeping generalities. Justice Cardozo has stated:

> A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment, a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.

Snyder v. Massachusetts, 291 U.S. 97, 114 (1934).

119. *See* note 69 *supra* and accompanying text.

120. 383 U.S. 663 (1966). In *Harper*, the Court struck down the requirement of a state poll tax imposed upon all residents over 21 years of age as a precondition for voting. The Court concluded that a state violates equal protection whenever it decrees the wealth of the voter or payment of a fee an electoral standard. *Id.* at 666.

121. *Id.* at 668.

122. *Id.*

123. 316 U.S. 535 (1942).

124. 383 U.S. at 670. *See* notes 74-75 *supra* and accompanying text.

125. 404 U.S. 71 (1971). The unanimity of the decision and the unity of the opinion

from the automatic classification formerly employed by the Court. Ignoring the traditional standards of review, the Court weighed the interests of the state—reduction of the workload of probate courts, avoidance of intrafamily controversy—against the individual interests being burdened—inability of qualified females to be appointed estate administrators.[126] Although the object of the legislation was found to be legitimate,[127] the Court adjudged the classification established by the statute wholly unrelated to its objective.[128] Therefore, the law was declared unconstitutional[129] without the Court having to specify sex as a suspect classification.

Similarly, the Supreme Court ruled in favor of the rights of illegitimate children without denominating the classification "suspect."[130] *Weber v. Aetna Casualty and Surety Company*[131] dealt with a state statute which prohibited illegitimate children from sharing equally with legitimate offspring in workmen's compensation awards. Justice Powell enunciated the appropriate inquiry as a dual one: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[132] Citing cases that applied the rational basis standard[133] as well as those utilizing strict scrutiny,[134] Justice Powell declared that a single standard of review was applicable in *all* equal protection cases.[135] Thus, in *Weber*, the Court

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support the hypothesis that this type of analysis may be acceptable to at least a majority of the members of the Court.

126. *Id.* at 75-77.

127. *Id.* at 76.

128. *Id.* at 76-77.

129. *Id.* at 74.

130. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Levy v. Louisiana, 391 U.S. 68 (1968).

131. 406 U.S. 164 (1972).

132. *Id.* at 173. In examining the interests of the state the Court found that "the regulation and protection of the family unit have indeed been a venerable state concern." *Id.* But the classification in question bore no significant relationship to the acknowledged purposes of recovery under the workmen's compensation statutes. *Id.*

133. *E.g.*, Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 384 U.S. 348 (1955); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

134. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Brown v. Board of Educ., 347 U.S. 483 (1954).

135. 406 U.S. at 173. Proceeding to examine the equal protection challenge in *Weber* on the basis of this single standard of review, Justice Powell first questioned whether denying workmen's compensation benefits to unacknowledged illegitimate children served the state's aim of discouraging illicit sexual relationships. *Id.* It could not be seriously contended, he asserted, that people avoid extra-marital relations because offspring of these liaisons will be ineligible for workmen's compensation benefits in the future. Justice Powell urged that the illegitimate offspring not be made to suffer because of

clearly avoided the two-tier approach to equal protection adjudication in preference of a studied analysis of competing interests.[136]

Another case in the equal protection area which adopted a weighing of interests approach is the recently decided New York Court of Appeals case of *Alevy v. Downstate Medical Center*.[137] As in *Bakke*, the *Alevy* court faced the question of whether the remedial admissions program at a state medical school violated the equal protection rights

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society's disapproval of such relationships, for the equal protection clause does provide courts with constitutional authority to invalidate legislative classifications that discriminate without justfication. *Id.* at 176.

136. Two recent cases which illustrate the Court's withdrawal from a calcified two-tier approach in the equal protection area are Califano v. Goldfarb, 97 S. Ct. 1021 (1977), and Craig v. Boren, 429 U.S. 190 (1976). In *Califano*, the United States Supreme Court held that the gender-based distinction created by a social security survivors' benefits provision, 42 U.S.C. § 402(f)(1)(D) (1970), constituted invidious discrimination. 97 S. Ct. at 1024. Under the Social Security Act, survivors' benefits based on the earnings of a deceased husband are payable to his widow regardless of dependency, 42 U.S.C. § 402(e)(1) (1970), while such benefits based on the earnings of a deceased wife are payable to her widower only if he was receiving at least half of his support from her. *Id.* § 402(f)(1)(D).

The Court reasoned that *Califano* presented an equal protection question indistinguishable from that presented in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). 97 S. Ct. at 1025. In *Weinberger*, a provision of the Federal Old-Age, Survivors and Disability Insurance Benefits program, 42 U.S.C. §§ 401-431 (1970), was found unconstitutional. 420 U.S. at 638, 639. The provision denied insurance benefits to surviving widowers with children, while authorizing the same benefits to similarly situated widows. 42 U.S.C. § 402(g) (1970).

The test employed by the Supreme Court in *Califano* is most significant. The Court stated that " '[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.' " 97 S. Ct. at 1029 (*quoting* Craig v. Boren, 429 U.S. 190, 197 (1976)).

The Court also engaged in a weighing of interests. Drawing upon the legislative history and inquiring into the actual purposes of the discrimination, the Court noted that the statute was phrased in terms of dependency and not need. 97 S. Ct. at 1030. The "only conceivable justification" for including the presumption of wives' dependency is the unverified assumption that it would save the government time, money and effort, and that was not sufficient to justify gender-based discrimination. *Id.* at 1032.

In *Craig*, the Court utilized the "substantially related" test to strike down an Oklahoma statute which prohibited the sale of 3.2 percent beer to males under the age of 21 and to females under the age of 18. 429 U.S. 190 (1976). In addition, the Court held that the objective of traffic safety could not support the conclusion that the gender-based distinction at issue served to achieve that objective and thus constituted a violation of equal protection. *Id.* at 204. See note 7 *supra* for a description of the factual situation of *Craig*.

It seems, therefore, that at least with reference to gender-based discrimination, the Court continues its adherence to an intermediate test coupled with a weighing of competing interests when determining the constitutionality of various legislation.

137. 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

of non-minority applicants.[138] However, the New York court reached a conclusion directly opposite to *Bakke*.[139]

The *Alevy* court considered the appropriate standard of review to be the threshold inquiry. Although noting that traditional equal protection analysis is two-tiered,[140] the court nonetheless applied an intermediate standard of review, one that weighed competing interests. The court rejected the strict scrutiny test for benign discriminations because such an application would be contrary to the beneficial as well as historic purposes for which the fourteenth amendment was adopted —to guarantee equality for blacks, and by logical extension, for all minority groups.[141] However, recognizing the detrimental effects of remedial admissions programs on those adversely affected,[142] the court declared that such programs should be subjected to a more careful scrutiny than the rational basis standard traditionally demanded. Therefore, an inquiry should be made to discover whether a "substantial" state interest is served; the courts must be assured that the policy furthers some "legitimate, articulated government purpose,"[143] although that interest need not be "urgent, paramount or compelling."[144] In order to satisfy the substantial state interest requirement, the benefits to be derived from the remedial admissions programs must outweigh their possible detrimental effects.[145]

Finding a substantial state interest does not end the inquiry, however. Once the interest requirement is met, the opponent must show that a less burdensome alternative is unavailable.[146] Possible alternatives must include reducing the size of the preference or limiting the time span of the program.[147] In conclusion, the court acknowledged that "*in proper circumstances*, reverse discrimination is constitutional."[148]

A further analogy may be provided by remedial hiring practices in the employment area. In remedial hiring programs, unlike remedial

138. *Id.* at 331, 348 N.E.2d at 542, 384 N.Y.S.2d at 87.
139. *Id.* at 336-37, 348 N.E.2d at 546, 384 N.Y.S.2d at 90.
140. *Id.* at 332, 348 N.E.2d at 542, 384 N.Y.S.2d at 87.
141. *Id.* at 334-35, 348 N.E.2d at 544-45, 384 N.Y.S.2d at 89.
142. The court noted that such programs may possibly encourage further polarization of the races as well as perpetuate thinking in racial terms. *Id.* at 335, 348 N.E.2d at 545, 384 N.Y.S.2d at 90.
143. *Id.* at 336, 348 N.E.2d at 545, 384 N.Y.S.2d at 90.
144. *Id.*
145. *Id.*
146. *Id.*, 348 N.E.2d at 546, 384 N.Y.S.2d at 90.
147. *Id.*
148. *Id.* (emphasis added).

admissions programs, the courts operate under the guide of a legislative enactment;[149] nevertheless, the basic principles are the same—to overcome the effects of past discrimination.

Normally, before any remedial efforts are undertaken in the employment area, there must be a history of minority discrimination followed by a finding that other available relief would be inadequate to overcome the present effects of discrimination.[150] However, it is not necessary to show that an employer intentionally discriminated against a minority group; a history of de facto discrimination is sufficient to establish a prima facie case of discrimination warranting remedial action.[151]

Once the effects of past discrimination have been eliminated, affirmative orders should terminate and the employer should no longer be required to abide by quotas or percentage goals.[152] Nearly every court that has ordered remedial action to be taken has recognized this; thus, the orders have been formulated to run either for a limited period of time[153] or until a stated percentage or numerical goal is reached.[154]

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149. Title VII of the Civil Rights Act of 1964, §§ 701-18, 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

150. *See, e.g.*, Rios v. Steamfitters Local 638, 501 F.2d 622, 631-32 (2d Cir. 1974); NAACP v. Allen, 493 F.2d 614, 620-21 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974). *See generally* Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 35 (1975) [hereinafter cited as Edwards & Zaretsky].

151. Erie Human Relations Comm'n v. Tullio, 493 F.2d 371, 373-74 (3d Cir. 1974). In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court suggested that discrimination might be prima facie proven merely by comparing the numbers of those allegedly discriminated against in the general population with representation of those same individuals in the employer's work force. The Court wrote: "The District Court may, for example, determine, after reasonable discovery that 'the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices.'" *Id.* at 805 n.19.

152. *See* Edwards & Zaretsky, *supra* note 150, at 32.

153. *See, e.g.*, United States v. Lathers Local 46, 471 F.2d 408, 413 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

154. *See, e.g.*, Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Erie Human Relations Comm'n v. Tullio, 493 F.2d 371 (3d Cir. 1974).

In determining the appropriate limit or goal for remedial action programs, the courts consider several factors. Some courts have considered the availability of qualified minorities in the geographic area from which the employer has traditionally drawn his employees. Rios v. Steamfitters Local 638, 501 F.2d 622, 632-33 (2d Cir. 1974). However, if the traditional job market is unreasonably small and thus excludes a potential group of minority employees, the court may prescribe a wider region from which to draw minority applicants. The goal is typically based on the percentage of minorities in the appropriate job market who could have been employed were it not for the prior discrimination. *Id.*

The availability of training programs for potential job applicants is another factor considered in determining the contours of the ultimate goal. It is not always required that

B. *Weighing of Interests in Other Areas*

Weighing of interests is an approach that has been utilized in decisional law in areas other than equal protection. In the 1960's, courts began to studiously weigh the competing interests of the state and those of public employees and students in deciding whether procedural rights such as notice and a hearing must be provided before an employee can be dismissed for cause[155] or a student expelled from a state university.[156]

In 1970, the United States Supreme Court ruled in *Goldberg v. Kelly*[157] that the concept of procedural due process prohibited termination of a welfare recipient's benefits without a prior hearing. Since qualified applicants were "entitled" to benefits under the Social Security Act, their "right" to payment was constitutionally protected.[158] The Court enumerated the interests that must be assessed in determining the necessary procedural safeguards. Three factors were listed as pertinent: (1) the importance of the interests in jeopardy;[159] (2) the appropriateness of the suggested procedure in protecting those interests;[160] and (3) the costs of requiring the procedure.[161]

Two years later the Court noted that the due process clause requires some deprivation of "liberty or property" before constitutional protec-

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potential applicants be qualified to do the work immediately, thus it is often held sufficient that the applicants be capable of learning the job in a reasonable period of time if that is what is generally required by the company. In such instances, the courts have ordered remedial training programs as well as remedial hiring practices. *See* United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

155. *See* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961).

156. *E.g.*, Dixon v. Alabama Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

157. 397 U.S. 254 (1970).

158. *Id.* at 261. In the past, requests for constitutional protection by welfare recipients have been denied since the payment of public benefits was deemed to be a privilege and thus not entitled to constitutional protection. However, this right-privilege distinction is no longer viable. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971). *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-58 (1968).

159. 397 U.S. at 262-63.

160. *Id.* at 267-70.

161. *Id.* at 266. The Court concluded that in *Goldberg* nearly all of the elements of a trial-type hearing are required. Thus, welfare recipients facing termination must be provided timely and adequate notice of the reasons for suspension of benefits; an opportunity to present testimony, to confront and cross-examine adverse witnesses; and the right to be represented by retained counsel. *Id.* at 267-68.

tion attaches.[162] Only if this requirement exists may the *Goldberg* analysis be employed to determine what procedure is needed to protect that interest.[163] Accordingly, in *Board of Regents v. Roth*[164] the Court held that a nontenured assistant professor had no constitutionally protected interest in being rehired after his one year contract ended.[165]

Weighing of interests is most often used in the first amendment area; the Court balances individual interests against governmental interests to reach a decision which accommodates conflicting claims. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*[166] is a recent example. The Court considered an appeal from the Commission's order that a local newspaper classify its help-wanted advertisements without reference to gender. The alleged infringement upon editorial prerogative was weighed against the Commission's interest in preventing sex discrimination.[167] Noting that the classified advertisement section of a newspaper is essentially commercial[168] and contributes little to the marketplace of ideas, the Court upheld the order of the Commission.[169]

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162. Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

163. *Id.* at 577-78.

164. 408 U.S. 564 (1972).

165. *Id.* at 569. The Court explained that a mere need for, or expectation of, continued employment did not create a "property" interest. *Id.* at 578. A different result was reached in the companion case of Perry v. Sindermann, 408 U.S. 593 (1972), however. The Court held that a professor who had served under a succession of ten one-year contracts might be able to show that he had a sufficient property interest. *Id.* at 603. Although the state had no formal tenure system, the Court thought it possible that the University might have encouraged an understanding that a faculty member could remain as long as his performance was satisfactory. *Id.* at 600.

A similar analysis has been applied to determine whether the individual's liberty interest has been threatened. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972). *See also* Griffin v. Illinois, 351 U.S. 12 (1956), in which the Court held that a state must provide a trial transcript to an indigent criminal defendant appealing his conviction, and Douglas v. California, 372 U.S. 353 (1963), in which the Court held that the state must provide counsel for indigent defendants when an appeal is granted as a matter of right. In both cases the Court found that the individual's interest in life and liberty outweighed the state's added financial burden. *But see* Ross v. Moffitt, 417 U.S. 600 (1974), in which the Court refused to extend the *Douglas* rationale to discretionary appeals. This holding is consistent with the weighing of interests analysis since by the time the defendant reaches the stage of discretionary appeal, his interest becomes outweighed by that of the state. The indigent has already been provided with one appeal to further plead his case—it is not the state's duty to provide interminable appellate review, particularly where such has not been granted to others as a matter of right.

166. 413 U.S. 376 (1973).

167. *Id.* at 386.

168. *Id.* at 387.

169. *Id.* at 391.

Another case combining protection of first amendment rights with a systematic, critical scrutiny of asserted governmental interests is *Cohen v. California.*[170] Cohen was arrested and convicted under a state statute for wearing a jacket in a courtroom corridor with the words "Fuck the Draft" stitched on it. The Supreme Court reversed.[171] Consideration and articulation of competing interests guided the Court in its ultimate disposition of the case.[172] Recognition of a broad state interest in eliminating certain words from public debate would be tantamount to acceptance of a boundless principle. Therefore, absent a more compelling interest, the state could not ban the simple public use of a four-letter expletive.[173]

C. Weighing of Interests as Applied to Bakke

Under the weighing of interests approach the court first scrutinizes the nature of the classification to determine its constitutional legitimacy in relation to the purported state goal.[174] The constitutionality of both the classification and goal must be established. In *Bakke*, the classification is based on race with the stated goal of integration.[175]

The goal of integration—rapid integration—is of constitutional proportions.[176] Not only is integration a substantial state interest but it is also a goal of highest priority as this country seeks to effectuate the promises of the Civil War Amendments more than a century after their adoption.[177]

Furthermore, society's potential benefit from rapid integration makes it entirely appropriate and indeed necessary for race to be considered a relevant factor.[178] The immediate effect of integrating the schools

170. 403 U.S. 15 (1971).

171. *Id.* at 26.

172. The Court emphasized three points. First, although Cohen's language was "vulgar" and "distasteful," it plainly conveyed an anti-draft message. *Id.* at 25-26. Second, the prohibition of particular words would run "a substantial risk of suppressing ideas in the process." *Id.* at 26. Third, due to the government's inability to make principled distinctions in matters such as taste and style, the Constitution yields to the individual in this area. *Id.* at 25.

173. *Id.* at 26.

174. *See* text accompanying note 119 *supra.*

175. *See* note 97 *supra* and accompanying text.

176. *See, e.g.,* Green v. County School Bd., 391 U.S. 430 (1968). The University stated that its special admissions program was "necessary" in order to integrate the medical school and medical profession. 18 Cal. 3d at 89, 553 P.2d at 1190, 132 Cal. Rptr. at 718. Anything less would not fulfill the constitutional mandate of immediate integration. 391 U.S. at 439.

177. 18 Cal. 3d at 87, 553 P.2d at 1188, 132 Cal. Rptr. at 716.

178. In fact, race may be the only classification which is both relevant and administratively feasible. *See* Ely, *The Constitutionality of Reverse Racial Discrimination,* 41

will be the interaction of persons possessing a variety of talents, life experiences, and outlooks.[179] This will significantly enhance the educational process for all students. In addition, the presence of minority members in medical schools will increase the profession's awareness of the medical problems of the minority communities.[180] Improving the health conditions in the minority communities will benefit society as a whole by providing a healthier and more productive citizenry.

Since the issue of past discriminatory conduct by the University was not raised by either party, the majority declined to rule on the amici curiae claim that the University's prior admissions program constituted "discrimination in fact against minorities."[181] However, Justice Tobriner recognized the imperative need for deciding this underlying, though unchallenged, allegation. "The fact that a governmental institution has not itself engaged in discrimination affords no reason for precluding such an institution from taking into account, through remedial classifications, the present effects of past discrimination by other bodies."[182] As such, the racial classification utilized in *Bakke* involved a reasonable attempt by the University to act in consonance with the mandate of the fourteenth amendment: to eradicate the pernicious effects of racial segregation and discrimination.

Many lower federal and state court decisions have recognized the urgent need of society to remedy the effects of previous racial inequities and have thus permitted the use of remedial programs as a means to that end.[183] Courts have upheld the use of racial classifications in both the employment[184] and education areas[185] when used to further

U. CHI. L. REV. 723 (1974): "And the fact that a characteristic is irrelevant in almost all legal contexts (as most characteristics are) need not imply that there is anything wrong in seizing upon it in the rare context where it does make a difference." *Id.* at 731.

179. 18 Cal. 3d at 85, 553 P.2d at 1187, 132 Cal. Rptr. at 715.

180. *Id.* at 86, 553 P.2d at 1187-88, 132 Cal. Rptr. at 715-16.

181. *Id.* at 59, 533 P.2d at 1169, 132 Cal. Rptr. at 697.

182. *Id.* at 76, 553 P.2d at 1180-81, 132 Cal. Rptr. at 708-09.

183. *See* notes 149-54 *supra* and accompanying text.

184. At least eight federal courts of appeals have either upheld or commented approvingly on using race as a factor in employment hiring. United States v. Masonry Contractors Ass'n, Inc., 497 F.2d 871 (6th Cir. 1974); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Associated Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); United States v. Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); and United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971).

185. See notes 186-87 *infra* and accompanying text.

the interests of integration. In *Jackson v. Pasadena City School District*,[186] for example, the court placed an affirmative duty on the school board to desegregate its schools, even without a showing of prior discriminatory intent. The court noted that:

> The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its causes.[187]

School desegregation cannot be accomplished without taking the student's race into consideration. Thus, to forbid the University to consider the race of the applicant under its special admissions program would seem to be directly contrary to *Jackson* and subsequent cases.[188]

The second phase of the weighing of interests approach requires the court to examine the importance of the individual interest being burdened or denied.[189] Underlying the decision of the majority was the assumption that the minority students admitted under the Davis special admissions program were less qualified than many of the nonminority students such as Bakke who were denied admission.[190] The court felt that applicants like Bakke, who ostensibly through "merit"

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186. 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963).

187. *Id.* at 881, 382 P.2d at 882, 31 Cal. Rptr. at 610. The court recently reaffirmed its position taken in *Jackson*. *See* NAACP v. San Bernadino City Unified School Dist., 17 Cal. 3d 311, 551 P.2d 48, 130 Cal. Rptr. 744 (1976); Crawford v. Board of Educ., 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976). *See also* Santa Barbara School Dist. v. Superior Court, 13 Cal. 3d 315, 530 P.2d 605, 118 Cal. Rptr. 637 (1975); San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 479 P.2d 669, 92 Cal. Rptr. 309 (1971). In these cases, race was held to be not only a permissible factor in classifying students, but also a factor constitutionally required to be taken into consideration when integrating the schools.

188. It cannot seriously be argued that the school desegregation cases differ in principle from those involving professional schools on the ground that no child in the desegregation cases is ever denied an education. This is a distinction without a difference. Justice Tobriner, in his dissent in *Bakke*, deftly dispels this assertion with the example of "magnet schools" where admission is not based solely on applicants with the highest "objective" criteria. 18 Cal. 3d at 75, 553 P.2d at 1180, 132 Cal. Rptr. at 708. Under the magnet school concept some students are inevitably denied admission. But, as Justice Tobriner noted:

> Whenever there is a limited pool of resources from which minorities have been disproportionately excluded, equalization of opportunity can only be accomplished by a reallocation of such resources; those who have previously enjoyed a disproportionate advantage must give up some of that advantage if those who have historically had less are to be afforded an equitable share. This reality, however, has not led courts to invalidate the remedial use of benign classifications.

Id.

189. *See* text accompanying note 119 *supra*.

190. 18 Cal. 3d at 38, 47, 553 P.2d at 1155, 1161, 132 Cal. Rptr. at 683, 689.

had earned the "right" to attend Davis Medical School, were deprived of that right due to the school's special admissions program.[191]

However, an applicant's desire to be admitted to a professional school is not a property "right" protected by the due process clause.[192] While courts have in the past viewed the interest in an elementary and secondary school education as "fundamental" because of its influence on the child's development as a citizen,[193] the California Supreme Court has implicitly rejected the application of the citizenship rationale to professional schools.[194] Thus, the only "right" which Bakke possesses is one which he shares with all other applicants—a right to be judged by standards which do not offend the United States Constitution.[195]

V. CONCLUSION

It cannot be gainsaid that remedial efforts on behalf of minorities present a formidable issue, yet an equitable solution must be attempted if the Supreme Court desires some finality in this area. However, remedial admissions programs are not properly reviewed under either the strict scrutiny or rational basis standard of the two-tier approach to

191. *Id.* at 62-63, 553 P.2d at 1171-72, 132 Cal. Rptr. at 699-700.

192. *See* the discussion of property rights at notes 162-65 *supra* and accompanying text.

193. Serrano v. Priest, 5 Cal. 3d 584, 605, 487 P.2d 1241, 1255-56, 96 Cal. Rptr. 601, 615-16 (1971). The second Serrano v. Priest decision, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), affirmed the holding of the first Serrano case which declared education to be a fundamental interest. *Id.* at 765-66, 557 P.2d at 951, 135 Cal. Rptr. at 367. This holding, however, was based on the adequate and independent state grounds of the California Constitution, *id.* at 762, 557 P.2d at 949, 135 Cal. Rptr. at 365, while *Bakke* is grounded in the fourteenth amendment to the United States Constitution. 18 Cal. 3d at 38, 553 P.2d at 1155, 132 Cal. Rptr. at 683. Thus San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), would be the controlling decision in *Bakke*.

194. D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 17-18, 520 P.2d 10, 22, 112 Cal. Rptr. 786, 798 (1974). Nor does a mere desire to be admitted to medical school comply with test stated in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), to determine whether a "right" is fundamental in the constitutional sense: i.e., whether it is "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34.

195. The majority opinion in *Bakke* attempted to distinguish the disadvantages suffered by a child who must travel some distance from his home to attend school and the absolute denial of a professional education. 18 Cal. 3d at 47, 553 P.2d at 1161, 132 Cal. Rptr. at 689. The reality is, however, that both situations entail some harm to nonminorities. The disappointment and adverse consequences that result from being bused out of one's neighborhood may be as distressing as the denial of admission to a professional school. The fact that many applicants must be turned away from professional schools merely reflects the competitive nature of professional education and is of no constitutional significance. *See also* note 188 *supra*.

equal protection—although their constitutionality may be upheld under both. Therefore, the Court is almost compelled to employ an intermediate standard of review. A proper solution will be attained if the Court analyzes and balances the competing interests of each side. Moreover, under such an intermediate approach, properly constructed remedial admissions programs[196] would be upheld as constitutionally permissible.

Olivia Jean Williams

196. Since remedial efforts involve sensitive and complex social issues the Court should allow only those programs which present the least detrimental side effects. Also, it should require that the goals be clearly set out and a termination date be set either in chronological or goal-achievement terms. *See* Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 337, 348 N.E.2d 537, 546, 384 N.Y.S.2d 82, 91 (1976).