

# Reinventing Bakke

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RACIAL PREFERENCES are under attack, and preferences employed in higher education are no exception. The People of California have declared such preferences illegal as a matter of state law, including those employed in college hiring and admissions. One federal court has found that non-remedial preferences in the hiring of high school faculty violate Title VII.<sup>1</sup> Another has found non-remedial preferences in law school admissions to be unconstitutional,<sup>2</sup> and a

third has found race-based scholarships similarly void.<sup>3</sup>

If racial preferences in education have a citadel, it is *Regents of California v. Bakke*.<sup>4</sup> According to the proponents of preferences, *Bakke* stands for the proposition that universities may employ racial preferences for the purpose of enhancing the “diversity” of a school’s student body.<sup>5</sup> Moreover, many have gone further, arguing that *Bakke* legitimates preferences in hiring for the purpose of ensur-

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1 *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (*en banc*).

2 *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996).

3 *Podberesky v. University of Maryland*, 38 F.3d 147 (4th Cir. 1994).

4 438 U.S. 265 (1978).

5 See Office of Legal Counsel, *Legal Guidance on the Implications of the Supreme Court’s Decision in Adarand Constructors, Inc. v. Peña*, 19 U.S. Op. O.L.C. No. \_\_\_\_, 1995 WL 835775, at 10-11 (June 28, 1995) (hereinafter OLC Opinion) (treating Justice Powell’s approval of preferences as “controlling”); Laurence H. Tribe *et al.*, *Petition For Certiorari In Texas v. Hopwood*, No. 95-1773, 12-15; *Non-Discrimination In Federally Assisted Programs; Title VI of the Civil Rights Act of 1964*, 59 Fed. Reg. 8756, 8760-62 (Feb. 23, 1994); Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW*, 1529 (2d ed. 1988). Indeed, twenty-nine distinguished constitutional scholars have characterized Justice Powell’s opinion as binding authority. See *Scholars’ Reply To Professor Fried*, 99 YALE L.J. 163, 164, 166 (1989).

ing a diverse workforce.<sup>6</sup> Decisions invalidating preferences, these advocates say, are inconsistent with *Bakke*.<sup>7</sup>

This essay argues that *Bakke* cannot bear the weight that has been placed on it by proponents of racial preferences. As an initial matter, the language of Justice Powell's controlling opinion approving of preferences, which so many have invoked, is *dicta*, the functional equivalent of an advisory opinion. Not surprisingly, this *dicta* rested upon certain crucial, untested assumptions, assumptions that have not been borne out since the decision. Thus, the question whether diversity really is a compelling state interest that will justify the sort of race-conscious admissions policies many universities are pursuing is still open to consideration by the courts and political branches.



It was, until recently, well settled as a matter of Constitutional Law that public institutions of higher learning may employ "benign" racial preferences in admissions.<sup>8</sup> The sole authority for this proposition was *Bakke v. Regents of California*, the only case in which the Supreme Court has considered such preferences. Although *Bakke* failed to produce a majority opinion, preference proponents have found

the holding of the case lodged in Justice Powell's opinion, which no other Justice signed, announcing the judgment of the Court. This opinion, these advocates say, was the narrowest ground supporting the judgment of the Court, and thus constitutes its holding.<sup>9</sup>

What, then was this holding? As proponents of preferences tell the story, Justice Powell's opinion "held" that, although a school cannot employ quotas in admissions, it can take race into account under a so-called "plus" system of the sort that was then in place at Harvard University.<sup>10</sup> Under such a system, schools may give credit to an applicant because of his or her race, so long as such a practice is part of a larger scheme in which applicants are given credit for attributes – socio-economic or geographic background and the like – of the sort that can diversify a student body.

Certainly Justice Powell's opinion *said* all of this, and more. The opinion "reversed" the (purported) judgment of the California Supreme Court that schools could not take race into account in admissions. Indeed, the Justice explicitly endorsed the sort of plus system that was in place at Harvard, even appending to his opinion a copy of Harvard's affirmative action plan. Achievement of a "diverse" student body, he said, was a compelling interest that justified the consideration of

6 OLC Opinion, 1995 WL 835775, at 10, n.30 (suggesting that rationale of *Bakke* "may carry over to the selection of university faculty").

7 See Tribe, Petition For Certiorari In *Hopwood*, at 13; Brief Amicus Curiae For The United States In *Texas v. Hopwood*, 12-13 ("Bakke's landmark holding has guided admissions policies of public and private institutions of higher education.").

8 Tribe, AMERICAN CONSTITUTIONAL LAW, at 1529; John Hart Ely, *The Supreme Court, 1977 Term – Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 10, n.33 (1978).

9 See OLC Opinion, 1995 WL 835775, at 10-11; Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. at 10, n.33; cf. *United States v. Marks*, 430 U.S. 188, 193-94 (1977). Unless otherwise noted, all citations of *Bakke* are to Justice Powell's separate opinion.

10 See *Nondiscrimination In Federally-Assisted Programs*, 59 Fed. Reg. at 8760-62; Tribe, CONSTITUTIONAL LAW, at 1529; Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. at 10, n.33. Indeed, even confirmed opponents of preferences treat Justice Powell's opinion as the controlling authority on this issue. See Lino Graglia, *Hopwood v. Texas, Racial Preferences In Higher Education Upheld And Endorsed*, 45 J. LEG. ED. 79, 86-87 (1995).

race in the admissions process. So long as the implementation of such plans involved the individualized consideration of each applicant, and the various attributes – racial and non-racial – that rendered an applicant “diverse,” they served a compelling state interest.<sup>11</sup>

Everything a court says, however, is not a holding – even in cases as monumental as *Bakke*. And, even cursory consideration suggests that Justice Powell’s approval of a plus system was not a holding, despite his “reversal” of the California Supreme Court. The plan at issue in *Bakke*, it must be recalled, was not a plus system, but instead a straight-forward quota plan. Under this plan, the medical school at the University of California at Davis reserved sixteen slots in the entering class for minority applicants, individuals whose applications were not compared with those of non-minorities. In this posture, then, the language in Justice Powell’s opinion “affirming” the judgment of the California Supreme Court that quotas are unconstitutional was certainly a holding. The language approving the use of a plus system, however, was plainly gratuitous, dealing, as it did, with an issue – and an admissions program – that was not before the Court. This language was *dicta* under the conventional definition.<sup>12</sup>

Justice Powell was quite aware that discussion of a plus system was not necessary to the disposition of the case before him. According to his biographer, he initially planned to vote simply to affirm the California Supreme

Court’s judgment voiding the Davis quota plan, leaving for another day the question whether other forms of racial preference might survive scrutiny.<sup>13</sup> Moreover, in a footnote, his final opinion responded directly to the assertion by Justice Stevens that “the question whether race can ever be used as a factor in an admissions decision is not an issue in this case.”<sup>14</sup> According to Justice Powell, it was appropriate to speak broadly for two related reasons: first, the trial court had denied Davis’ motion for a declaration that its plan was lawful, and second, the California Supreme Court had found the Davis plan unconstitutional because it employed race as a factor in admissions – not simply because it employed a quota.<sup>15</sup>

A consideration of Justice Powell’s (legal) justification for speaking broadly only confirms that, in fact, language approving a plus system was *dicta*. To be sure, the state had sought a declaration that its admissions policy was lawful. Yet, this claim was simply the mirror image of Allan Bakke’s claim that the scheme was *unlawful*; it is not clear how the trial court’s denial of the state’s motion somehow placed the legality of a plus system in issue. Moreover, although the California Supreme Court had stated that any use of race was unconstitutional, it affirmed only that portion of the trial court’s opinion declaring the plan before it to be invalid, leaving for another day the broader question whether the school could employ race in another manner.<sup>16</sup>

11 *Bakke*, 438 U.S. at 311-18.

12 See BLACK’S LAW DICTIONARY, 454 (6th ed. 1990) (defining *dictum* as “[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand”). For a detailed analysis concluding that this language was *dicta*, see Arval A. Morris, *The Bakke Decision: One Holding Or Two*, 58 OR. L. REV. 311, 326-32 (1979). I have drawn upon this article in constructing portions of my argument.

13 See John C. Jeffries, Jr., JUSTICE LEWIS F. POWELL, JR., 486-87 (1994).

14 *Bakke*, 438 U.S. at 411 (Stevens, J., concurring in the judgment and dissenting in part); *id.* at 271, n.†.

15 See *Bakke*, 438 U.S. at 271, n.†.

16 See Morris, *One Holding Or Two*, 58 OR. L. REV. at 329-31. It should be noted that, initially, the California Supreme Court remanded the case with orders that Bakke be considered for admission without regard to his race. See *Bakke*, 438 U.S. at 280. This judgment, it seems, extended beyond mere

The Supreme Court reviews only judgments, not statements in opinions, and the *judgment* of the California Supreme Court simply declared Davis' admissions policy unlawful.<sup>17</sup>

The analysis thus far may seem hypertechnical – even formalistic! What, however, about the functional reasons for distinguishing *dicta* from holding? There is, it seems, no better statement of the policy distinguishing *dicta* from holding than that offered by Chief Justice Marshall.

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in conjunction with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.<sup>18</sup>

Was the question whether a school could employ a plus system “investigated with care, and considered in its full extent?” Justice Powell thought so. After all, the question whether

public universities could employ race in admissions had been thoroughly briefed and argued, first in *DeFunis v. Odegaard*<sup>19</sup> – where the Court had ducked the issue – and then in *Bakke* itself. Indeed, according to his biographer, Justice Powell believed that the Court was as informed as it could be on the role of race in college admissions, with the result that failure to address the question broadly would subject it to charges of dereliction of duty.<sup>20</sup>

To be sure, the Justices who heard *Bakke* had been bombarded with briefs concerning the permissibility *vel non* of race-conscious admissions. Still, the Court lacked significant information about the sort of system that Justice Powell approved. There was no factual record developed at trial about how a plus system or its various possible variants actually operated – Davis, after all, was operating a quota system. Further, there was no consideration of such a plan in the opinion of the California Supreme Court. Indeed, even in its brief in the Supreme Court, Davis did not defend a plus system. Instead, it was left to several elite private schools to describe such a plan in a brief *amicus curiae*. That brief, it should be noted, did not ask the Court to distinguish between a quota system and a plus system, but, instead, to approve both systems.<sup>21</sup>

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disapproval of Davis' quota system. *But see* Morris, *One Holding Or Two*, 58 OR. L. REV. at 330 (arguing that this initial judgment did not preclude any consideration of race). However, in its petition for rehearing, the State conceded that Bakke would have been admitted absent its race-conscious admissions program, and the California Supreme Court amended its opinion simply to order Bakke admitted. *See Bakke*, 438 U.S. at 280-81. Thus, even if the remand order precluded any use of race, it was extinguished by the amended judgment from which the State petitioned. *See* Morris, *One Holding Or Two*, 58 OR. L. REV. at 330-31; *Bakke*, 438 U.S. at 410-11 (Stevens, J., dissenting in part).

17 *See Texas v. Hopwood*, 116 S. Ct. 2581, 2582 (Ginsburg, J., joined by Souter, J., concurring in the denial of certiorari); *California v. Rooney*, 483 U.S. 307 (1987).

18 *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821).

19 416 U.S. 312 (1974).

20 Jeffries, JUSTICE LEWIS POWELL, at 489.

21 *See* Brief Of Amici Curiae Columbia University, Harvard University, Stanford University and the University Of Pennsylvania, 2, n.1 (“[W]e seek in this brief to preserve the substantial independence of our faculties, including the freedom to adopt admissions policies different from those we here defend.”); *id.* at 27, n.18 (arguing that Davis quotas were constitutional).

The mere fact that citizens are interested in an abstract question – and thus willing to file amicus briefs on the subject – is not sufficient to confer on the Court the authority or ability to resolve the issue. Instead, Article III's case or controversy requirement is designed to ensure "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."<sup>22</sup> Of course, there was a live controversy before the *Bakke* Court: the respondent had been excluded from medical school by a racial quota, which the State sought to defend. Still, the policies animating the case or controversy requirement compelled Justice Powell to confine himself to resolution of that actual, concrete issue; any language broader than necessary to do so should have no precedential value should the Court decide to revisit the question.<sup>23</sup>

Even before the question reaches the High Court, however, lower courts and the political

branches will be forced to answer it for themselves.<sup>24</sup> Certainly these actors owe some deference to Supreme Court *dicta* that is recent and carefully considered.<sup>25</sup> There is little reason for these actors to accord *Bakke's dicta* such deference, though. By issuing what was in essence an advisory opinion on the propriety of a plus system, Justice Powell bypassed the process of litigation that ordinarily precedes constitutional decisionmaking, depriving himself and his brethren of important information about the contours and operation of such a system.<sup>26</sup> For, as noted earlier, the only information about a plus system before Justice Powell was a three page statement found in the appendix to the amicus brief that described how Harvard University purportedly conducted its admissions program. There was no factual finding that the Harvard system actually operated in the manner described, or that other systems operated in a similar manner. Nor did Justice Powell cite any decisions in lower courts addressing the operation of plus systems. Still, in drawing the pivotal distinction

22 *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961) ("[Advisory] opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give.").

23 Michael C. Dorf, *Dicta and Article III*, 142 U. PENN. L. REV. 1997, 2000-2001 (1994) (arguing that distinction between *dicta* and holding reflects Article III's concern that issues be resolved only after careful consideration); *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 572-73 (1993) (Souter, J., concurring). See also *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, n.7 (1984) (Powell, J.) (refusing to consider argument raised by amici because "neither party before this Court presses the argument").

24 This duty, it should be noted, may well extend to universities themselves. See *Alleghany Corp. v. Hasse*, 896 F.2d 1046, 1053-56 (7th Cir. 1990) (Easterbrook, J., concurring).

25 *Reich v. Continental Casualty Co.*, 33 F.3d 754, 757 (7th Cir. 1994); but compare *Covino v. Reopel*, 89 F.3d 105, 109 (2d Cir. 1996) (declining to follow recent Supreme Court *dicta*).

26 "[A]dvisory opinions are bound to move in an unreal atmosphere. The impact of actuality and intensities of immediacy are wanting. In the attitude of court and counsel, in the vigor of adequate representation of the facts behind legislation (lamentably inadequate even in contested litigation) there is thus a wide gulf of difference, partly rooted in psychological factors, between opinions in advance of legislation and decisions in litigation after such proposals are embodied into law. Advisory opinions are rendered upon sterilized and mutilated records." Felix Frankfurter, *A Note On Advisory Opinions*, 37 HARV. L. REV. 1002, 1005-1006 (1924).

between a plus and a quota plan, Justice Powell made certain critical assumptions. Perhaps most importantly, he assumed – again without any factual findings – that schools really did consider all forms of diversity, and not simply racial diversity, a compelling educational objective. Moreover, he assumed that academics – most of whom have no training in constitutional law – could and would comprehend and implement the framework premised upon this belief.<sup>27</sup> Finally, and relatedly, he assumed that they would implement a system purportedly designed to further diversity across the board without using it “as a cover for the functional equivalent of a quota system.”<sup>28</sup> How schools would do this, and how courts could tell, was not addressed.<sup>29</sup> *Dicta* built on such flimsy foundations should not deter other actors from making independent judgments on the question.



Constitutional cases do not exist in a vacuum, but are instead shaped by the responses of political actors.<sup>30</sup> *Bakke* was no exception. Despite the argument, explicitly made by Justice Stevens, that Justice Powell’s opinion went further than warranted by the controversy before the Court, the academy and the

political branches immediately spun *Bakke* into a “holding” that non-quota preferences in admissions were permissible.<sup>31</sup> In evaluating the legality of their plans, schools had little to go on, except Justice Powell’s statement that a school could not place a hard and fast ceiling on non-minority admits, that it had to provide “individualized consideration” to applicants, and that it could consider race only as one of many factors bearing on an applicant’s diversity.

Litigation that has occurred since *Bakke*, however, suggests that at least some schools have failed to follow even the principles Justice Powell made relatively clear, and that some of the assumptions the Justice made may not have involved “a realistic appreciation of the consequences of judicial action.” Under the aegis of *Bakke*, the law schools at both Berkeley and the University of Texas adopted preference plans that (1) set numerical “goals” for the admission of various minority groups, (2) reviewed minority applications separately from those of non-minorities, and (3) kept segregated waiting lists.<sup>32</sup> Moreover, each school was apparently engaged in reverse engineering, varying the size of the “plus” or making other adjustments mid-way through the admissions process, when it appeared that “goals” would not be

27 See *Bakke*, 438 U.S. at 318 (“A boundary line ... is none the worse for being narrow.”).

28 *Bakke*, 438 U.S. at 318.

29 Cf. Antonin Scalia, *The Disease As Cure: In Order To Get Beyond Racism, We Must First Take Account Of Race*, 1979 WASH. U. L.Q. 147, 148 (arguing that courts would not be able to determine whether schools are pursuing diversity consistently).

30 See Neal Devins, SHAPING CONSTITUTIONAL VALUES, 23-40 (1996).

31 *Nondiscrimination In Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Policy Interpretation*, 44 Fed. Reg. 58509, 58510 (Oct. 2, 1979) (“The [*Bakke*] Court affirmed the legality of voluntary affirmative action.”); Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. at 10, n.33. One counter-example is Professor Morris’ article: *One Holding Or Two*, 58 OR. L. REV. at 326-332. The academy does not seem particularly interested in Professor Morris’ argument. A Lexis search located two citations of this article, neither of which mentions the assertion that Justice Powell’s approval of a plus system was *dicta*.

32 See *Hopwood*, 78 F.3d at 935-38; Letter from Gary D. Jackson, Regional Civil Rights Director Office For Civil Rights, United States Department of Education, to Dr. Chang-Lin Tien, at 2-4 (September 25, 1992) (hereinafter Jackson Letter).

met.<sup>33</sup> There were apparently no goals, separate consideration, separate waiting lists, or mid-course adjustments for applicants of modest means, student leaders, or others diverse for reasons unrelated to their race.<sup>34</sup> Given their narrow focus on racial diversity *simpliciter*, it seems doubtful that these schools could have demonstrated that pursuit of “diversity” was truly a compelling state interest, as Justice Powell understood that term.<sup>35</sup> Moreover, these plans, even if they had pursued diversity consistently, seemed to offend Justice Powell’s requirement that applicants be accorded individualized treatment.<sup>36</sup> If faculties at some of the best law schools in the country cannot comprehend and apply the distinction between a quota system and a plus system, it is not clear how we can expect everyone else to do so.<sup>37</sup>

The inability of universities to understand and apply *Bakke* may stem not so much from a

lack of understanding, as from a lack of will. There is strong support for racial preferences in the academy, and one suspects that many institutions, at least, are not overly concerned with the niceties of how, exactly, such programs are administered.<sup>38</sup> Still, if schools are circumventing Justice Powell’s *Bakke* opinion, that opinion must bear some of the blame. For, the Justice was decidedly vague about just how a plus system could be operated. This vagueness can be traced directly to the absence of any actual controversy over the constitutionality of a plus system, and the insistence by Justice Powell upon reaching a question that had not yet “percolated” in the lower courts. In the face of such strong support in the academy for preferences, anything but a clear, factually anchored opinion was destined to fail.<sup>39</sup>

One could argue that, at least from today’s vantage point, any objection to Justice Powell’s overreaching is moot. For, there now seems to

33 *Hopwood*, 78 F.3d at 936, n.6; Jackson Letter, at 3.

34 See Jackson Letter, at 2 (“Only the applicant’s race or ethnicity is closely monitored and evaluated with reference to percentage targets. No benchmarks have been established with respect to consideration of the remaining factors.”).

35 See *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 546-47 (holding that an interest that is not consistently pursued cannot be deemed “compelling”); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978) (Powell, J.) (same). Cf. *Bakke*, 438 U.S. at 315 (“The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”).

36 See Jackson Letter, at 4-5. Even the Clinton Administration concluded that the Texas plan was inconsistent with Justice Powell’s *dicta*. See Brief For The United States In *Hopwood*, at 14, n.13.

37 These cases do not appear to be isolated instances. In *Hopwood*, for instance, the Deans at the University of North Carolina, the University of Minnesota, and Stanford Law School all submitted testimony in support of the Texas plan. See 861 F. Supp. 551, 576, n.72 (W.D. Tex. 1994). According to the district court, the Minnesota system “use[d] mechanisms in the admissions procedure similar in function to those used by [the University of Texas] law school.” *Id.* Similarly, the court concluded that, prior to a settlement with the Office of Civil Rights, Stanford “use[d] a system comparable to that used by [Texas]” under which one individual, instead of a committee, examined only minority applications. *Id.* Stanford, of course, is not bound by the Fourteenth Amendment. It is, however, bound by federal statutory law, which forbids racial discrimination by universities that receive federal funding. See *Bakke*, 438 U.S. at 284-87 (finding that requirements of Title VI and the Constitution are coextensive).

38 Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. at 10, n.33 (referring to the distinction between quotas and a plus system as “cosmetic”).

39 For an argument that this problem characterizes the Court’s affirmative action jurisprudence generally, see Neal Devins, *Adarand Constructors v. Peña and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 W. & M. L. REV. 673 (1996).

be general consensus that separate admissions committees of the sort employed at Texas and Berkeley are unlawful. One might therefore conclude that schools are, with this supplementary guidance, capable of operating a plus system in a manner that does not devolve into a quota, thus lending (admittedly tardy) support to Justice Powell's assumption to this effect and suggesting that lower courts and others should treat Justice Powell's *Bakke* opinion as a holding.<sup>40</sup>

Still, the mere elimination of separate committees cannot, *ipso facto*, give schools a blank check to employ racial preferences. There is still the separate question whether racial preferences, in whatever form, serve a compelling state interest. In "holding" that they did, Justice Powell assumed that schools would consider race along with other factors that might render an applicant "diverse." Indeed, such an even-handed consideration of *all* such factors is a necessary, albeit not sufficient, condition for a finding that racial preferences serve a compelling state interest.<sup>41</sup> Thus, even if universities are employing a unitary admissions process, whether diversity really can be a compelling state interest is still, despite Justice Powell's *dicta*, unresolved, awaiting actual controversies, first in the lower

courts and then, presumably, in the Supreme Court itself.



Let us assume, however, that schools can demonstrate that diversity is an interest that they are pursuing consistently. The question still remains whether, as Justice Powell assumed, schools can be trusted to pursue that interest without adopting the functional equivalent of a quota system. For, even if all applicants are considered by a single committee that considers multiple diversity factors, a cunning school can, based on experience and foresight, set the size of the plus to assure that the entering class has a certain percentage of minorities. Indeed, the Dean at Berkeley confidently predicted that the elimination of separate admissions committees, numerical targets, and segregated waiting lists would not affect the proportion of minorities matriculating there.<sup>42</sup>

If, in fact, it is possible to achieve racial targets simply by adjusting the size of the plus, the distinction between quotas and a plus system seems well nigh illusory. This realization, of course, could cut in different directions. To opponents of preferences, it simply confirms

40 Some might also argue that "reliance" upon Justice Powell's *dicta* should justify adherence to it, even by the Supreme Court. See Tribe, Petition For Certiorari In *Hopwood*, at 13. It is hard to say, however, that schools that had adopted separate admissions committees, for instance, really did "rely" on Justice Powell's *dicta* in any meaningful sense. At any rate, it seems doubtful that reliance by the state constitutes the sort of reliance that requires adherence to a decision. Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1993). Finally, allowing institutions – particularly institutions that coordinate their behavior through trade associations – to transmute *dicta* into a holding by means of "reliance" will create dangerous incentives.

41 See n.35, *supra* (collecting cases holding that an interest cannot be deemed compelling if it is not pursued consistently).

42 See SAN FRANCISCO CHRONICLE, A1 (September 29, 1992) (quoting Dean Herma Hill Kay); *Hopwood*, 78 F.3d at 948, n.36 ("In this case, the law school appeared to be especially adept at meeting its yearly 'goals.'"). See also Bernard Schwartz, BEYOND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT, 155 (1988) (claiming that "virtually all" universities set the size of the plus so as to "secure roughly the same percentage of minority students each year"). This is not to say that such reverse engineering of the size of the plus will be as effective at assuring proportional representation as an outright quota. Schools should find little solace, however, in the fact that they are merely attempting to violate the Equal Protection Clause.



that a plus system inevitably devolves into a quota system, with all the evils Justice Powell identified; to proponents, it reemphasizes that something very much like a quota is necessary to serve the compelling state interest of diversity. As courts reconsider the validity of racial preferences it will all boil down, it seems, to whether or not race can ever be a factor in the admissions process, not how it is used.

The equation of a plus system with a quota system does not, however, follow ineluctably from the conclusion that the consideration of race can constitute a compelling state interest. The apparent inevitability of equating a plus system with quotas depends upon a particular method of reading Justice Powell's (admittedly ambiguous) *dicta* about what a constitutional preference system would look like. More precisely, the current state of affairs seems premised upon a view that "diversity" is an attribute possessed by, say, an entering class, viewed as a whole, instead of an attribute possessed by individual members of that class. That these two approaches are quite different is confirmed by the different manner in which they would be implemented. Under the former approach, the size of the plus would be set so as to assure, to the extent possible, that a certain proportion of minorities, student leaders, and other diverse applicants are admitted. Under the latter, the size of the plus would be determined, behind a veil of ignorance, based upon a judgement about the value of the characteristic in question to the educational atmosphere that an institution hopes to foster. Application of this sort of plus system may or may not produce diverse *classes*, depending upon the size of the plus and relative academic qualifica-

tions of applicants who are not "diverse," or are diverse for reasons unrelated to race.

Proponents of preferences might argue that these two methods of taking race into account are not mutually exclusive. After all, the value of a certain attribute to the community might depend upon the presence of other students who possess the same attribute. Minorities, for instance, might feel a sense of isolation if there are not a sufficient number of fellow minorities in their class, a factor that cannot be taken into account from behind the veil of ignorance. Perhaps Justice Powell was referring to this phenomenon when he noted that the size of the plus might change year to year "depending upon the 'mix' both of the student body and applicants for incoming classes."<sup>43</sup>

One can grant, *arguendo*, that the value of a particular individual's attributes might depend upon the presence or absence of other students sharing the same attribute, though again, this assumption was not tested in the crucible of the adversarial process in *Bakke*. Such a conclusion, however, would not require lower courts to approve the use of a plus system to achieve numerical goals. After all, similar reasoning would seem to require the setting of targets not simply for those who are racially diverse, but also for those who possess other diversity characteristics as well, something universities likely do not do, thus undermining any claim that targets are aimed at "diversity."<sup>44</sup> Moreover, there is no reason why schools should set targets, as they apparently have, based upon, say, the proportion of minorities appearing in the population, or some subset of it.<sup>45</sup> Instead, such a plus should be set with reference to that propor-

43 *Bakke*, 438 U.S. at 317-318. See also Harvard College Admissions Program, reprinted in *Bakke*, 438 U.S. at 323 ("there is some relationship between numbers and achieving the benefits to be derived from a diverse student body").

44 Students of modest means or Evangelical Christians, for instance, may feel isolated if not in the presence of many similar students.

45 See *Hopwood*, 861 F. Supp. at 560, and n.19 (finding that the law school set its "goals" for admission of minorities based upon "the percentage of minority college graduates" in Texas). Some states appar-

tion of minorities that is necessary to eliminate feelings of isolation, a percentage which should bear no logical relationship to the proportion of minorities in the state in which an institution happens to reside. Programs that insist instead upon some form of proportional

representation would not be narrowly tailored. Thus, even if courts should determine that diversity is a compelling state interest, the choice between competing definitions of diversity will significantly shape the contours of permissible racial preference programs.



Justice Powell's conclusion that colleges and universities may employ a race-conscious system of admissions was a quintessential advisory opinion, an opinion that rested upon several untested assumptions. Lower courts and others, then, should feel free to reach their own conclusions about the propriety of

employing racial preferences in the admission process. In so doing, they will have occasion to test directly the assumptions Justice Powell made by examining closely the manner in which "plus systems" are operated. In so doing, they may see something Justice Powell missed. *GP*

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ently require their universities to employ similar benchmarks. See Maryland Educ. Code Ann. § 12-107(a)(3) (1996) (requiring universities "to assure that women and minorities are equitably represented among the student body ... so that the University reflects the diversity of the State's population."); Conn. Gen. Stat. § 10a-11 (1996) (directing state's Board of Governors of Higher Education "to ensure ... that students ... at each institution are representative of the racial and ethnic diversity of the total population of the state").