

# BAKKE BETRAYED

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## I

### INTRODUCTION

The President must “take care that the laws are faithfully executed.”<sup>1</sup> Such faithful execution requires more than mere careful attention to the language of statutes; it also requires the President to interpret the Constitution. The Constitution, after all, is the supreme law of the land, law that Presidents must enforce.<sup>2</sup> Just as judges exercise judicial review, Presidents must also exercise “presidential review,” refusing to enforce statutes they believe are unconstitutional.<sup>3</sup>

The existence of presidential review begs an important question: How much deference should the Executive accord to courts when determining whether a statute offends the Constitution? According to some scholars, judges have the “last word” about the meaning of the Constitution.<sup>4</sup> As they see things, the political branches are perfectly free to derive their own meaning of the Constitution, unless and until the Supreme Court has spoken. Once the Court has spoken, however, the President and others must “toe the line,” implementing the Court’s view of the Constitution.<sup>5</sup> Not surprisingly, this “judicial hegemony” view finds support in some rather self-important Supreme Court *dicta*.<sup>6</sup>

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1. U.S. CONST art. II, § 3.

2. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-90).

3. See generally *id.* See Freytag v. CIR, 501 U.S. 868, 906 (1991) (Scalia, J., concurring); see also Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (1994).

4. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). A recent opinion by the Office of Legal Counsel apparently took this position:

The Supreme Court plays a special role in resolving disputes about the constitutionality of enactments. As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.

Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199, 200 (1994).

5. See generally Alexander & Schauer, *supra* note 4, *passim*.

6. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) (claiming that “the root of American governmental power is revealed most clearly in the instance of the power conferred by the

Another view, however, treats the political branches as coequal even when it comes to constitutional interpretation. Under this approach, the President need not subordinate his own view of the Constitution to that of the Supreme Court, but may instead adopt and implement an independent interpretation.<sup>7</sup> For instance, the President may refuse to enforce a statute he believes to be unconstitutional even if the Supreme Court has recently sustained it.<sup>8</sup> Proponents of this approach argue that the Constitution may be interpreted by everyone, not merely judges, and that the process of constitutional interpretation is and should consist of a dialogue between the Court, the political branches and, ultimately, the people.<sup>9</sup>

Regardless of its normative merit, the judicial hegemony approach appears inconsistent with our constitutional traditions.<sup>10</sup> Andrew Jackson vetoed a bill to reauthorize the National Bank on constitutional grounds, paying no deference to the unanimous opinion in *McCulloch v. Maryland*.<sup>11</sup> Lincoln refused to follow the rule announced in *Dred Scott*,<sup>12</sup> and vowed to undo it.<sup>13</sup> Franklin D.

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Constitution upon the Judiciary of the United States and specifically upon this Court"); Cooper v. Aaron, 358 U.S. 1, 18 (1958).

7. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 982-90 (1987).

8. See Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041, 1050-61 (1987); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What The Law Is*, 83 GEO. L.J. 217, 271-72 (1994).

9. See, e.g., Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998). President Lincoln summarized this view in his first inaugural address:

[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *Inaugural Addresses of the Presidents of the United States*, S. DOC. NO. 101-10, at 139 (1989).

James Madison held similar views:

As the Legislative, Executive, and Judicial departments of the United States are co-ordinate, and each equally bound to support the Constitution, it follows that each must, in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation of it; and, consequently, that in the event of irreconcilable interpretations, the prevalence of the one or the other department must depend on the nature of the case, as receiving its final decision from one or the other, and passing from that decision into effect, without involving the functions of the other.

James Madison, Unaddressed Letter of 1834, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 349 (1867) (quoting President Andrew Jackson).

10. See NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES 10-18 (1996).

11. 17 U.S. (Wheat) 316 (1819); see DEVINS, *supra* note 10, at 14. According to President Jackson, [t]he opinion of the judges has no more authority over Congress than the opinion of the Congress has over the judges, and on that point the President is independent of both. Each public official who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.

*Id.*, quoting

12. *Dred Scott v. Sandford*, 60 U.S. (How) 393 (1857).

13. See DEVINS, *supra* note 10, at 14-15; Colby, *supra* note 8, at 1053 ("In two cases arising in Boston, Lincoln refused to allow his federal agents to deny a black student his passport or a black inventor his patent.").

Roosevelt, of course, proposed legislation inconsistent with *Lochner*<sup>14</sup> and its progeny.<sup>15</sup> More recently, President Reagan vetoed the Fairness Doctrine, because it offended the First Amendment, despite clear “law” to the contrary.<sup>16</sup> He also carried on a vigorous campaign against *Roe v. Wade*<sup>17</sup> and issued Executive Orders based on views of the Constitution at odds with Supreme Court precedent.<sup>18</sup> By opposing the Court’s reading of the Constitution, these Presidents touched off a dialogue about the meaning of the various constitutional provisions involved.<sup>19</sup>

Of course, open defiance of Supreme Court doctrine may come with a high price—particularly if the doctrine is popular. Presidents who claim the authority to disagree with the Court may face charges that they are ignoring “the Constitution,” which some at least equate with the Court’s case law.<sup>20</sup> To be sure, Presidents can attempt to convince the public that it is the *judges* who have departed from the Constitution, both by claiming a monopoly on interpretation and “getting it wrong” on the merits. Still, not all Presidents are Lincoln, and not all cases are as clearly incorrect as *Dred Scott*. Moreover, the public may well look askance at politicians who claim to know more about the Constitution than life-tenured judges. Thus, a President who defies the Court runs the risk of initiating a dialogue that he cannot win—a dialogue that, ironically, might further entrench the rule he opposes.

Thus, it seems that a President who disagrees with the Court’s account of the Constitution faces two rather unpalatable choices: enforce the Court’s decision “to the letter,” or defy the Court and take his case to a skeptical populace. There is, however, a “third way”—a way in which a President can “have his cake and eat it too.” The President can publically embrace the doctrine in ques-

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14. *Lochner v. New York*, 198 U.S. 45 (1905).

15. See DEVINS, *supra* note 10, at 16-18; Easterbrook, *supra* note 2, at 911.

16. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (sustaining so-called “Fairness Doctrine” against First Amendment challenge); *President’s Message to the Senate Returning Without Approval the Fairness in Broadcasting Bill*, 1 PUB. PAPERS 690 (June 19, 1987); DEVINS, *supra* note 10, at 35.

17. 410 U.S. 113 (1973).

18. For instance, Executive Order 12,630, “Governmental Actions and Interference With Constitutionally Protected Property Rights,” declared that regulations that “substantially affect [the] value or use” of private property would constitute compensable takings unless such regulations addressed “real and substantial threats to public health and safety,” “were designed to advance significantly the health and safety purpose,” and produced burdens on property “no greater than necessary to achieve the health and safety purpose.” 1 Pub. Papers 340-41 (Mar. 16, 1988). The requirement that the regulatory burden be “no greater than necessary” is not consistent with judicial precedent. See *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

19. See Devins & Fisher, *supra* note 9, at 90-106 (arguing that dialogue between the branches will produce more durable and legitimate settlement of constitutional issues).

20. For instance, when President Reagan’s Attorney General suggested that the Constitution, and not case law, is the Supreme Law of the Land, the then-president of the American Bar Association claimed that such an approach would “shake the foundations of our legal system.” See *id.* at 83 n.5; see also, e.g., Matthew J. Franck, *Support and Defend: How Congress Can Save the Constitution from the Supreme Court*, 2 TEX. REV. OF LAW & POL. 315, 324-25 (1998) (noting that one senator has “made a fetish over the last decade of asking [Supreme Court] nominees to . . . affirm the superiority of the Court over all rivals in these matters”).

tion, while at the same time refusing to follow it. For instance, a President could purport to agree with the Supreme Court that the Fairness Doctrine is constitutional, while at the same time appointing FCC Commissioners who will dismantle it on purportedly non-constitutional grounds. Or a President can purport to agree with the Court that Congress has plenary control over interstate commerce, but veto an increase in the minimum wage because it supposedly imposes an undue burden on small businesses. By pursuing such a strategy, the President can work to ensure that federal law reflects his constitutional vision, without submitting that vision to the people for consideration.

The Clinton Administration has followed just such a “third way” approach to *Regents of the University of California v. Bakke*.<sup>21</sup> As a rhetorical matter, the Administration has embraced Justice Powell’s controlling opinion in this case, characterizing certain language in the opinion as a “holding” that approved racial preferences in college admissions purportedly designed to further “diversity.” On the other hand, the Administration has actually adopted or encouraged a variety of racial preferences that were plainly inconsistent with the very language in Justice Powell’s opinion that it embraced. Thus, while the Administration treated Justice Powell’s opinion as the “last word” on the subject of preferences, in practice it ignored key aspects of that opinion. Instead of wrestling with the Court openly about the proper scope for racial preferences, the Administration instead defied the Court *sub silentio*, all the while purporting to “toe the line.” While such a course may have been politically expedient, it deprived the public of the dialogue that open defiance of *Bakke* would have produced and may, over the long run, ultimately hasten the demise of racial preferences.

## II

### A REVIEW OF THE BAKKE DECISION

Any analysis of the Administration’s interpretation of *Bakke* must, of course, begin with a review of that decision. In *Bakke*, the Justices considered a “special admissions program” administered by the medical school at the University of California at Davis. Under this program, Davis reserved or “set aside” sixteen places in the entering class of one hundred for individuals who were members of certain minority groups.<sup>22</sup> The school filled these spaces with those members of underrepresented groups that were otherwise the most qualified for admission. Individuals who were not members of these favored groups competed for the remaining, unrestricted spots.

Allan Bakke lost that competition, and he sued the Davis Medical School, arguing that the special admissions program contravened the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.<sup>23</sup> Davis conceded

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21. 438 U.S. 265 (1978).

22. *See id.* at 272-76 (describing operation of special admissions program).

23. 42 U.S.C. § 2000(e) (2000).

that, but for the special admissions program, it would have admitted Bakke.<sup>24</sup> Nevertheless, the school argued that its treatment of Bakke was necessary to accomplish several important objectives. First, the school claimed that the set-asides would help increase the number of physicians from underrepresented groups, and thus enhance the medical services available in minority communities.<sup>25</sup> Second, the school argued that the program was necessary to remedy the effects of prior discrimination suffered by applicants from underrepresented groups.<sup>26</sup> Finally, the school argued that the program would create a “diverse” student body.<sup>27</sup> Such diversity, the school argued, would enrich the educational experiences of all students by exposing them to numerous perspectives, attitudes, and viewpoints.<sup>28</sup>

The Court split on the propriety of Davis’s special admissions program. Four justices held that the program was justified as an attempt to ameliorate the effects of prior discrimination.<sup>29</sup> Four other justices refused to reach the constitutional question, finding that the special admissions program violated Title VI.<sup>30</sup> Justice Powell provided the crucial vote, and he announced the judgment of the Court. According to Justice Powell, the Davis plan was unconstitutional because it created a set-aside or quota for favored minorities.<sup>31</sup> Such a plan, the Justice said, could not be justified as an attempt to remedy previous discrimination because the Davis Medical School had made no findings regarding the injury or appropriate remedy for such discrimination, nor was it competent to make such a finding.<sup>32</sup> Moreover, Davis had adduced no evidence that minority physicians were more likely to serve underserved minority communities.<sup>33</sup> Finally, Justice Powell rejected Davis’s assertion that its program was justified as an attempt to enhance the diversity of its student body. All Davis had done, the Justice said, was to pursue racial diversity *simpliciter*.<sup>34</sup> Moreover, the school had done so by insulating a subset of minority applicants from any comparison with non-minority applicants, many of whom might themselves have possessed characteristics that rendered them “diverse.”<sup>35</sup> Thus, Powell concluded, the Davis program did not advance a compelling state interest, and offended the Equal Protection Clause.<sup>36</sup>

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24. See *Bakke*, 438 U.S. at 280-81.

25. See *id.* at 310-11.

26. See *id.* at 307-10.

27. See *id.* at 311-15 (describing this contention).

28. See *id.*

29. See *id.* at 355-79 (Brennan, White, Marshall, and Blackmun, JJ., joint opinion).

30. See *id.* at 412-21 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C.J., Stewart, and Rehnquist, JJ.).

31. See *id.* at 305-15.

32. See *id.* at 308-39.

33. See *id.* at 310-11 & n.46 (“The only evidence in the record with respect to such underservice [of minority communities] is a newspaper article.”).

34. See *id.* at 315 (“Petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.”).

35. See *id.* at 315-17.

36. See *id.* at 320. “The diversity that furthers a compelling state interest encompasses a far

Justice Powell did not stop there. Not only did he conclude that the Davis program was void, he also opined on the constitutionality of a different admissions scheme, a scheme advanced by several *amici curiae*, including Harvard, Princeton, and Stanford.<sup>37</sup> Under the so-called "Harvard Plan," admissions officers purportedly considered numerous factors bearing on an applicant's "diversity," including state of residence, rural upbringing, musical or artistic talent, athletic ability, academic interests, career interests, political views, and ethnic or racial identity.<sup>38</sup> No quotas were set, and admissions officers gave "individualized consideration" to each application.<sup>39</sup> So, for instance, a process that had already admitted several African-Americans from privileged backgrounds might prefer a less privileged African-American with "an apparently abiding interest in black power" to an otherwise more qualified candidate.<sup>40</sup> Or a school that had already admitted several privileged and underprivileged African-Americans might prefer "a white student with extraordinary artistic talent."<sup>41</sup> Such a plan, Justice Powell said, pursued diversity consistently, and thus advanced a compelling interest.<sup>42</sup> Moreover, unlike the Davis Plan, such a plan treated each applicant as an individual, and not merely as a member of a racial group.<sup>43</sup> Thus, Powell concluded, such a plan would be constitutional.<sup>44</sup>

Although Justice Powell spoke only for himself, he announced the judgment of the Court, declaring the Davis plan unconstitutional. Moreover, unlike those

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broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315.

37. See generally Brief of Columbia University et al. as *Amicus Curiae*, *Bakke*, 433 U.S. 265 (1978) (No. 76-811), reprinted in 99 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 689 (Philip Kurland & Gerhard Casper eds., 1978).

38. See *Bakke*, 438 U.S. at 322-23 (reproducing Harvard College Admissions Program); see also Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY 7 (Sept. 26, 1977) (describing similar plan purportedly operated by Princeton), cited in *Bakke*, 433 U.S. at 317 n.51. Use of the term "purportedly" is not meant to suggest that the *amici curiae* were not, in fact, following the Harvard Plan as described to the Court. I mean only to emphasize that there were no factual findings before the Court regarding the actual operation of the plans.

39. See *Bakke*, 438 U.S. at 317 ("In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism."); see also *id.* at 322 ("The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B." (quoting Harvard College Admissions Program)).

40. See *id.* at 324.

41. *Id.*

42. See *id.* at 315-19.

43. See *id.* at 315-20.

44. See *id.* at 315-19.

Justices who thought all preferences were inconsistent with Title VI,<sup>45</sup> Justice Powell confined his condemnation to Davis's quota scheme. Therefore, as the narrowest opinion supporting the judgment, Justice Powell's opinion can properly be viewed as the "holding" of the case.<sup>46</sup>

While *Bakke* voided the only plan actually before the Court, proponents of preferences spun the decision as a victory for race-conscious admissions policies.<sup>47</sup> These advocates seized on Justice Powell's approval of the sort of "plus system" purportedly in place at Harvard and other Ivy League Schools, even though this language was arguably *dicta*.<sup>48</sup> After all, the judgment of the California courts did not purport to ban any consideration of race in the admissions process; instead, the courts simply ordered Davis to admit Bakke.<sup>49</sup> Moreover, Davis did not seek to defend a "plus system" like the Harvard plan in the lower courts or the Supreme Court, but instead chose to stand up for its quota plan. Only *amici curiae* placed a plus system before the Court.<sup>50</sup> Thus, Justice Powell's endorsement of a plus system was advisory in nature, approving an admis-

45. See *id.* at 412-18 (Stevens, J., concurring in the judgment in part and dissenting in part).

46. See *Marks v. United States*, 430 U.S. 188, 193 (1977); John Hart Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 9-10 n.33 (1978). There is one sense in which Justice Powell's opinion was not the narrowest ground supporting the judgment. After all, Justice Stevens refused to reach the constitutional question at all, reaching the same judgment on purely statutory grounds. One could argue that principles of judicial restraint require subsequent courts to treat this non-constitutional rationale as the narrowest ground of the ruling, and thus as the holding of the case, leaving the political branches free of judicial interference, at least in the short run. Nonetheless, this essay will treat Justice Powell's opinion as the opinion of the Court. See *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J. concurring).

47. See Alan J. Meese, *Reinventing Bakke*, 1 GREEN BAG 2d 381, 386 (1998). The Carter Administration, for instance, claimed that Justice Powell's opinion validated the very type of preferences it had encouraged as part of its administration of Title VI. See *Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Policy Interpretation*, 44 Fed. Reg. 58,509, 58,510 (1979) ("The *Bakke* Court affirmed the legality of voluntary affirmative action.").

48. See Meese, *supra* note 47, at 382-86; Arval Morris, *The Bakke Decision: One Holding or Two?*, 58 OR. L. REV. 311, 326-32 (1979).

49. To be sure, the *opinion* of the California Supreme Court stated that schools could not take race into account when making admissions decisions. See *Bakke v. The Regents of the Univ. of California*, 553 P.2d 1152, 1166 (Cal. 1976) ("In short, the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race."). Moreover, the California Supreme Court remanded the case to the lower court with orders that Bakke be considered for admission without regard to his race. However, in its petition for rehearing to the California Supreme Court, the state conceded that Davis would have admitted Bakke but for its quota plan. See *Bakke*, 438 U.S. at 280-81. The California Supreme Court then narrowed its judgment, ordering simply that Davis admit Bakke. This amended, limited judgment did not by its terms preclude Davis from using a non-quota system of racial preference in future cases. Because the state only sought *certiorari* from this amended judgment, the question whether Davis could employ non-quota schemes such as a plus system was simply not before the Court. The Supreme Court reviews judgments, not opinions, and the *judgment* of the California Supreme Court did not purport to outlaw a plus system. See *Bakke*, 438 U.S. at 409-11 (Stevens, J. concurring in the judgment in part and dissenting in part); Meese, *supra* note 47, at 383-84; see also *California v. Rooney*, 483 U.S. 307, 311 (1987) (holding that the Court "reviews judgments, not statements in opinions"); *Texas v. Hopwood*, 518 U.S. 1033, 1033 (1996) (Ginsburg, J., joined by Souter, J., concurring in denial of *certiorari*) ("[T]his Court, however reviews judgments, not opinions.").

50. See Meese, *supra* note 47, at 384-85.

sions system operated only by parties not even before the Court.<sup>51</sup> Nevertheless, the political branches and the academy treated this portion of the opinion as a holding that validated Harvard-like admissions policies.

Like previous administrations and the academy, the Clinton Administration has embraced Justice Powell's opinion in *Bakke*, at least rhetorically. In a 1995 Memorandum to Agency General Counsels, the Office of Legal Counsel cited Justice Powell's opinion with approval, endorsing the language approving the Harvard Plan as a holding that supported the use of preferences in various non-remedial contexts.<sup>52</sup> Moreover, when the Fifth Circuit opined that *Bakke* was no longer good law,<sup>53</sup> the Administration disagreed, advising colleges, universities, and the Supreme Court that Justice Powell's "landmark opinion" approving preferences was still the law.<sup>54</sup>

As discussed *infra*, reality does not match the Administration's rhetoric. To be sure, various agencies have given lip service to Justice Powell's opinion in *Bakke*, invoking it to establish the propriety of racial preferences in a variety of contexts. As noted earlier, however, any language in Justice Powell's opinion approving preferences was arguably *dicta*, addressing, as it did, a plan that was not before the Court. At any rate, even if viewed as a holding, Justice Powell's opinion does not purport to approve all non-quota preferences. Instead, Justice Powell endorsed only a particular system of preferences—a system that pursued diversity consistently and provided applicants for admission individualized consideration. Nevertheless, while allegedly relying on this opinion, federal agencies have often failed to adhere to its terms in practice, implementing and approving programs of racial preference that do not comport with Justice Powell's opinion. Thus, the Administration sought to "have its cake and eat it too"—pursuing and encouraging problematic racial preferences while avoiding the political costs that accompany explicit defiance of the Court. While such a policy may appear advantageous in the short run, it short-circuits the inter-branch dialogue that usually results from executive defiance of Supreme Court decisions. By treating language that is arguably *dicta* as the "last word" on the permissibility of preferences, the Administration has abdicated its responsibility to engage with the Court over the meaning of the Constitution. Without such a dialogue and concomitant reconsideration of *Bakke* by the Supreme Court, Justice Powell's opinion will remain "on the books," giving courts and future ad-

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51. See *id.* at 385 (describing Justice Powell's approval of a plus system as "in essence an advisory opinion"). Cf. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 n.7 (1984) (Powell, J.) (refusing to consider argument raised by United States as *amicus curiae* because "neither party before this Court presses the argument").

52. See Office of Legal Counsel, Memorandum to General Counsels, *Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Peña* (June 28, 1995) [hereinafter Office of Legal Counsel Memorandum].

53. See *Hopwood v. Texas*, 78 F.3d 932, 944-46 (5th Cir. 1996).

54. See Letter from Judith A. Winston, Office of Civil Rights, Department of Education, to College and University Counsel (July 30, 1996); see also Brief of The United States as *Amicus Curiae* for the State of Texas, at 12-13, *Texas v. Hopwood*, 518 U.S. 1033 (1996) (No. 95-1773) ("*Bakke's* landmark holding has guided admissions policies of public and private institutions of higher education.").

ministrations a convenient vehicle for nullifying the type of diversity-based preferences the Clinton Administration has embraced.

### III

#### BAKKE MIS(APPLIED)

Justice Powell's *Bakke* opinion does not purport to justify racial preferences in all contexts. It does not, for instance, justify race-conscious decisionmaking in awarding highway contracts. Still, *Bakke* may conceivably apply beyond the realm of university admissions, justifying racial preferences that are necessary to promote a robust exchange of ideas in other contexts. Below, I examine the Administration's reliance on *Bakke* to justify various racial preferences in two contexts—communications and education. In each instance, it is submitted, the Administration has misapplied Justice Powell's opinion in *Bakke*.

#### A. Preferences in Broadcasting

In 1978, the Federal Communications Commission ("the Commission" or the "FCC") announced a series of measures designed to increase minority ownership of broadcast facilities.<sup>55</sup> First, the Commission resolved to accord minority applicants a "plus" or "boost" when allocating scarce broadcast frequencies in "comparative licensing proceedings."<sup>56</sup> Second, the Commission created a policy of awarding tax certificates to licensees that sold or otherwise transferred control of their broadcast authority to minority-owned broadcasters.<sup>57</sup> Finally, the Commission promulgated a so-called "distress sale" policy under which licensees who had arguably violated their public interest obligations could avoid forfeiture of their licenses by selling them to minorities so long as the sale price was significantly below the license's fair market value.<sup>58</sup> The Commission justified these race-conscious measures on the ground that they would enhance the

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55. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978). Previously the Commission had taken the position that such preferences were not advisable. See *Mid-Florida Television Corp.* 33 F.C.C.2d 1, 17-18 (Rev. Bd.), *rev. denied*, 37 F.C.C.2d 559 (1972). The D.C. Circuit disagreed, however, and directed the Commission to take action to further minority participation in broadcasting. See *T.V. 9 v. FCC*, 495 F.2d 929 (D.C. Cir. 1973); see also *Communication Center v. FCC*, 463 F.2d 822, 823 (D.C. Cir. 1972).

56. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 982-83; see also *WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978) (stating that "minority ownership and participation is also an affirmative factor enhancing the applicant's proposal and raising its level in the comparative evaluation"); *Atlass Communications, Inc. (WJPC)*, 61 F.C.C.2d 995, 996-97 (1976). See generally THOMAS KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 93-101 (1998) (describing system of comparative licensing); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-95 (1965).

57. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 983. In so doing, the Commission acted pursuant to its statutory authority to issue tax certificates whenever "necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations." *Id.* at 983 n.19 (quoting 26 U.S.C. § 1071).

58. See *id.* at 983; see also *Metro Broadcasting*, 497 U.S. at 558 (stating that distress sale price must not exceed 75% of the market value).

diversity of voices and viewpoints broadcast over the nation's airwaves.<sup>59</sup> The D.C. Circuit upheld the use of race as a plus factor in comparative licensing proceedings against a Fifth Amendment challenge, relying heavily upon Justice Powell's opinion in *Bakke*.<sup>60</sup>

The Supreme Court reviewed the distress sale and comparative license policies in *Metro Broadcasting, Inc. v. FCC*.<sup>61</sup> Asserting that Congress had expressly authorized these two policies, the Court subjected them to intermediate scrutiny.<sup>62</sup> More precisely, the Court asked whether the policies were "substantially related" to the achievement of important governmental objectives.<sup>63</sup>

Relying heavily on Justice Powell's opinion in *Bakke*, the Court sustained both programs over a vigorous dissent by Justice O'Connor.<sup>64</sup> Assurance of diverse voices on the Nation's airwaves, the Court said, would promote First Amendment values by furthering the "right" of listeners to receive a wide variety of viewpoints.<sup>65</sup> Thus, the Court reasoned, enhancing broadcast diversity was "at the very least an important governmental objective"<sup>66</sup>—directly analogous to the objective of "a robust exchange of ideas" furthered by a "diverse student body."<sup>67</sup> The Court also found that the distress sale and comparative licensing policies "substantially" furthered the "important" interest in promoting broadcast diversity.<sup>68</sup>

Then came *Adarand*.<sup>69</sup> In 1995, the Court entertained a challenge to racial preferences for federal funding of interstate highway construction. In an opinion by Justice O'Connor, the Court repudiated *Metro Broadcasting's* conclusion that "benign" racial preferences approved by Congress should receive intermediate scrutiny.<sup>70</sup> Instead, the Court said, such preferences should receive strict scrutiny, the same scrutiny accorded preferences adopted by state and local

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59. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 980-82; see also *T.V. 9, Inc.*, 495 F.2d at 937-38; *In re Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264-65 (1982).

60. See *West Michigan Broadcast Co. v. FCC*, 735 F.2d 601, 614-16 (D.C. Cir. 1984) ("The FCC policy would clearly be validated under Justice Powell's approach [in *Bakke*], which had endorsed a rationale very similar to that offered here by the FCC.").

61. 497 U.S. 547 (1990); see also *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the Fifth Amendment contains an equal protection component).

62. See *Metro Broadcasting*, 497 U.S. at 563-66 ("[B]enign race-conscious measures mandated by Congress—even if those measures are not remedial in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."); see also RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW § 18.3, at 218-21 (1999) (describing so-called intermediate scrutiny under equal protection clause); *id.* at 219 n.16 (characterizing opinion in *Metro Broadcasting* as an example of intermediate scrutiny).

63. See *Metro Broadcasting*, 497 U.S. at 564-65.

64. See *id.* at 567-601.

65. See *id.* at 567-68.

66. *Id.* at 567.

67. *Id.* at 568 (quoting *Bakke*, 438 U.S. at 311-13 (Powell, J.)).

68. See *id.* at 569-79.

69. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

70. *Id.* at 225-27.

governments.<sup>71</sup> In so doing, the Court took great pains to emphasize that application of strict scrutiny would not result in nullification of all “benign” race-conscious programs.<sup>72</sup> Unfortunately, the Court did not actually evaluate the program before it; thus, the *Adarand* opinion adds little, if anything, to the content of strict scrutiny analysis.<sup>73</sup>

Despite its disapproval of *Metro Broadcasting*’s decision to apply intermediate scrutiny, *Adarand* did not by its own terms call the FCC’s racial preferences into question.<sup>74</sup> Certainly, a neutral observer “counting votes” would predict that such preferences would receive a hostile reception from the current Court—the four dissenters in *Metro Broadcasting* remain on the Court, and each joined the *Adarand* majority.<sup>75</sup> Moreover, Justice Thomas, who joined the Court after *Metro Broadcasting* and also joined the *Adarand* majority, expressed his disapproval of the FCC’s gender-based preferences before joining the Court.<sup>76</sup>

Nevertheless, the duty of the Executive Branch is not simply to predict what courts will do: It must instead make its own independent judgment about the meaning of the Constitution.<sup>77</sup> Since *Adarand*, the Clinton Administration has done just that, taking the position that the preferences involved in *Metro Broadcasting* are constitutional, even when analyzed under the strict scrutiny standard adopted in *Adarand*.<sup>78</sup> In so doing, the Administration has relied on *Bakke*, and Justice Powell’s determination that the promotion of “diversity” is a compelling interest. As shown below, the preferences embraced by the Administration do not find shelter in *Bakke* and are instead plainly unconstitutional under that decision.

As noted earlier, the FCC’s racial preferences once took three forms: (1) a “plus” accorded minority applications during comparative licensing proceedings, (2) tax certificates for licensees who transferred broadcast authority to minorities, and (3) the “distress sale” policy.<sup>79</sup> Just three months before *Adarand*,

71. See *id.* at 218-31.

72. See *id.* at 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)). See generally David A. Strauss, *Affirmative Action and The Public Interest*, 1995 SUP. CT. REV. 1 (concluding that “strict scrutiny” applied to “benign” race-conscious programs is less exacting than that applied to race-conscious programs that burden minorities).

73. See Neal Devins, *Adarand Constructors, Inc. v. Pena and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673, 677 (1996).

74. See *id.* at 708-11 (arguing that “[t]he FCC diversity preference, although a tougher sell, may also survive the *Adarand* decision”).

75. Justice O’Connor authored the lead dissent in *Metro Broadcasting*. Chief Justice Rehnquist and Justices Scalia and Kennedy all joined that dissent, as well as the majority opinion in *Adarand*.

76. See *Lamprecht v. F.C.C.*, 958 F.2d 382 (D.C. Cir. 1992) (Thomas, J.) (voiding consideration of gender during comparative licensing proceedings).

77. See *supra* notes 7-19 and accompanying text. *But compare Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel at 200 (“As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue.”).

78. See *infra* notes 85-90 and accompanying text.

79. See *supra* notes 55-58 and accompanying text.

however, Congress eliminated the tax certificate program, albeit over the Commission's objection.<sup>80</sup> This left in place two racial preference programs—the distress sale policy and comparative licensing policy.<sup>81</sup>

Despite congressional indifference or even downright hostility, the Commission did not repeal the distress sale policy or the policy according minorities a “plus” in comparative licensing proceedings.<sup>82</sup> Moreover, the Chairman of the Commission called for a renewal of the tax certificate program, in a speech that did not mention *Adarand*.<sup>83</sup> The Clinton Administration did nothing to discourage this position and, if anything, has encouraged it. More precisely, shortly after *Adarand*, the Office of Legal Counsel (“OLC”) produced a lengthy memorandum advising agency general counsel of the legal implications of the decision.<sup>84</sup> The memorandum accepted *Adarand*'s decision to apply strict scrutiny but opined that enhancing diversity of viewpoints on the nation's airwaves constituted a compelling state interest that would justify the racial preferences approved in *Metro Broadcasting*.<sup>85</sup> *Adarand*, OLC said, did not mention or question Justice Powell's opinion in *Bakke*.<sup>86</sup> Indeed, OLC argued, Justice O'Connor, the author of *Adarand*, had previously expressed her approval of Justice Powell's opinion.<sup>87</sup>

More recently, the Administration reiterated its assertion that racial preferences in broadcasting satisfy the strict scrutiny mandated by *Adarand*. In *Lutheran Church-Missouri Synod v. FCC*,<sup>88</sup> the Department of Justice, as *amicus curiae*, sought to defend Commission regulations requiring broadcast licensees to pursue equal employment opportunity hiring policies. Although the Administration claimed that such regulations were “race neutral,” and thus not subject

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80. See Deduction for Health Insurance Costs of Self-Employed Individuals, Pub. L. No. 104-7, §2, 109 Stat. 93, 93-94 (1995) (codified at 26 U.S.C. 1071 (1994)); see also Statement of FCC General Counsel William E. Kennard, 1995 F.C.C. Lexis 1550 (1995) (endorsing tax certificate program and arguing that it is constitutional under *Metro Broadcasting*). Mr. Kennard is now Chairman of the Commission.

81. Congress recently directed the Commission to award most broadcast licenses through an auction system in lieu of the comparative licensing process. See Balanced Budget Act of 1997, § 3002(a)(1)(A), 47 U.S.C. § 309(j) (1997). Nevertheless, the Commission retains authority to engage in comparative licensing proceedings with respect to licenses for “digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses.” 47 U.S.C. § 309(j)(2)(B). Moreover, the Commission is considering a credits system that will enhance the prospect of minority bidders to prevail when auctions do take place. See Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 12 F.C.C.R. 22363, 22399-400 (1997).

82. See Trinity Broadcasting of Florida, Inc., 1999 F.C.C. Lexis 1591 (1999) (applying minority ownership policy).

83. See *FCC Chief Makes Pitch to Revive Minority Tax Incentive Program*, ATLANTA J. CONST., June 18, 1999, at H3.

84. See Office of Legal Counsel Memorandum, *supra* note 52.

85. See *id.* at 20-21.

86. See *id.* at 20.

87. See *id.* (discussing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (O'Connor, J. concurring)). But see *Metro Broadcasting*, 497 U.S. at 631 (O'Connor, J. dissenting) (“In sum, the FCC has not met its burden even under the Court's test that approves of racial classifications that are substantially related to an important governmental objective. Of course, the programs even more clearly fail the strict scrutiny that should be applied.”).

88. 141 F.3d 344 (D.C. Cir. 1998).

to strict scrutiny, it argued in the alternative that the regulations were “narrowly tailored” to encourage stations to hire more minorities and thus advanced the compelling state interest of broadcast diversity.<sup>89</sup> In so doing, the Department relied explicitly on Justice Powell’s opinion in *Bakke*.<sup>90</sup> Similar reasoning, of course would validate FCC policies designed to promote racial diversity in the ownership of broadcast licenses.

Close inspection suggests that, far from supporting the Administration’s position on racial preferences in broadcasting, *Bakke* actually requires repeal of such programs. Consider the distress sale policy: Under this program, licensees may avoid forfeiture of their licenses for misconduct if they agree to sell their licenses *to minorities*, and no one else.<sup>91</sup> The program is not a “plus system”; it instead confers financial benefits—the ability to purchase a valuable commodity below market price—on minorities, period. To be sure, the minorities in question must be qualified, and two or more minorities might compete for the license. This was equally true of the Davis quota system, however. As Professor Paul Mishkin, co-author of Davis’s brief in *Bakke*, has argued, the distress sale policy “ma[k]e[s] race an absolute gateway to special consideration” and thus would not survive scrutiny under Justice Powell’s opinion in *Bakke*.<sup>92</sup>

This does not mean that race-conscious communications policies can *never* survive the strict scrutiny mandated by *Adarand*. Programs such as the comparative licensing system and the tax certificate policy seem less problematic, as both merely make race a single “plus” factor affecting the allocation of licenses.<sup>93</sup> Nevertheless, there is a more fundamental flaw with the distress sale, tax certificate, and comparative licensing policies, a flaw that should cause the Commission to abjure all three programs. Unlike the race-conscious admissions plan that Justice Powell blessed in *Bakke*, none of the preference policies employed by the FCC pursues or even attempts to pursue diversity in a consistent

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89. See Brief of the United States as *Amicus Curiae* for the Federal Communications Commission at 26-34, *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 334 (D.C. Cir. 1998) (No. 97-1116).

90. See *id.* at 27.

91. See *supra* note 58 and accompanying text.

92. See Paul Mishkin, *Foreword: The Making of a Turning Point—Metro and Adarand*, 84 CAL. L. REV. 875, 883 (1996) (“[I]t seems fair to say that, . . . under Justice Powell’s opinion in *Bakke*, the ‘distress sale’ program would have fallen for the same reason that the Davis Medical School program was held invalid. Rather than a plus in an overall individual evaluation, it made race an absolute gateway to special consideration and possible preferential treatment.”). That the distress sale policy applied to “only a small fraction of broadcast licenses” is not significant. *Metro Broadcasting*, 497 U.S. at 598-99 (claiming that distress sale policy was “narrowly tailored” for this reason). As one scholar noted, *Bakke* did not turn on the number of seats reserved by the quota system, but instead upon the lack of individualized consideration that characterized the Davis plan. See Neal Devins, *Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 135 n.76 (1990) (“It is preposterous to suggest that the distress sale preference is indistinguishable in kind from the comparative hearing preference because it applies ‘only with respect to a small fraction of broadcast licenses.’ [quoting *Metro Broadcasting*, 497 U.S. at 598-99.] Justice Powell’s distinction of the Davis and Harvard plan in *Bakke* had nothing to do with the size of the Davis quota. It had everything to do with the nature of the quota, that is, the reservation of slots only for minority students.”).

93. See Mishkin, *supra* note 92, at 883 (arguing that “the program of enhancement for minorities in comparative proceedings might have passed muster under Justice Powell’s opinion in *Bakke*”).

or uniform manner.<sup>94</sup> No tax certificates have ever been available for licensees who sell to religious fundamentalists, libertarians, socialists, or individuals from other groups whose views are decidedly underrepresented on the nation's airwaves.<sup>95</sup> Similarly, the Commission's distress sale policy allows for sales only to racial minorities, and not to members of other underrepresented groups. Finally, unlike the "Harvard Plan" approved by Justice Powell in *Bakke*, which accorded a "plus" for any number of diversity characteristics, the system of comparative licensing provides a "plus" for only one diversity factor: race.<sup>96</sup>

The failure to pursue diversity consistently casts serious constitutional doubt on the FCC's distress sale and comparative licensing policies, and also on the race-conscious policies the Commission previously pursued.<sup>97</sup> For purposes of strict scrutiny analysis, it is well-settled that failure to pursue an interest consistently undermines any assertion that the interest is "compelling."<sup>98</sup> Indeed, as noted earlier, Justice Powell relied on this principle explicitly in *Bakke*, voiding the Davis quota scheme because it pursued only racial diversity *simpliciter*.<sup>99</sup> The reasons for this rule should be obvious. If the state refuses to pursue a purported objective "across the board," but instead does so only by interfering with protected rights or creating suspect classifications, a presumption naturally arises that the state does not, in fact, believe the interest is compelling, but is instead pursuing some other objective.<sup>100</sup> In the case of broadcast preferences, the

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94. See *Metro Broadcasting*, 497 U.S. at 621 (O'Connor, J., dissenting) ("[O]f all the varied traditions and ideas shared among our citizens, the FCC has sought to amplify only those particular views it identifies through classifications most suspect under equal protection doctrine.").

95. See Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 OHIO ST. L.J. 551, 585-91 (1998); Eugene Volokh, *Diversity, Race As Proxy, And Religion As Proxy*, 43 UCLA L. REV. 2059, 2070-76 (1996); see also *Lutheran Church-Missouri Synod*, 141 F.3d at 350 ("[R]eligious affiliation, a matter of affirmative intellectual and spiritual decision, is far more likely to affect programming than skin color.").

96. See *supra* notes 55-58 and accompanying text. Race is only one factor the Commission considers in comparative licensing proceedings. See *West Michigan Broadcast Co.*, 735 F.2d at 615 (claiming that the comparative licensing process satisfies *Bakke* because it allows for consideration of numerous "traits to assess an applicant's potential for increasing diversity and quality of programming"). Still, a program does not pass muster simply because it employs race as one of several factors, most of which have nothing to do with diversity. Instead, at a minimum, the program must make some effort to pursue diversity consistently. The Commission, apparently, has only considered "traits" that bear on racial diversity.

97. See *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 924-25 (D.C. Cir. 1989) (Silberman, J.), *rev'd sub nom. Metro Broadcasting*, 497 U.S. 547 (1990).

98. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546-47 (1993); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978) (Powell, J.).

99. See *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."); see also *Hopwood*, 78 F.3d. at 965-66 (Wiener, J., concurring) (stating that pursuit of racial diversity *simpliciter* does not satisfy *Bakke*).

100. See *Church of the Lukumi Babalu Aye*, 508 U.S. at 546-47 ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."); *First National Bank of Boston*, 435 U.S. at 792-94 (rejecting the assertion that prohibition of corporate speech during referenda campaigns served the "compelling interest" of protecting shareholders where state failed to regulate corporate speech in other contexts); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in the

FCC's failure to pursue "diversity" consistently suggests that the Commission is pursuing a racial "spoils system," attempting to promote particular viewpoints, or both.<sup>101</sup> If, as the Administration claims, Justice Powell's opinion in *Bakke* is "the law" where diversity-based racial preferences are concerned, then the FCC must dismantle its distress sale policy. It must also refrain from pursuing other policies that advance racial diversity "for its own sake."<sup>102</sup>

## B. Preferences In Education

The FCC is not the only federal agency that has defied *Bakke* during the Clinton Administration. The Department of Education followed a similar course. As noted earlier, the Department embraced Justice Powell's opinion in *Bakke* as a "landmark."<sup>103</sup> Still, exercising its authority to administer Title VI of the Civil Rights Act of 1964, the Department blessed or encouraged racial preferences that were plainly inconsistent with Justice Powell's opinion.

1. Admissions. Unlike, for example, the State of California, the federal government does not directly administer colleges and universities.<sup>104</sup> Nevertheless, the federal government does provide substantial financial aid for higher education, and Title VI of the Civil Rights Act of 1964 forbids racial discrimination by institutions that receive such aid. In *Bakke*, five Justices agreed that, despite its plain language, Title VI only forbids those preferences that if adopted by a public institution would offend the Fourteenth Amendment.<sup>105</sup>

The Department of Education is responsible for administering Title VI, and a finding by the Department that a college or university is engaged in discriminatory practices can deprive the school of federal money. Thus, the Department occasionally reviews preference programs administered by schools that receive federal funds. In 1997, the Department's Office of Civil Rights ("OCR" or "the Office") completed a thorough review of UCLA's admissions policies, including its affirmative action plan.<sup>106</sup> Under the plan, UCLA admissions offi-

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judgment) ("[A] law cannot be regarded as protecting an interest 'of the highest order,' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.").

101. See *Bakke*, 438 U.S. at 315; *Metro Broadcasting*, 497 U.S. at 617 (O'Connor, J., dissenting) ("[T]he Court has never upheld a broadcasting measure designed to amplify a distinct set of views or the views of a particular class of speakers."); Strauss, *supra* note 72, at 1 (arguing that the Court's affirmative action jurisprudence is designed to identify and void preference programs that are simply special interest transfers); see also *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943) ("Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis.").

102. See Office of Legal Counsel Memorandum, *supra* note 52, at 3 ("To the extent that affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective beyond the achievement of diversity itself.").

103. See Brief of the United States as *Amicus Curiae* for The State of Texas at 12-13, *Texas v. Hopwood*, 518 U.S. 1033 (5th Cir. 1996) (No. 95-1773).

104. The military academies are, of course, an exception.

105. See *Bakke*, 438 U.S. at 284-87 (Powell, J.); *id.* at 328-41 (Brennan, J. concurring in the judgment and dissenting in part).

106. See Letter from John E. Palomino, Regional Civil Rights Director, to Charles E. Young, Chan-

cials assigned each applicant two scores. The first score was based solely on an assessment of the applicant's academic potential.<sup>107</sup> Applicants received scores of one through five, with one being the highest. The second "supplemental score" was based on a student's race, disadvantage, and residence.<sup>108</sup> Membership in racial and ethnic groups that were "historically underrepresented" at UCLA earned a significant boost in an applicant's supplemental score, while membership in groups that had been better represented resulted in a smaller boost.<sup>109</sup> White individuals received no boost for their ethnicity. Finally, no boost was given for special talents, political views, unique experience, or religious beliefs.

Individuals with academic scores of one were admitted, regardless of their supplemental scores, without further consideration. Moreover, California residents with academic scores of two or higher were admitted, again without consideration of their supplemental scores. Taken together, these two groups accounted for sixty percent of the applicants admitted.<sup>110</sup> Admissions officials then combined the academic and supplemental scores to obtain one composite score. Individuals with a sufficiently high composite score were admitted without any further consideration.<sup>111</sup> So, for instance, individuals who were members of underrepresented minority groups, and thus entitled to high supplemental scores, were automatically admitted if they possessed a sufficiently high academic score. These individuals made up about thirty percent of the admitted student body.

UCLA officials then gave consideration to the remaining applicants by means of the "read process." Under this process, evaluators reviewed individual files to determine whether "the applicant could succeed academically at UCLA."<sup>112</sup> In doing so, evaluators considered factors such as "special interests, talents and experiences."<sup>113</sup> UCLA made offers to about one thousand such students, or about ten percent of the total admitted.<sup>114</sup>

The process just described produced the entire entering class for the fall of 1990. The process did not end there, however. Instead, UCLA also offered 645 students deferred admission for the Winter 1991 semester.<sup>115</sup> This cohort, known as the "Winter Group," was composed solely of students with a combination of high supplemental scores and strong, but not spectacular, academic

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cellor, University of California at Los Angeles (Oct. 9, 1997).

107. *See id.* at 4-5.

108. *See id.* at 5.

109. *See id.* at 6.

110. *See id.* at 7.

111. *See id.* ("In the next step of the admissions process, students were admitted based upon a combination of academic and supplemental rank. These students did not receive academic ratings as high as [the first 60% admitted], but because of high supplemental scores, were . . . admitted.")

112. *Id.*

113. *See id.*

114. *See id.*

115. *See id.* Why positions were open in the winter quarter semester that were not open in the fall is unclear. Perhaps some students admitted in the fall would drop out after one semester.

rankings.<sup>116</sup> UCLA did not consider students with low or non-existent supplemental scores for inclusion in this group.

OCR found that UCLA's admissions program passed muster under Justice Powell's opinion in *Bakke*.<sup>117</sup> The Office emphasized that the plan contained no quotas and claimed that each applicant competed for all slots in the entering class.<sup>118</sup> Moreover, the Office found that the consideration of race as a "plus factor" was "narrowly tailored" to further the school's interest in diversity.<sup>119</sup> Finally, the Office asserted that race was only one of seventeen factors that UCLA considered, thus suggesting that the school was pursuing several forms of diversity, and not just racial diversity *simpliciter*.<sup>120</sup>

OCR's application of *Bakke* does not withstand scrutiny. First, the UCLA program fails *Bakke*'s individualized consideration requirement.<sup>121</sup> For example, in constructing the Winter group, students with an academic rank of 2.5 were offered deferred admission *automatically* if they were members of certain racial groups, disadvantaged, or residents of certain parts of California. This group of applicants was not compared to those of students with special talents, experiences, and backgrounds: Students with these diversity characteristics who possessed academic ranks of 2.5 or even higher were simply ineligible for inclusion in this group, regardless of the uniqueness of their characteristics. Thus, the process of constructing the Winter group insulated certain minorities from comparison with non-minorities who themselves possessed diversity characteristics in addition to similar or even better academic qualifications. The latter group was simply excluded altogether from consideration for inclusion in the Winter Group. The insulation of some students from comparison with others rebuts OCR's assertion that all applicants could compete for all spots in the entering class and plainly offends *Bakke*'s requirement of individualized consideration.<sup>122</sup>

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116. *See id.*

117. *See id.* at 10-12.

118. *See id.* at 12.

119. *See id.*

120. *See id.* at 10-11.

121. *See supra* notes 38-44 and accompanying text (discussing *Bakke*'s requirement of individualized consideration).

122. *See Bakke*, 438 U.S. at 317 (concluding that a plus system is superior to a quota system because the former "does not insulate the individual from comparison with all other candidates for the available seats"). "In short [a plus system] is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration." *Id.* "The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.* at 318. This requirement was clear to those who read Justice Powell's opinion closely. For instance, Professor Archibald Cox, who argued in support of Davis in the Supreme Court, concluded that Justice Powell's opinion mandated individual consideration of all applicants. *See* Archibald Cox, *Minority Admissions after Bakke*, reprinted in THE ROCKEFELLER FOUNDATION, BAKKE, WEBER AND AFFIRMATIVE ACTION 80, 101 (1979) ("[A]n admissions program almost surely will fail to survive judicial scrutiny

Second, shortcomings also infected the general admissions process employed to admit students in the fall. Here, again, minority students with certain academic qualifications were admitted automatically, as were students deemed “disadvantaged.” Such admission occurred without any comparison to students with special talents, experiences, or viewpoints, even if such students possessed the very same academic qualifications or qualifications superior to those individuals who were admitted automatically. While evaluators surely considered such talents during the “read process,” this process did not allow admissions officers to compare the applications of students with special talents, experiences, or viewpoints to the applications of minorities and others who had already been admitted. Like the process employed to construct the Winter Group, this process insulated minority applicants from competition with candidates who did not possess the characteristics that entitled applicants to a positive supplemental score.

Third, UCLA’s admissions process also suffered from a separate flaw, namely, a failure to pursue diversity in a consistent fashion. Although OCR claimed that the UCLA system considered seventeen different factors, careful inspection suggests that there was less to such consideration than meets the eye. To begin with, nine of the factors were unrelated to diversity but were instead indicia of potential academic performance.<sup>123</sup> This left only eight other “diversity factors”: race, socioeconomic, educational, or physical disadvantage, residency, special talents, interests, or experiences.<sup>124</sup> Putting aside the question of whether each of these factors is analytically distinct, consideration of such factors hardly constitutes a consistent pursuit of diversity as Justice Powell employed that term in *Bakke*. For instance, there is no indication that UCLA considered the political views of its applicants.<sup>125</sup> Further, the plan made no effort to achieve religious diversity among the student body.<sup>126</sup> Finally, while the plan purported to consider the “residence” of applicants, preference for residence was given only to California residents. For example, applicants from Iowa, Alaska, or New Hampshire apparently received no “plus,” contrary to the Harvard Plan Justice Powell endorsed in *Bakke*.<sup>127</sup> UCLA’s failure to consider

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[under *Bakke*] if it leaves the appraisal of minority applicants to a special committee without true comparison of the merits of individual applicants. . . . The requirement surely turns on substance, not on form.”).

123. See Letter from John E. Palomino, *supra* note 106, at 10.

124. See *id.* Moreover, it is not clear that UCLA considered these factors for the purpose of enhancing diversity. For instance, OCR found that UCLA considered “special talents, interests or experiences” for the purpose of determining “whether the applicant *could succeed academically* at UCLA.” See *id.* at 7 (emphasis added). Thus, while race and socioeconomic advantage operated in an individual’s favor independent of predictions of academic success, “special talents,” for instance, may have had no such independent weight.

125. Cf. *Bakke*, 438 U.S. at 324 (quoting Harvard plan for proposition that “an abiding interest in Black Power” was an important diversity characteristic).

126. Cf. Bowen, *supra* note 38, at 9 (“[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, *religions* and backgrounds.” (emphasis added)), quoted in *Bakke*, 438 U.S. at 312-313 n. 48 (Powell, J.).

127. See *Bakke*, 438 U.S. at 322-23.

these three rather obvious and probative diversity characteristics calls into question any assertion that “student diversity” is a compelling state interest.<sup>128</sup> Thus, although it invoked *Bakke* as support for the constitutionality of racial preferences, OCR actually refused to follow Justice Powell’s opinion in practice.

2. Scholarships. Colleges and universities have relied upon *Bakke* to justify race-conscious admissions policies. Some have gone even further, however, relying on Justice Powell’s opinion to support and defend race-conscious decisions in the process of awarding financial aid. Indeed, many schools have even created scholarships for which only minorities are eligible.<sup>129</sup> At the very least, such policies raise serious questions under the Equal Protection Clause and *Bakke* itself.<sup>130</sup>

In 1991, the Bush Administration sought to answer these questions. OCR issued a notice of proposed rulemaking pursuant to its authority to implement Title VI. Noting *Bakke*’s conclusion that the standards emanating from Title VI were coextensive with those of the Fourteenth Amendment, OCR opined that any race-conscious distribution of scholarship monies had to comply with decision in *Bakke*.<sup>131</sup> Applying Justice Powell’s opinion in what seemed to be a

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128. Cf. *First National Bank of Boston*, 435 U.S. at 793 (rejecting assertion that ban on corporate speech during referendum was justified as shareholder protection measure where state had not outlawed other forms of corporate speech that were equally offensive to shareholders). The Bush Administration reached a similar conclusion, finding that the admissions process employed by Boalt Hall Law School offended Title VI because the process pursued racial diversity *simpliciter*, and not other forms of diversity. See 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 (Sept. 25, 1992); see also Volokh, *supra* note 95, at 2075 (“Religion says much more about the experiences, outlooks, and ideas that a person brings than does being a musician, a chess player, or a French speaker. It might even say more than, or at least as much as, race or geographical background or even ‘exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [or] ability to communicate with the poor.’”).

129. Many schools openly tout such set-asides on their internet web sites. For instance, the University of Iowa awards numerous scholarships available only to certain minorities, including the Opportunity at Iowa Scholarships (reserved for students who are “African American, Hispanic/Latino(a), Native American/American Indian, or Alaskan Native,”) Iowa Minority Academic Grants for Economic Success (IMAGES) (reserved for students who are “African American, Hispanic/Latino(a), Asian, Pacific Islander, Native American/American Indian, or Alaskan Native”), University of Iowa Black Alumni Scholarship (reserved for students of “Afro-American heritage”), and the Minority American Science Scholarship (reserved for U.S. citizens who are “African American, Hispanic/Latino(a), Native American/American Indian, or refugee Southeast Asian”). See *Scholarships at the University of Iowa* (visited Mar. 8, 2000) <<http://www.uiowa.edu/financial-aid/schol1.htm>>. Further, the University of Michigan reserves various scholarships for minorities, including the Martin Luther King, Jr., Scholarship, the Michigan Scholar Award, the National Achievement Scholarship, and the Michigan Achievement Award Community College Transfer Scholarship. See *Miscellaneous (Other) Scholarships* (visited Mar. 8, 2000) <<http://www.finaid.umich.edu/othersch.htm>>. Also, Ohio State University has created a Minority Scholars Program, which awards scholarships “on a competitive basis to members of the following ethnic minority groups: African American, Asian American, Hispanic, and American Indian/Alaska Native.” See *Costs and Scholarship Opportunities* (visited Mar. 8, 2000) <[http://www-afa.adm.ohio-state.edu/apps/fresh/cost\\_fin.html](http://www-afa.adm.ohio-state.edu/apps/fresh/cost_fin.html)>.

130. See *Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Proposed Policy Guidance*, 56 Fed. Reg. 64548 (1991).

131. See *id.* at 64548-49.

straightforward manner, OCR proposed that colleges and universities could not employ race-specific scholarships, but could consider race as a “plus factor” when awarding such aid.<sup>132</sup>

OCR’s proposed rule created an uproar as well as more than 600 written comments.<sup>133</sup> The Bush Administration took no further action on the rulemaking, and President Clinton took office in 1993. After considering the comments engendered by the 1991 notice, OCR issued a final rule, which departed from the proposed rule in one important respect: The Clinton Administration allowed schools to create and employ race-specific scholarships.<sup>134</sup>

The Administration’s endorsement of race-specific scholarships seems to squarely contradict *Bakke*. While OCR did not expressly address this apparent conflict, the “Legal Analysis” supporting the Policy Guidance did suggest several bases for ignoring *Bakke*’s injunction against set-asides. For instance, OCR claimed that, unlike admission quotas, scholarship quotas do not, by themselves, exclude any individual from a college or university.<sup>135</sup> Moreover, unlike spaces in an entering class, the amount of financial aid available to students is not necessarily fixed: Some donors might contribute to a college’s financial aid pool only if they were allowed to target the money to racial minorities.<sup>136</sup> Finally, OCR argued that, unlike the admissions quotas in *Bakke*, scholarship quotas might be narrowly tailored, that is, strictly necessary to achieve racial diversity. Some schools, OCR opined, might have a reputation for being “inhospitable to minority students,” thus necessitating such aid.<sup>137</sup> The availability of such aid can thus serve as a recruitment tool, encouraging racial minorities to consider the school. Further, such scholarships can encourage students to accept an offer of admission.<sup>138</sup> Also, OCR claimed that such aid can “assist colleges in retaining students until they complete their program of studies.”<sup>139</sup>

None of these arguments in support of scholarship quotas withstands scrutiny under Justice Powell’s opinion. To be sure, denying an applicant financial aid because of his or her race does not *ipso facto* exclude that person from the school in question; often individuals can pay their own tuition and living ex-

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132. *See id.* at 64548.

133. *See* Nondiscrimination in Federally Assisted Program; Title VI of the Civil Rights Act of 1964; Final Policy Guidance, 59 Fed. Reg. 8756, 8756 (1994).

134. *See id.*

135. *See id.* at 8762 (“The affirmative action admissions program struck down in *Bakke* had the effect of excluding applicants from the University on the basis of their race. The use of race-targeted financial aid, on the other hand, does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race.”).

136. *See id.* (“A college’s receipt of privately donated monies restricted to an underrepresented group might increase the total pool of funds for student aid in a situation in which, absent the ability to impose such a limitation, the donor might not provide any aid at all.”).

137. *See id.* at 8761 (“Commenters argued that a college—because of its location, its reputation (whether deserved or not) of being inhospitable to minority students, or its number of minority graduates—may be unable to recruit sufficient minority applicants even if race or national origin is considered a positive factor in admissions and the award of aid.”).

138. *See id.*

139. *See id.*

penses. In reality, however, some individuals *cannot* pay their own tuition and living expenses; racial scholarship quotas will thus have the foreseeable effect of excluding such individuals from the school in question, or from college altogether.<sup>140</sup> Nevertheless, the Administration appeared to believe that any such exclusionary impact could not be traced to race-conscious decisionmaking, but was instead attributable to purely private forces, thus distinguishing the quotas at issue in *Bakke*. Race-based scholarships, the Administration argued, did not erect the same type of absolute bar to admission erected by the quotas in *Bakke*.

This argument, however, does not withstand scrutiny. A “Catholics only” scholarship policy would not, by itself, exclude individuals of the Presbyterian, Baptist, or Jewish faith from a college; members of each group could still pay their own way. Still, such a policy would be subject to strict scrutiny. At any rate, the main vice of the quota system in *Bakke* was not that it erected an “absolute bar” to some students, but rather that it denied non-minority students individualized consideration for an important government benefit.<sup>141</sup> This denial, Justice Powell held, did not advance a compelling state interest, because Davis was not pursuing diversity in a consistent fashion. Racial scholarship quotas also deny non-minority applicants individualized consideration, and do so in pursuit of racial diversity *simpliciter*. Such schemes are, therefore, plainly inconsistent with *Bakke*.

At any rate, the Administration’s narrow definition of “exclusion” is inconsistent with the result and holding of *Bakke*. By itself, the quota system in *Bakke* did not exclude anyone: Non-minorities were free to compete for the eighty-four seats not subject to the quota. Individuals who lost that competition did so because their test scores, undergraduate record and interview skills did not “measure up” compared to non-minorities who were admitted. Race-specific scholarships do not affect an individual’s willingness and ability to pay the school’s tuition and room and board, but they nevertheless ensure that some individuals will not attend the school in question. Similarly, Davis’s quota plan did not affect the objective qualifications of applicants such as Allan Bakke; however, the plan “excluded” some individuals from medical school.

Moreover, it is of little significance that some donors might provide support only for race-specific scholarships, with the result that banning race-specific scholarships might not increase the amount of aid to be distributed on race-neutral grounds. Private individuals and foundations are perfectly free to disagree with *Bakke*; they may even distribute race-specific aid directly to students, so long as they do not involve state universities or private institutions

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140. This assumes, of course, that a prohibition on scholarship quotas would cause schools to divert the aid in question to needy students. OCR took issue with such an assumption, arguing that outlawing such scholarships would simply lead schools to divert these resources to recruiting efforts. This argument ignores the fact that donors and state legislatures often earmark funds for financial aid, funds that cannot be diverted to other purposes.

141. See *supra* notes 38-44 and accompanying text (discussing *Bakke*’s requirement of individualized consideration).

that receive federal funds in the process. Nevertheless, the state cannot give the force of law to preferences deemed illegitimate by the Constitution.<sup>142</sup> Furthermore, states and colleges cannot lend direct or indirect assistance to private individuals or institutions that practice illegitimate racial discrimination.<sup>143</sup> Colleges cannot shirk their constitutional responsibilities because private parties wish to subsidize unconstitutional state action. A university cannot ignore the Constitution because a benefactor will not have it any other way.

OCR's "narrow tailoring" argument is also defective. Although OCR claimed that scholarship quotas might be necessary to attract minority students to some schools, it adduced no evidence to support this dubious proposition. Moreover, OCR did not explain or suggest just how someone could falsify a school's *assertion* that some students would apply only if a scholarship quota is in place.<sup>144</sup> OCR's position, then, would seem to empower schools to adopt such quotas based solely on their own *ipso dixit*. At any rate, OCR's assertion that scholarship quotas are necessary to attract minority students does not withstand scrutiny. OCR did not explain why minorities will not apply to a school that

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142. See *Palmore v. Sidoti*, 466 U.S. 429, 429 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Buchanan v. Warley*, 245 U.S. 60 (1917); see also *Shelley v. Kraemer*, 334 U.S. 1 (1948).

143. See *Norwood v. Harrison*, 413 U.S. 455 (1973) (holding that the state may not provide even indirect financial assistance to private schools that engage in racial discrimination); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (state may not lease facilities in public buildings to private individuals engaged in racial discrimination).

144. In one ruling that post-dated the release of OCR's policy guidance, the Department relied solely upon a university's characterization of its interviews with minority students to conclude that scholarship set-asides were narrowly tailored to attract African-American matriculants. See Letter to Mr. John C. Scully, Counsel, Washington Legal Foundation, at 2 (Feb. 21, 1997) (scrutinizing race-based scholarships at Florida Atlantic University). Such hearsay evidence, of course, would be inadmissible in any court and forms a poor basis for the Department's finding that the program in question survives strict scrutiny. Cf. *City of Richmond v. Croson*, 488 U.S. 469, 500 (1989) (requiring "strong basis in evidence" before preferences can satisfy strict scrutiny); *Bakke*, 438 U.S. at 310-11 & n.46 (refusing to credit "evidence" contained in a newspaper article). It should be noted that, despite its finding that the scholarships in question were consistent with Justice Powell's opinion in *Bakke*, the Department also advised the university to allow non-minorities to apply for the scholarships in question, making race only "a factor" in the award. See Letter to Mr. John C. Scully, *supra*. This adjustment of the criteria governing the award did not cure its constitutional infirmity, in so far as pursuit of racial diversity *simpliciter*, by means of a plus system or otherwise, does not constitute a compelling state interest. See *supra* notes 97-102 and accompanying text.

I do not mean to suggest that the Department has always implemented its Policy Guidance in a manner inconsistent with *Bakke*. In one instance, the Seattle Office of OCR approved an agreement with the University of Oregon requiring the school to eliminate race-based tuition waivers. At this office's behest, the waiver program was modified so as to require consideration of various diversity factors, in addition to race or ethnicity. See Letter from Gary D. Jackson, Director Seattle Office, Western Division, to Joseph W. Cox, Chancellor, Oregon State System of Higher Education (July 3, 1997). Although it is not clear which diversity factors the University is employing under the agreement and whether diversity is actually being pursued consistently, compliance with the agreement may well render the University's policy consistent with Justice Powell's opinion in *Bakke*. Application of similar reasoning would void numerous scholarships currently employed by major universities around the country. See *supra* note 129 and accompanying text (describing various race-based scholarships publicized on internet web sites at the University of Iowa, University of Michigan, and Ohio State University); see also *infra* note 150 and accompanying text (describing race-based scholarships in place at various graduate programs). These scholarships are "open and notorious," and the Administration has apparently taken no action against them.

“merely” accords them a plus—sometimes a very large plus—in the admissions process and “merely” accords them a plus when awarding financial aid?<sup>145</sup> To be sure, some minorities may not be aware of the size of the “plus” that schools may accord. Schools may easily remedy this information shortfall by explaining the existence and magnitude of these pluses in the information they distribute to potential applicants. The availability of these less restrictive alternatives forecloses any claim that scholarship quotas are “necessary” to attract minority students.<sup>146</sup>

There is, moreover, another fundamental flaw in OCR’s reasoning. Simply put, the argument proves too much. If scholarship quotas are an effective method of attracting applications, then presumably admissions quotas are even more effective. What better way to attract minority applicants than to reserve a fixed percentage of the entering class for any minority student who is qualified! Nevertheless, the mere fact that an unconstitutional admissions system might otherwise attract minority applicants did not save such a system in *Bakke*. Unless *Bakke* is to be overruled, minorities’ preferences for scholarships reserved for them cannot validate such set asides.

OCR also claimed that race-specific scholarships might be necessary to convince minorities to attend an institution, perhaps because of its location or reputation. The notion is that schools should be allowed to “buy” students who are attractive because of their race by offering them financial aid over and above their demonstrated financial need, and over and above what they would receive if race were deemed a “plus factor” in the award of scholarship aid. OCR offered no evidence, aside from statements by the schools themselves that schools cannot generally attract a sufficient number of minority students by competing “on the merits.” Such statements do not establish that race-based scholarships are “narrowly tailored.” The statements are equally consistent with the existence of destructive competition between schools for minority students. Once some schools *do* begin to employ race-based scholarships, others will be forced to follow their lead, or risk losing minority matriculants they would otherwise attract. It is not clear that such competition will do much to alter the actual distribution of students among schools. The obvious solution to such destructive competition would be a comprehensive ban on all race-based scholarships.

Finally, OCR’s reasoning suffers from an even more fundamental flaw. Throughout its policy guidance, the Department effectively assumes that achievement of a *racially* diverse student body constitutes a compelling state interest. There is no indication that, before diversity can be deemed a compelling

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145. According to one scholar, this plus is equivalent to 400 SAT points at elite colleges and universities. See Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, 59 OHIO ST. L.J. 971, 991 (1998) (finding that, at selective institutions, “race weighs heavily in admission decisions: being black or Hispanic has approximately the same effect on one’s chances of admission as two-thirds of a grade point performance in high school or roughly 400 points on the SAT test”).

146. See *Wygant*, 476 U.S. at 280 n.6 (Powell, J.) (Court should void race-conscious measure if less problematic alternative will promote the interest in question “about as well.”); see also *Bolger v. Young Prod. Corp.*, 463 U.S. 60, 73 (1983) (invalidating blanket ban on mailing of contraceptives where slightly less effective alternatives were available.)

interest, schools must show that they are pursuing various forms of diversity consistently.<sup>147</sup> Instead, OCR's Policy Guidance is a signal to schools that they may employ their financial aid programs to pursue racial diversity *simpliciter*, while at the same time ignoring other forms of diversity.<sup>148</sup> Such an approach is plainly inconsistent with Justice Powell's opinion in *Bakke*, even if scholarship set-asides are narrowly tailored to achieve a racially diverse student body.

Thus, the Administration's attempt to justify race-specific scholarships fails to pass muster under *Bakke*. There is, however, one last argument in OCR's quiver—an argument that purports to justify the use of race-based scholarships by graduate and professional schools, if not by undergraduate institutions. More precisely, OCR argued that race-specific scholarships were narrowly tailored to serve the “compelling interest” of increasing the number of minority graduate and professional students, and thus ultimately enhancing the diversity of the academy.<sup>149</sup> Indeed, OCR went so far as to argue that a school could employ such scholarships even if its student body was already diverse because the enrollment of additional racial minorities could lead to further diversification of the national community of scholars, thus enhancing the quality of scholarly dialogue that occurs within the academy.<sup>150</sup>

Like the other arguments for race-based scholarships, this argument comes up short. Simply put, “faculty diversity” is apparently not a compelling state interest as Justice Powell defined that term in *Bakke*. Significant evidence suggests that, unlike the Harvard Plan, which pursued several forms of diversity, the Academy does not pursue faculty diversity in any consistent fashion. Take the legal academy as an example. It is common knowledge that individuals from certain religious groups are vastly underrepresented at America's law

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147. See *supra* notes 97-102 and accompanying text (showing that failure to pursue diversity consistently dooms programs under Justice Powell's opinion in *Bakke*).

148. The Department took just such an approach when analyzing race-specific scholarships awarded by Florida Atlantic University. Instead of asking whether the university was pursuing diversity across the board, the Department asked whether the scholarships were necessary to achieve *racial* diversity. Thus, the Department blessed the school's creation of scholarships for African-Americans after finding that the University had been able to recruit “Hispanic, Asian/Pacific Islander, and white students” without employing race-based scholarships. See Letter to Mr. John C. Scully, *supra* note 144, at 2. There was no inquiry into whether the school had sought to attract students from varied religious, geographic, political, or economic backgrounds.

149. See *Final Policy Guidance*, 59 Fed. Reg. at 8761 n.8. Cf. Office of Legal Counsel Memorandum, *supra* note 52, at 18 n.30 (noting that “Justice Powell's thesis may carry over to the selection of university faculty: the greater the racial and ethnic diversity of professors, the greater array of perspectives to which students would be exposed”).

150. See *Final Policy Guidance*, 59 Fed. Reg. at 8761 n.8. Numerous universities apparently employ such minority-only scholarships in their graduate and professional programs. For instance, 45 schools in 14 states participate in the “Doctoral Scholars Program,” which provides scholarship support only to members of minority groups. See *SREB Doctoral Scholars* (visited Sept. 9, 1999) <<http://www.SREB.ORG/Programs/Doctoral/doctoral.html>>. Moreover, the University of Wisconsin administers the Hastie Fellows Program, which provides financial and other support for minorities pursuing an LL.M. degree there. See *William H. Hastie Fellowship* (visited Dec. 30, 1999) <[http://www.law.wisc.edu/lawatwis\\_fr/williamh.htm](http://www.law.wisc.edu/lawatwis_fr/williamh.htm)> (“The Hastie Fellowship is designed to assist and prepare ethnic minority law school graduates for a career in law teaching.”).

schools; Roman Catholics and evangelical Protestants come to mind.<sup>151</sup> Political conservatives are also few and far between.<sup>152</sup> Yet, for all the discussion within the legal academy about “faculty diversity,” law schools make almost no effort to diversify their faculties along religious or political lines.<sup>153</sup> Applicants who are Republicans, Fundamentalists, or both receive no “plus” in law school hiring processes. Some have even suggested that they receive a minus.<sup>154</sup> There are no fellowships designed to increase the number of Roman Catholics teaching in law schools. Simply put, the “diversity” project, at least as pursued in the law schools, has one goal: increase the number of certain racial minorities on law school faculties.<sup>155</sup> There is no indication that this state of affairs is any different in other professional or graduate schools. Contrary to the Administration’s assertions, pursuit of this form of diversity does not serve a compelling state interest.<sup>156</sup> In sum, the Administration has encouraged racial set-asides that are plainly inconsistent with *Bakke*.

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151. See, e.g., Sanford Levinson, *Some Reflections on Multiculturalism, “Equal Concern and Respect,” and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989, 996 (1993) (“My life in the elite legal academy has been basically devoid of contact with committed Christians, especially evangelical Protestants. One can count literally on the fingers of one hand the number of publicly visible Protestant evangelicals who hold tenured positions at America’s ‘leading’ law schools. In this respect (and, undoubtedly, many others), no elite law school even remotely “looks like America,” at least if that is meant to suggest that members of the various sub-cultures of American society should actively participate in each of the institutional structures that comprise that society.”); Volokh, *supra* note 95, at 2072 (describing lack of religious diversity at UCLA Law School); *id.* at 2073 n.23 (reproducing survey data showing that only 13.7% of law professors are Catholic, compared to 26% of the full-time working population).

152. See Volokh, *supra* note 95, at 2073 n.23 (reproducing survey data showing that only 12.9% of law faculties are Republicans, compared to 41% of the full-time working population).

153. See Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2062 n.7 (1992) (reviewing MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS*) (“Almost none of the contemporary demands for greater diversity of voices within the academy include a call for a greater presence of the almost totally absent sound of a strong religious sensibility.”).

154. See Martha Nussbaum, *Cooking for a Job*, 1 GREEN BAG 2d 253, 259 (1998) (opining that individuals “with unpopular religious or political beliefs” are disadvantaged in the law school hiring process); *id.* at 260 (“I am sure that Christian conservatives are disadvantaged at some schools [in the hiring process].”).

155. The bylaws of the American Association of Law Schools are telling in this regard. Section 6-4(a) requires schools to provide “equal opportunity in legal education for all persons, including faculty and employees with respect to hiring, continuation, promotion and tenure . . . without discrimination or segregation on the grounds of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation.” (emphasis added). Section 6-4(c) provides that “A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex.” Thus, while member schools may not discriminate against individuals because of their religion, they are under no obligation to assure that their faculties reflect the nation’s religious diversity. Thus, the Association has apparently made a conscious decision not to foster religious diversity.

156. See Hall, *supra* note 95, at 858-91; Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 1001 (1993) (contending that law schools’ reliance on “diversity” to justify racial preferences in hiring is pretextual); Volokh, *supra* note 95, at 2075-76.

## IV

## THE UNCERTAIN FUTURE OF PREFERENCES

As shown above, the Clinton Administration has in various ways defied Justice Powell's opinion in *Bakke*. Standing alone, such defiance is not particularly remarkable; there is a long tradition of executive branch constitutional interpretation at odds with Supreme Court precedent. There is, however, one important difference between the Administration's stance toward *Bakke* and, say, President Lincoln's approach to *Dred Scott*, or President Reagan's stance toward the Fairness Doctrine. Unlike Lincoln or Reagan, President Clinton has carried out his anti-*Bakke* campaign *sub rosa*, praising and gutting the decision at the same time. In doing so, the President forfeited the opportunity to call upon the Court to reconsider Justice Powell's conclusion that quotas are an impermissible method of achieving diversity.<sup>157</sup> Moreover, the President also abjured the chance to characterize Justice Powell's endorsement of the Harvard Plan as *dicta*, thereby challenging Justice Powell's conclusion that pursuit of racial diversity *simpliciter* does not constitute a compelling state interest. Far from touching off any dialogue about the soundness of Justice Powell's decision, the Administration's quiet defiance has led to an apparent reaffirmation of the status quo.

It is not difficult to understand why the Clinton Administration would refrain from advertising its defiance of *Bakke*. Defiance of Supreme Court precedent comes with a political cost—a cost that would be particularly high in an environment skeptical about the fairness of racial preferences. An administration that announced its support for scholarship quotas, “even though they are inconsistent with *Bakke*,” would pay a high political price, as opponents of such quotas would accuse it of ignoring the Constitution for political purposes. Similarly, an administration that characterized Justice Powell's endorsement of a plus system as *dicta* and endorsed the FCC's pursuit of racial diversity *simpliciter* would forfeit the constitutional high ground in the debate over preferences. An administration that itself repudiated *Bakke* in this manner could not, for instance, criticize the Fifth Circuit's decision in *Hopwood* for disregarding a “landmark” decision.<sup>158</sup> Moreover, open defiance of *Bakke* could “let the genie out of the bottle,” provoking a dialogue that might ultimately lead to a political repudiation of preferences.

Whatever the short run considerations that might support it, the current Administration's strategy could boomerang over the longer term. By continuing to embrace *Bakke* as a rhetorical matter, the Administration has, in a sense, strengthened the legitimacy of Justice Powell's opinion which, after all, *rejected* most arguments for preferences. At the same time, by encouraging colleges and others to adopt programs plainly inconsistent with *Bakke*, the Administra-

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157. See generally Girardeau A. Spann, *Writing Off Race*, 63 LAW & CONTEMP. PROBS. 467 (Winter/Spring 2000).

158. See *supra* note 54 (discussing Administration's disagreement with *Hopwood*).

tion created “targets of opportunity” for those who would challenge preferences in the courts. Such challenges can do more than just void the individual programs in question; they might also serve ultimately to undermine *Bakke* itself. Consider in this respect a challenge to a minority-only scholarship scheme justified as a means of “diversifying” the academy. The academy’s obvious failure to pursue faculty diversity consistently would undermine the assertion that such diversity is a “compelling state interest” that supports racially-targeted scholarships. Moreover, confining such a ruling to the scholarship context would be difficult; a judicial finding that schools were not pursuing diversity consistently would also undermine future assertions that, for instance, concern for “diversity” justifies racial preferences in faculty hiring.

Of course, the Clinton Administration or, for that matter, a possible Gore Administration, would not stand idly by as opponents of preferences attacked the various programs the Administration has encouraged. The Administration could always argue that such programs are consistent with *Bakke*, or, in the alternative, that Justice Powell simply “got it wrong” when, for instance, he concluded that racial diversity was not itself a compelling interest. The Administration could even claim that most of Justice Powell’s opinion was *dicta*, that is, that he held merely that *quotas* were unlawful, and nothing else. Still, Mr. Clinton’s term will end in 2001, and Mr. Gore may not succeed him. Moreover, any attempt to dislodge Justice Powell’s opinion would face an uphill battle. Any court would be reticent to jettison an opinion that has enjoyed, or at least appeared to enjoy, such strong political support for more than two decades. To be sure, the Administration or other proponents of preferences could argue that *Bakke* is “unworkable” or based on false premises. Such arguments, however, would have little credibility at such a late date coming as they would from groups that have vociferously embraced Justice Powell’s opinion.

The discussion thus far points to a larger shortcoming in the Administration’s approach to *Bakke*. By refusing to announce its opposition to Justice Powell’s approach publicly, the Administration missed an opportunity to touch off and lead a national discussion about the meaning of “diversity” and, more importantly, the extent to which the pursuit of racial diversity *simpliciter* can justify racial preferences. Such a discussion, informed by two decades of experience with *Bakke*, may well have led to a consensus that “diversity” (broadly defined) is not in fact as compelling as Justice Powell thought it was.<sup>159</sup> While such a consensus would assuredly undermine Justice Powell’s diversity-based approval of preferences, it would also focus renewed attention on other justifications for racial preferences, rationales that Justice Powell largely rejected in *Bakke*. Such a debate would undoubtedly be contentious. It would also be worth having.

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159. Cf. Meese, *supra* note 47, at 386-88 (arguing that Justice Powell’s *Bakke* opinion rested on false assumptions about the manner in which preferences are administered).

## V

## CONCLUSION

Like judges, Presidents are bound to uphold the Constitution. In discharging this duty, Presidents need not defer to judges, but must instead apply their own independent judgment to constitutional controversies. While these independent judgments may in some instances differ from those rendered by the Supreme Court, such disagreement promotes an inclusive dialogue about the Constitution's meaning—a dialogue that ultimately strengthens and legitimizes the resulting settlement of constitutional questions.

President Clinton exercised such independent judgment concerning the constitutionality of racial preferences. Although the Clinton Administration publicly embraced Justice Powell's opinion in *Bakke*, various agencies actually defied Justice Powell's opinion in practice. Such defiance did not, however, have the salutary effects often associated with executive branch interpretation. By concealing his defiance of the Court, President Clinton deprived the public of the benefits of constitutional discourse and ensured the maintenance of an unsatisfying status quo.