Bakke as Pseudo-Tragedy

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On June 28, 1978, the Supreme Court of the United States decided Regents of the University of California v. Bakke. One could almost say that the case had been the focus of national attention before it even arose. The issues involved had been debated in hypothetical terms for years. Cases raising analogous issues, such as De Funis v. Odegaard, had come up and had been sidestepped. Finally, as Bakke itself made its way up to the Court and excitement grew, national attention became riveted on the seemingly fundamental value conflicts involved, and a solution, a catharsis, was widely awaited.

If a clear solution, a ranking of the underlying values at stake, was sought, then the Supreme Court's decision was totally disappointing. In a deep sense it settled nothing. And yet the desired catharsis did occur, and even before it was certain that this would be the case, the decision was hailed by scholars and journalists as "Solomonic" and a high example of "judicial statesmanship." In this lecture, I would like to explore why this was the reaction to the anticlimax of Bakke, why in some instances Court decisions like Bakke and the subsequent approbation it received are highly desirable, and why I, instead, think that both the decision in Bakke and its wide acceptance were on the whole misguided.

At first glance, Bakke appeared to involve a clash of irreconcilable fundamental principles. Two conceptions of egalitarianism, both basic to our society, seemed locked in conflict. On the one hand was the universalist, meritocratic notion of equality of opportunity regardless of race. On the
other was the idea that there should be reparation, and even advantage, to those groups which could not share equally in the benefits of the meritocratic ideal of egalitarianism because of society's past decisions and biases. Both principles are, in fact, deeply rooted in American morality and law. The career open to talent, the open society, which does not look to and indeed abhors, caste and class as a basis for choice, is so much a part of the American ideal that I need not spend time on its origins. That other conception of equality requiring special treatment for well defined disadvantaged classes, or for socio-economic groups which for some reason stand out as disfavored, however, is no less widely held. One need only note the acclaim which greeted Rawls' *Theory of Justice* and consider his implicit view of the "least favored" classes to see how much appeal there is in reparation for group socio-economic disadvantage. The least favored group in Rawls is not, and cannot be, those individuals who will be hit by trucks or are dying of cancer. His maximin formula does not apply to them. Rather, it is those categories like racial minorities, or the poor, whom we can categorize *a priori* as least favored (even though they would not change their lot for that of the cancer victim) for whom Rawls implicitly demands special treatment.5

When basic ideals are in irreconcilable conflict, a society is likely to face what Philip Bobbitt and I have elsewhere called a tragic choice.6 In such situations it may choose to favor one ideal at the expense of the other, or it may avert its eyes in order to try to cleave to both, or, finally, it may opt for instability by adopting one principle and praising its merits—for a time—and then rejecting it and decrying its injustices while shifting to the other, equally basic but equally fragile ideal, again for a time only.

In *Tragic Choices* we argued that the first approach—the abandonment of one ideal to serve another when both ideals are truly deeply and widely held—is both unlikely and frequently undesirable.7 In the end, the permanent dominance of one fundamental value over another is acceptable in

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5. See id. at 97-98. Rawls defines least favored groups in terms of social and economic inequalities and offers two possible methods of defining such groups. The first is to choose a particular social position, such as unskilled worker, "and then to count as the least advantaged all those with the average income and wealth of this group, or less." Id. at 98. The second possibility is a "definition solely in terms of relative income and wealth with no reference to social position." Id. Rawls realizes that it is impossible to avoid some arbitrariness in defining the least favored group but notes that a more precise definition may prove unnecessary. See also G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 186-89 & n.105 (1978) [hereinafter cited as CALABRESI & BOBBITT].
6. Id. at 17-28.
7. Id. passim.
a democratic and pluralistic society only if there is wide agreement on that particular hierarchy of values. If there is not such agreement, the group experiencing the permanent rejection of its deeply held value is also in a significant sense rejected and emarginated from the society. When, moreover, the conflict between ideals is internal—when each individual would like to have it both ways—to opt permanently for one ideal would be to force each of us to be a human being we do not wish to be: to make us reject a value to which, ideally, we would want to cling. In such cases, it may be better, for a time, to fudge, to shade honesty (which is no less but no more significant a value than any of the other ideals) than permanently to reject one of the others.

The lack of absolute predominance of honesty is a hard notion for scholars to accept. After all, we are the ones who are paid to be honest, to look into dark places, to tell society what is really going on—though the heavens may fall. But we would be dishonest if we failed to recognize that at times total candor is not desirable or desired by society. People can live with results they do not like so long as those results can be rationalized as not necessarily in conflict with ideals they cannot abandon. But they will, understandably, reject and even fight a policy which tells them with blinding clarity that those ideals that they hold dearest are, permanently, to be denied.

A society which in no uncertain terms permitted active “mercy killings” and defined in exquisite detail when a life could be so taken, would, I expect, be utterly unacceptable to most of us here today. Yet how many of us are genuinely troubled by the fact that juries frequently acquit defendants in mercy killing cases? The jury does not tell us why it found the defendant not guilty—for its prime characteristic is to give results and not reasons and it is always possible that in the particular case, the defendant was in fact temporarily insane or otherwise protected by a legitimately defined and generally acceptable defense. One may not like the results in many cases, and one may even recognize that the results may to some extent reflect the values of those in the society who believe in euthanasia, and yet one can still admit that in a pluralistic society, so long as the ideal to which we would hold is not rejected, such results should be tolerated—specially since it is impossible to specify with certainty which specific outcomes would violate the ideal. In such cases, the jury permits us to accommodate conflicting values without scandal—and I use the old church term

9. See generally CALABRESE & BOBBITT, supra note 5, at 57-64.
advisedly—because it is a subterfuge which works, because it allows us to avert the eyes without undue danger.

In *Bakke* the Court first recognized that one traditional subterfuge could not be used to mediate between the values in conflict, and then, in the telling opinion of Mr. Justice Powell, sought refuge in another, equally traditional technique in order to blunt the conflict, to avert the eyes.

The device the Court found to be unavailable was that of avoiding the issue by eliminating scarcity. It could not make admission to medical schools available to everyone and hence "moot" the problem before it.10 This technique, which has been used, for instance, to evade the tragic choices entailed in the allocation of artificial kidneys,11 is in the end itself a subterfuge. Unless total scarcity can be abolished, the underlying question will remain: why save renal failure victims and not those suffering from aplastic anemia or those needing cardiac shunts, or languishing in mental hospitals?12 When, as in *Bakke*, the conflict in values emerges as a struggle for the allocation of social goods, a *local* solution can at times be found by giving the desired goods to all those at hand. But since scarcity is a fact of the human condition, that local solution will only put off or hide the deeper conflict. Even if medical school admissions could have been made available to all, the problem of preferential treatment or affirmative action in the society at large would have still remained. In any case, in *Bakke* the Court did not think that even the local solution was available, and therefore chose another approach.

The approach taken was very like the one I described in euthanasia cases. Race could not be used, by itself, as a ground for preferential admission. But diversity of background, Justice Powell said, is surely an acceptable basis for an admission policy.13 Indeed it is almost constitutionally protected if we are to be assured a free and wide inquiry within an educational process. Like an insanity defense to murder, also almost constitutionally protected,14 it is a ground for decision which impugns no fundamental values. Who, then, is to decide what is the appropriate degree of diversity? Not a jury, but the universities themselves, of

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13. 438 U.S. at 311-12.
14. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970). Both of these cases stand for the proposition that the due process clauses protect a defendant against conviction if there is reasonable doubt that he was sane at the time he committed the crime.
course! And equally, of course, the universities should be free from too much governmental scrutiny in how they work out diversity, for “eagle eye” review of the internal workings of admissions committees would surely hamper the independence of these necessarily independent bodies!

The “jury” then becomes, in Justice Powell’s opinion, the university; the “valid ground” instead of “insanity” becomes “diversity of background”; and the same justifiable lack of interference guarantees that we will get only results without explanations which might too openly reject one value and select the other. If you are not blatant, if you cause no scandal, if you let us reconcile what you are doing with grounds that can be acceptable to most, we will let you work out your own quiet compromise between our deeply held, but irreconcilable, ideals. That is what the Court seems to be saying. As I said elsewhere, “all that is lost is . . . candor!”

I suggested earlier that, on the whole, I am not averse to the compromise that has been reached in euthanasia cases, though it does entail a subterfuge. I also noted that the Bakke opinion was widely accepted as wise, precisely because it did not force us to choose between unacceptable alternatives. And I admitted, as well, that it did work a kind of catharsis—people are still concerned but much less so than before the decision, when it looked as though a principle they deemed fundamental might be forsaken, and one they deemed abominable adopted. Why, then, do I dislike the result?

There are two reasons for my unhappiness—a narrow one on which I shall not spend much time, and a broader one to which I shall devote the rest of the lecture. The narrow one is simply that universities are not juries and diversity is not insanity. I am far more willing to trust juries to reflect the unspoken, and often unspeakable, compromises that the society must make than I am to trust university admissions committees to make such decisions. Juries are, after all, popular bodies. No one jury lasts that long and only a whole series of juries can shape the unspoken compromise. As such they are relatively incorruptible (there are too many of them) and relatively representative of the society whose values they seek to accommodate.

None of this is true of university admissions committees. They

15. 438 U.S. at 312-14. Justice Powell noted that although not specifically enumerated, academic freedom has “long been viewed as a special concern of the First Amendment.” Id. at 412. This freedom to “make its own judgments as to education includes the selection of [the university’s] student body.” Indeed, choosing who may be admitted is one of the university’s “four essential freedoms.” Id. (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).


are, to put it mildly, utterly unrepresentative of anything and their value-compromises need have no relation whatsoever to those of the society at large. Hiding the choice by leaving it to the university is therefore far more dangerous than is the analogous delegation to the jury in euthanasia cases. Moreover, the standard universities are to apply—diversity—has been sufficiently used by them in the past to disfavor disadvantaged groups that it should give one pause as to its suitability as the basis for the "acceptable," if unspoken and unreviewable, decisions of today.19 When we must avert the eyes, we should try to do it in a way which gives us some confidence that what happens where we do not look will reflect the conflict of societal values at stake, instead of other, perhaps self-serving, interests.

Nevertheless, were the conflicts in Bakke truly irreconcilable, I might well agree that Justice Powell’s opinion and its delegation to universities of jury-like functions was the best we could do, and hence admirable and even Solomonic. But before one accepts a compromise that undermines candor and honesty, however, one must be sure that no solution is available that would, in fact, reflect the mixed desires of the society and yet be achievable openly and candidly. Honesty is, after all, as fundamental a value as any, and also as fragile. Precisely because—realistically—we must admit that our society at times abandons honesty to further other values, we must be sure that it is never shaded unnecessarily. We must always seek the honest and open solution to our problems when one can be found that does not reject principles basic to too many of us. For only if we do this can we allow ourselves the exceedingly dangerous luxury of occasionally looking the other way in those truly tragic cases in which we can do no better. In Bakke, as in many cases where we quickly choose the uncandid way, I suggest that an appropriate and acceptable “honest” solution did exist.

My solution is simply stated; its grounding in American constitutional law and its capacity to accommodate deeply held divergent societal values will require more discussion. My thesis is that if benign quotas are limited to blacks and perhaps to American Indians, so long as those groups—however society choses to define them—remain sufficiently disadvantaged as groups so that membership in them can by itself constitute disadvantage without more, no major rejection of the basic universalist, meritocratic ideal would be entailed. It is only as the notion of affirmative action comes

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19. I think it no accident that Justice Marshall, filing a separate opinion, expressly stated that considering race in deciding diversity was acceptable, but only if it served to benefit groups which had suffered past disadvantages. 438 U.S. at 399-400 & n.12 (Marshall, J., concurring in judgment in part and dissenting). The fear that diversity might be used to exclude groups, like Jews, seems both obvious and justified. Id.
to be expanded and applied to nondisadvantaged individuals belonging to the multitude of other disadvantaged groups that a conflict with individual rights becomes, in practice, crucial. As more and more groups demand affirmative action, albeit correctly if reparation is a generally available ground for allocation of social goods, then the spaces that remain—the social goods that are available—for allocation on a purely meritocratic, ethnic and racially blind, basis become too few, and the effect of the benign becomes necessarily malignant. Moreover, as more and more groups are asked to look into their history for examples of past group wrongs to justify present affirmative redress, the very principle of racial and ethnic blindness becomes meaningless, regardless of how many social goods could still be allocated on a "blind" basis.

That is not the case, I would suggest, if affirmative action is limited to those groups having suffered such special ill-treatment that they were made the object of a special constitutional status or adjustment. Such special ill-treatment is crucial both to finding the constitutional basis underlying my view and to limiting my notion to those extraordinary cases which a racially blind ideal can encompass, as exceptions, without being destroyed by doing so. To put it another way, the conflict of values we feel in Bakke is a conflict which existed in the fourteenth amendment itself. That amendment, together with the thirteenth and fifteenth, represented a single constitutional revolution, but one which contained (as most laws do) at least two quite disparate themes.

We all have grown accustomed to what has properly become the dominant theme—the theme of racial, religious, sexual, and ethnic equality. It is this theme which I believe will ultimately win out completely, and which will, in God's time, permit us truly to say that we are all one society in which racial, religious, sexual, and ethnic differences exist and are sources of fruitful diversity but which do not permit, let alone require, special attention from the law. But to say that this is when we are, and should be, going, in no way requires us to deny where we have been. Moreover the Civil War Amendments unmistakably had another theme that ran in a very different direction from the universalist, egalitarian theme that has become increasingly dominant. That other theme, as Justices Blackmun and Marshall powerfully note and document, was one of special redress for the special disadvantages of blacks even at significant cost to other groups.20 The words could be egalitarian words, because even these were needed to include blacks in our general egalitarian norms. They had not,
in our Constitution, been treated as "created equal." But the theme was one of specific inclusion, and hence of redress.

It would be wrong, however, to read this theme as permitting affirmative action for other racial or ethnic groups who have suffered and still suffer inequities. To do so would be to make "redress" the sole theme of the amendments, an interpretation both incorrect historically because the "pure egalitarian theme" was surely also in the fourteenth amendment, and misguided as a description of our current values or ideals, since our society does not want the ideal of redress for past wrongs to supersede the meritocratic ideal. But it would be just as wrong to deny that redress was a part of the Civil War Amendments, insofar as they focused on blacks and on their extraordinary grievances. Moreover, it would be foolish to ignore the fact that the principal reason why the reparation theme has survived the extraordinary growth of the other, the universalist theme, is that many in our society still believe deeply that the original reason for redress for blacks applies today. That fact is why Bakke stirred the emotions it did.

An honest recognition of these dual and contradictory themes in the Civil War Amendments may help us to reconcile the underlying conflict in values by allowing us to limit the sphere of each without abandoning either. The question focuses on the limitations of each sphere and whether a boundary can be drawn to meet the bulk of current needs while being true to constitutional history. I believe a line can be drawn and shall devote the rest of the lecture to defining that boundary.

In outlining the boundary, the first question we face is whether the reparation theme of the Civil War Amendments should be read to apply only to former slaves, to descendants of former slaves, to all blacks so long as blacks as a group remain sufficiently disadvantaged in America, to all blacks in perpetuity, or to other disadvantaged groups as well. I have already said that to read the reparation theme as applying to groups other than blacks would be wrong and would destroy the egalitarian theme of the fourteenth amendment. What about the other choices? To permit redress only for former slaves would be a possible reading of the Civil War Amendments, but it would totally ignore the sweep of their language and the persistence of the problem that slavery created. Such a reading is surely not required, and would fail to respond to the needs and values of those who cannot accept the egalitarian, universalist theme as fully predominant in today's America. The correct reading of the constitutional theme of redress is, instead, that slavery created such a disadvantage for blacks that until they, as a group, are treated equally in society, society needs to, and therefore can, favor individual members of that group, even
when they are not personally disadvantaged apart from group membership. Only in this way can the goal, redress of slavery, be achieved. Thus stated, the answer to the narrow reading, redress for former slaves only, also answers the suggestion that redress applies to blacks in perpetuity. The answer is no: it was the disadvantage to blacks—as a group—caused by slavery that must be overcome, and once group disadvantage is overcome, the broader, egalitarian theme of the fourteenth amendment can become the sole theme.

This leaves the hardest problem in drawing a boundary around the reparation theme: should reparation be permitted for all blacks, as long as former slaves are disadvantaged as a group, or only for those who are descendants of former slaves? Professor Dershowitz of Harvard, in a letter to me, suggested the latter, citing his belief that German reparations should be available only to those Jewish descendants of Holocaust victims, instead of to all Jews. The position has a certain appeal. It enables one to cut redress loose from race. Neither Jews nor blacks have an absolute right to redress, regardless of individual disadvantage; instead, the right belongs to those having a special link, regardless of race, to the extraordinarily mistreated group. And in the context of the Holocaust—only a generation away—that appeal may well be correct. No special tracing is needed to define those deserving redress. The link is clear and easily known. As a result, requiring such a connection as the basis for reparations serves the appropriate function of lessening the significance of race, of that very category which the broader theme of the fourteenth amendment would rule out.

The case of blacks, however, is very different. In the first place, many descendants of nonslaves who our society, by whatever extraordinary devices it uses, defines as blacks are disadvantaged as a result of the one-time existence of slavery. More importantly, too much time has passed. As a practical matter, therefore, Dershowitz’s view would end up emphasizing race more than would the position that all blacks can benefit from affirmative action. This is because Dershowitz’s view would entail that very tracing of bloodlines which is anathema to the anti-racial theme of the fourteenth amendment. If affirmative action were to depend on proof of a blood link to ancestors of a hundred years ago, we would inevitably be resorting to Nuremberg-type fractions of blood. The constitutional object may be properly Dershowitz’s: to extirpate the group disadvantage

22. In the early days of the Nazi regime, the Nuremberg Laws treated as Jews those persons having a certain percentage of “Jewish blood”. 
which still exists, as a result of slavery, by favoring descendants of former slaves. But the least racist way of achieving this object, ironically, is to broaden the category to all blacks regardless of links to former slaves. In seeking to achieve such a goal, judicial statesmanship is called for. Such statesmanship dictates an avoidance of the narrow reading—limiting affirmative action only to former slaves—and the broader reading—applying it to all blacks in perpetuity—and is what the Court must use in choosing among various possible linguistic and historically plausible alternatives.

What does this approach do to other groups, to nonblacks? Does allowing affirmative action only in those cases in which a special constitutional status exists, such as that given blacks in the Civil War Amendments, meet the needs and aspirations for affirmative action in America today? Does it openly assert the preeminence of the universalist, egalitarian theme, while permitting just those exceptions which must be made? Or does it exclude too many groups? If it does, Justice Powell's more open ended, though uncandid, approach may be the right one after all, for it allows "diversity" to be used to favor any sometime disfavored group.

This question is best faced by asking, hypothetically if one wishes, what other groups there are which we might wish to see favored on a group basis, regardless of individual disadvantage, and examining whether such groups can be accommodated under the approach I have set out. In doing this one should first note that if the "group" is the "disadvantaged"—whether economically, or socially, or whatever—there is no problem. No one doubts that personal or individual disadvantage is a valid ground for specially favorable treatment under the fourteenth amendment. As a result, if the group is defined as the "disadvantaged," then there is no conflict—for the individual members of the group are by definition also personally disadvantaged.

23. It seems likely that the existence of programs favoring the "disadvantaged" would, for instance, result in a continuation, in practice, of affirmative action for individual members of groups, such as Chicanos. For another possible basis for continuation of affirmative action programs for Chicanos, see note 33 infra. Although today affirmative action for Chicanos is based on racio-ethnic lines, the beneficiaries of such programs reflect more than anything else the almost universal individual socio-economic disadvantage of its members arising from past discrimination, at least in some parts of this country. From this point of view, "poverty," while certainly a constitutionally legitimate basis for affirmative action, see, e.g., San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 20-22 (1973), may nonetheless be a less desirable one than more complex grounds. For example, "disadvantage" in college and university admissions might appropriately take into account factors such as parental educational level as well as financial status. Linguistic barriers could, of course, be considered directly in evaluating any tests based on knowledge of English. Inevi-
disadvantaged in that he or she may be sufficiently wealthy and well educated so that the term "disadvantaged" would not fit, nevertheless the fourteenth amendment would permit special treatment for such a person.\textsuperscript{24} The rubric, I suppose, would be that no suspect classification was being used.\textsuperscript{25} For while discrimination against the handicapped might well involve a "suspect" category,\textsuperscript{26} lack of handicap is not such a category. In this regard race, religion, sex, and ethnic backgrounds are special,\textsuperscript{27} for they are the only categories which are suspect symmetrically so to speak. To classify one by race is suspect both as to those within and as to those without the category.

In the end all this is saying only that the broad, egalitarian value in our society, though nominally fully meritocratic on a purely \textit{individual} basis, is not, in fact, unduly offended by, and does not seek the constitutional protection of the fourteenth amendment from distinctions designed to favor groups like the handicapped or the disadvantaged. It is only when the distinction is based on membership in ethnic, religious, sexual, or racial
tably, "disadvantage" depends on the type and geographical location of the institution from which one is seeking admission or employment. See note 34 infra.

One danger of the approach described in the text is that the society will simply choose not to establish programs giving affirmative action to the disadvantaged in general. There may be too many who appropriately fit that category, and society may prefer to avoid facing up to this fact. But the solution of picking and choosing among individuals, who are equally disadvantaged, on racial or ethnic lines is precisely what creates an equal protection of the laws problem, unless that choice has some fairly explicit constitutional basis of the sort discussed in the text. Moreover, the ability to pick and choose on racial or ethnic lines, because it tends to divide those who suffer from socio-economic disadvantage, may too readily allow the society to avoid facing and seeking to resolve what remains as fundamental a problem as any, that of socio-economic disadvantage in general.

\textsuperscript{24} Courts are beginning to recognize that, in order to insure equal rights for the handicapped, affirmative, compensatory action is appropriate. See Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wis. 1977). See also Hull, The Specter of Equality: Reflections on the Civil Rights of Physically Handicapped Persons, 50 TEMPLE L.Q. 944, 952 & n.42 (1977).

\textsuperscript{25} The "traditional indicia of suspectness" are present when the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1972). See also Frontiero v. Richardson, 411 U.S. 677, 686 (1972) (members of suspect classes possess characteristics determined solely by accident of birth, having no relationship to ability to contribute to society).

\textsuperscript{26} See Burgdorf & Burgdorf, Jr., A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" under the Equal Protection Clause, 15 SANTA CLARA LAW. 855, 902-08 (1975).

\textsuperscript{27} Although sex is not currently defined by the Court as a suspect category, the Court has traditionally carefully scrutinized discrimination in this area. See note 31 infra. Similarly, religion is not defined as "suspect," yet its status as a first amendment right results in careful scrutiny of any infringement in free exercise.
groups that those who defend the values which underlie a "career open to talents" become embattled. What then of distinctions based on these categories? How do they, apart from blacks, fare under my test?

There is one group as to which the same kind of analysis made with respect to blacks could be strongly argued. That is, of course, American Indians. Here, too, an affirmative action program may be needed to overcome group disadvantage, even if the individual beneficiaries of the program are not identifiably disadvantaged apart from membership in the group. But here too an adequate special constitutional status may exist. One would have to know more about the history and constitutional position of Indian treaties than I do to make the argument. But it is significant that, apart from blacks, Indians are the one group in which intuitively the need for affirmative action apart from individual disadvantage has long been recognized and special status has in fact been accorded in many areas of law. The fact of special status and the need for generalized affirmative action do not, of course, arise from independent sources. Indeed, they both generally stem from the fact that in the absence of some special rules creating special status, even the broad, egalitarian premises had not been applied to the particular group. American Indians, like blacks, were not treated as created equal in our constitutional history.

As to most other groups, Italians, Puerto Ricans, Spanish surnamed, Asians—I have little problem. Individual disadvantage (which might and, in fact, often does arise out of past racial or ethnic abuse) can, of course, be compensated for, but group disadvantage, not reflected in individual hardship, ought not be considered. Does one really wish to favor the university admission of the well educated child of a wealthy Puerto Rican, Italian, or Chinese-American because Italians, Puerto Ricans, and certainly Chinese-Americans have been abused in the past? I think not.

28. 25 U.S.C. §§ 1 through 1673 (1976) is indicative of the special status accorded to Indians by our legal system. This title establishes many preferential and affirmative action programs to overcome the disadvantages suffered by Indians as a group. See, e.g., id. § 47 (preferences for employment of Indian labor); id. § 470 (authorizes the Secretary of the Treasury to establish a revolving fund for loans to Indian corporations to encourage economic development); id. § 471 (authorizes appropriations to pay for the tuition expenses incurred by Indians attending vocational and trade schools).

The courts have also interpreted treaties as granting special status to Indians regarding self-governance. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 538 (1832) (the Treaty of November 28, 1785 between the Cherokee nation and the United States recognizes the Cherokee nation "to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory . . ."); Williams v. Lee, 358 U.S. 217, 221 (1959) (Treaty of June 1, 1868 between the Navajo nation and the United States implicitly recognized the right of the Navajo tribal government to exercise exclusive jurisdiction over the internal tribal affairs).
One could, of course, do so and tie it to that past abuse. But such a step is neither necessary to eliminate the disadvantages these groups still suffer as a result of past prejudices, nor is it needed to aid the current victims of such prejudices. Conversely, to recognize affirmative action so broadly would be to abandon the universalist, meritocratic ideal that our society also wishes to affirm. Before we would do this we should, I suggest, return to Justice Powell's subterfuge.

There is another group I have not mentioned which, in a sense, represents the acid test of my approach. For it is a group that has suffered from generalized societal prejudice and now seeks affirmative action apart from evidence of individual disadvantage (other than by membership in the group), although it currently enjoys no special constitutional status such as that which I suggest may be used to benefit blacks and American Indians. The group argues precisely for such a special constitutional statement and, like blacks and American Indians did in the past, asks for it, in part at least, in order to be admitted fully just to the universalist, egalitarian ideal. It is also a group which, unlike the handicapped, cannot easily be favored without creating a disfavored category as suspect as the one it, itself, represents. I am, of course, thinking of sex as the category, and women as the disfavored group seeking redress.

One could duck the problem by suggesting that, since the Court permits reparation for members of a group in those instances in which a university or an employer has itself discriminated against that particular group, affirmative action for women can almost always be justified. It is true that past prejudice against women by individual employers and academies can all too readily be demonstrated. But it is far from clear why such past prejudice, despicable though it is, should constitutionally justify disfavoring other applicants having no part in that behavior in order to favor individuals who were not themselves disadvantaged. If nondisadvantaged individuals can be benefitted, at the expense of other innocent individuals because a particular institution has sinned, why not mandate the same for the whole society which has sinned? The Court's exception proves too much, and would, if applied fully, affirm the ideal of generalized redress. Short of that undesirable abandonment of the universalist, meritocratic ideal, the exception the Court seems to make can only constitute an unprincipled device, which would at the same time both allow an approach like mine to be accepted and yet would permit redress for past grievances to all women, even to those individually advantaged. If that

were the only way out, the position of women would—on a theoretical level at least—undermine my approach.

There is, however, another fact which makes the current status of women and their demands for affirmative action very helpful to my point of view, and that is the existence of the Equal Rights Amendment (E.R.A.). Opponents often question the reasons for the E.R.A., arguing that the fourteenth amendment, so similar in language, provides all that the E.R.A. would give, at least if the Court would openly announce, what it seems to have been in practice holding, that sex is a suspect classification under the fourteenth amendment. Yet, supporters argue, if this were truly so, why do the opponents oppose it so fervently? The answer to all these questions lies, I suggest, precisely in the double themes that such "egalitarian" amendments have. The fourteenth amendment, I have argued, must be read both to further general equality regardless of race, and to permit affirmative action for a particular group, such as blacks, regardless of individual disadvantage and apart from group membership, so long as the group remains disadvantaged. E.R.A. is being fought, and fought for, unconsciously perhaps, because it is meant to play the same role for women as the fourteenth amendment was meant to play for blacks.

I have argued that one should give the following rather crude answer to those groups at large who seek affirmative action for themselves, apart from individual disadvantage: that the universalist thrust of the fourteenth amendment forbids it. In doing so, the fourteenth amendment reflects a deep commitment to meritocratic equality in our society. There are exceptions to the commitment for blacks and perhaps for American Indians. They have obtained a special constitutional status allowing differential treatment for such time as they, as a group, remain disadvantaged. If you think that your group's hardships support an equivalent exception, get yourself an amendment passed which proclaims, in effect, that your hardships are sufficiently great so that the society can justify the exception, and still affirm its general universalist beliefs. If you cannot, then you must make do, on your own, like the bulk of the citizenry, asking redress only for personal rather than group disadvantages.

30. H.R.J. Res. No. 208, 92d Cong., 2d Sess. (1972), reprinted in U.S.C.A., Const. Amend. 14 - end. Section I of this proposed amendment declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

31. See Reed v. Reed, 404 U.S. 71 (1971)(Idaho statute violated the equal protection clause because it provided dissimilar treatment for men and women who were similarly situated.) Only in Frontiero v. Richardson, 411 U.S. 677 (1973), did the Court, in a plurality opinion, declare that classifications based on sex are inherently suspect. No subsequent case has so held.
If my answer is correct, then one can truly understand what E.R.A. is about, and why many, like me, support it, despite the fact that as a matter of sheer language it merely affirms the application to women of the general, universalist language of the fourteenth amendment. Women, like blacks and American Indians, were for a long time excluded from the scope of the universalist, meritocratic language of our organic laws. Just as blacks were not deemed "created equal" at our founding, so women were not automatically protected from discrimination by the seemingly all-encompassing language of the fourteenth amendment. These historical facts were, in part, the sources of the movements to add language that, taken literally, perhaps did no more than make egalitarianism applicable to these groups. For blacks, this was the fourteenth amendment; for women, it is the E.R.A. The fact that such language was needed to ensure that even general egalitarian principles were applied to a group immediately distinguishes that group from other, more common, disadvantaged groups. At the same time, it constitutes the basis for going beyond its own language and permitting, but not requiring, the granting of affirmative redress. In other words, societal mistreatment sufficiently great to require a special constitutional act admitting members of a group to the benefits of the generalized, egalitarian ideal, by its very fact, serves to justify—both emotionally and constitutionally—the conclusion that group disadvantage is equivalent, for many members of that group, to individual disadvantage, and that redress is therefore permitted. It also serves to justify the conclusion that extirpation of that group's disadvantage may be sufficiently crucial to society to allow the favoring of nondisadvantaged individuals as a limited exception to the meritocratic ideal. For this reason, I believe the current status of women, together with the heated debate over E.R.A., constitutes yet another bit of evidence that my approach to affirmative action is the appropriate one.33

32. See, e.g., Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856) (descendants of black slaves "were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States").

33. One may well ask why the presence of the suffrage amendment does not suffice to give constitutional status to affirmative action for women. Why, on the basis of my analysis, ought one to need a generalized "egalitarian" amendment like E.R.A., rather than the simple fact that special constitutional action was needed to give women a right as fundamental to equality as the right to vote? Similarly, could not the presence of state constitutional amendments designed to redress localized past discrimination against particular groups, like Chicanos in the Southwest for example, thereby assuring them access to the general egalitarian constitutional ideals, form the basis for a fourteenth amendment argument that affirmative action is permitted for such groups, at least in the appropriate states? My answer to both is . . . perhaps.
I have suggested that my reading of constitutional acts, like the fourteenth amendment and the E.R.A., would permit, but not require, affirmative action for members of those groups for whom passage of such amendments was essential, in order to include them in our generalized egalitarian ideal; for those who, without such acts, would not have been deemed “created equal” or been granted the “equal protection of the laws.” Why do I limit myself to this “permissive” reading? The answer is, I think, twofold. First, the language of the amendments is universalist and egalitarian. It would be a subterfuge of a fairly rank sort to read it as automatically requiring redress and preference without a finding by a majoritarian body that the group that needed the amendment to be treated

The precise line one draws is less important than the approach which requires some kind of constitutional recognition of a special problem before affirmative action can be maintained on racial, ethnic, or sex lines. The point of the approach is to find a workable compromise between conflicting meritocratic and reparational ideals. To be workable and open, that compromise must limit the exceptions to those categories which evoked a sufficient sense of wrong in the society to support constitutional action. Any less stringent requirement would permit a simple coalition of “past wronged” groups to legislate their own need for affirmative action at the expense of other equally “past wronged” groups, and the meritocratic ideal would crumble. How strong a constitutional statement of past wrong is needed to support affirmative action depends on where the society cares to compromise the two ideals. Obviously the broader the constitutional statement the more it is likely to reflect a deep belief that reparations to a particular group are appropriate and the more likely that an affirmative action compromise for that group will prove viable. In this sense the need for a constitutional act to declare that a group is to be treated as equal to others, in general, is broader than a constitutional act which assures equal access to a specific right, even a right as fundamental as the vote.

Nevertheless, suffrage amendments clearly do represent constitutional acts of the sort my analysis envisages, and state constitutional amendments may. Whether they suffice to justify affirmative action without a too great undermining of the meritocratic ideal, whether they can support workable compromises in specific contexts, is one of those questions which the Court has considerable latitude in answering. Once again, judicial statesmanship is appropriate and, hence, called for.

All this, however, serves to underscore the particular position of blacks. The constitutional statements enacted with blacks specifically in mind were designed to emancipate, give suffrage to, and assure access to generalized egalitarian norms for this particular group. That very fact serves to distinguish blacks from all other disadvantaged groups and would support affirmative action for them even at the hands of a court which required more than the generalized egalitarian constitutional statement that I have made the basis of my analysis in the text.

There is an irony in my analysis because it implies that affirmative action may be denied to groups too weak to arouse in us the sense of outrage for past wrongs which alone can result in the passage of constitutional amendments. But in a pluralistic society such groups realistically will be denied affirmative action regardless of theory. In the end, the principal protector of such weak groups remains the right not to be discriminated against embodied in the egalitarian ideal of the fourteenth amendment. That remains the general premise which only extraordinary cases of societal feelings of guilt toward past wronged groups can compromise.
as equal also needs affirmative action to overcome the disadvantage which membership in the group entails and, thereby, to achieve equal opportunity. Such a finding is a necessary link between the specific group reparation theme of these amendments and the universalist language the same amendments use. Only through such a finding can the common understanding that the fourteenth amendment was concerned with blacks and that the E.R.A. is concerned with women be joined to the language used in order to support affirmative action.

Second, if the reparation theme of these amendments purports to redress individual disadvantage arising solely from membership in a particularly disadvantaged group, redress must become suspect when the link between group disadvantage and individual disadvantage becomes tenuous. And if the reparation object stems instead from the perceived societal need to help the whole group, even when doing so entails benefitting some nondisadvantaged individuals, then that object also becomes weakened as the group ultimately finds its place as an equal in society—that is, not as “no longer disadvantaged”, but as no more in special need than other sometime disadvantaged groups. To imply a requirement of affirmative action from the amendments themselves, rather than from laws and rules promulgated under them, would, I fear, rigidify and perpetuate the right of reparation so that it would too readily remain in force when the very special circumstances allowing reparation as an exception to the universalist themes of the same amendments no longer existed.

We do, in fact, have a deep conflict of principles between universalist, meritocratic notions and the desire to redress the wrongs done to certain groups in the past. We can resolve that conflict by declaring one principle

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34. Such a “permissive” approach to affirmative action would have the further advantage of allowing a majoritarian body to decide the issue of whether group disadvantage required individual redress differently in different areas. Affirmative action might not be justified for women in college admissions and yet still be appropriate in many areas of employment. My approach would allow Congress to decide such issues under an enacted E.R.A. Such distinctions might even be geographical if group disadvantage persisted in some parts of the country and was no longer significant in others. See note 23 supra.

35. This, of course, raises all sorts of problems dealing with the degree to which the determination of such needs can be constitutionally delegated by majoritarian bodies such as Presidents, Congresses, and state legislatures to bureaucrats and even university admissions committees. That issue is a complex one which I cannot treat in this lecture. See, e.g., Kent v. Dulles, 357 U.S. 116 (1958) (any delegation of the power to regulate a citizen’s liberty to travel will be narrowly construed and subject to adequate standards); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (although state legislature may appoint committee to investigate subversives, it cannot delegate its responsibility to insure against the deprivation of constitutional rights); A. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); Bickel, The Passive Virtues, 75 HARV. L. REV. 40 (1961).
superior to the other. But that is dangerous, for it emarginates the proponents of the losing ideal. We can, like Justice Powell in *Bakke*, treat the conflict as a tragic one and try to paper it over by tricks and subterfuges. In doing so we let honesty suffer and we open ourselves to possible results, like the granting of favored treatment to the individually *advantaged* Puerto Rican or Italian-American over the individually disadvantaged New York Jew or Appalachian Wasp, which *neither* principle can justify. Or, finally we can seek to find an open accommodation between the principles. We can see if there is, in fact, a nontragic solution respecting both principles and nevertheless looking to a time when conditions will permit one of them to become truly dominant. I have tried in this lecture to suggest such an accommodation which would yield affirmative action where it is most insistently sought, deny it where it has come to be asked only by extension, and which looks to a day when it will not be needed at all. I have suggested that the seeming correlation between those groups for whom affirmative action is most pressed and those for whom it can be constitutionally justified is not accidental, since our Constitution does reflect our basic values. I do not make too much of a brief for my solution. One can only know in retrospect whether the choices a society faced at a given time were tragic or could have been accommodated. It may be that Justice Powell is right. But the dangers of using subterfuges are sufficiently great and the temptation to rely on them unnecessarily so substantial, that any uncandid solution should be suspect. For that reason I remain unconvinced, and continue to regard the opinion in *Bakke* as more tragic than the underlying choices.