BAKKE REVISITED

In 1978, Lewis Powell saved affirmative action. By one vote—or perhaps only half a vote—he allowed the continued integration of elite institutions of higher education, despite persistent deficits in the academic qualifications of many minority applicants.

It is hard to imagine that integration could have had a more unlikely champion. A child of the Old South, Powell had lived most of his life, uncomplainingly, in racial segregation and educational apartheid. Like many southerners of his generation, Powell later found it incomprehensible that he had ever accepted the systematic subjugation of blacks, but accept it he had. Only after *Brown*,¹ and the massive challenge to legality that *Brown* provoked,² did the beliefs of his upbringing give way to the mandate of color-blindness before the law. Within a few years, he was asked to move beyond color-blindness, to which he had but newly been won, and embrace racial preference. This personal journey, which in some sense he never completed, led to Powell’s opinion, for himself alone, in *Regents of the University of California v Allan Bakke.*³

That opinion was as conflicted as its author. On the one hand, Powell said that racial preferences in favor of minorities were con-
stitutionally equivalent to discrimination against them and re-
quired the same judicial scrutiny. On the other hand, he denied
the conclusion to which that doctrine led. He rejected the reasons
for thinking “reverse” discrimination different from the traditional
variety, yet he embraced that result. He dismissed the distinction
between goals and quotas as “beside the point,” but came to rest
on precisely that ground. And throughout, his argument seemed
devoid of any broad consistency that might be called principle.
Indeed, the difference between the affirmative action plans that
Powell found unconstitutional and those that he was prepared to
uphold was not substantive, or even formalistic, but essentially aes-
thetic. Considered purely as a matter of craft—of consistency with
precedent, coherency as doctrine, and clarity of result—Powell’s
_Bakke_ opinion must be judged a failure.

Yet twenty-five years later, it carried the day. In _Grutter v Bol-
linger_, the Supreme Court embraced not only Powell’s result, but
also his reasoning, in all its logic-chopping contradiction, em-
braced it not merely as a consequence of the need to count to five,
but as a humane and hopeful response to an intractable problem.
Unlike his contemporaries, Powell’s successors found wisdom in
his approach. Even dissenters had respectful things to say. Despite
years of strife and litigation, the constitutionality of affirmative ac-
tion in higher education has now been determined, probably for
a generation, along precisely the lines that Powell laid out in 1978.

The evolution of Powell’s position from idiosyncratic outlier to
received wisdom is one of the most interesting and unlikely stories
in American constitutionalism. It tells us something about the risk
of a priori reasoning in an imperfect world and about the Supreme
Court’s power to influence the course of public opinion to which,
in the long run, the Court itself must respond. Ultimately, the
history of Powell’s opinion in _Bakke_ also challenges the way many
of us think about constitutional law.

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4 Id at 289 (“This semantic distinction is beside the point: the special admissions program
is undeniably a classification based on race and ethnic background.”).

5 123 S Ct 2325 (2003). Unless otherwise indicated, subsequent references are to _Grutter._
Occasional citations to its companion case, _Gratz v Bollinger_, 123 US 2411 (2003), are
specifically identified.

6 123 S Ct at 2370 (Kennedy, J, dissenting) (“The opinion by Justice Powell, in my view,
states the correct rule for resolving this case.”).
Although affirmative action has remained durably controversial in the years since Bakke, the constitutional landscape has changed. At that time, there were essentially two positions. Each was intellectually coherent and well grounded in the rhetoric and decisions of the Supreme Court, and each laid claim to the moral conscience of the nation. Although partisans on each side underrated the other, both positions had substantial merit. But if the two positions were arguably equipollent, they were also utterly incompatible.

One view, pressed in Bakke and today, is that the Constitution requires color-blindness. Absent a specific remedial justification, the Constitution should be interpreted to forbid any governmental consideration of race or ethnicity. The rhetoric dates at least from the first Justice Harlan, who from the incomparable prestige of his Plessy dissent, declared that, “Our Constitution is color-blind.” The sentiment was echoed by Martin Luther King, Jr., by the early Thurgood Marshall, and by a whole phalanx of law professors who, in the lead-up to Brown, insisted that, “Laws which give equal protection are those which make no discrimination because of race in the sense that they make no distinction because of race.” Racial classifications, they concluded, were “completely precluded” by the Constitution.

No one defended color-blindness more eloquently than Alexander Bickel. In the interval between the Court’s false start in De-

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7 Plessy v Ferguson, 163 US 537, 559 (1896) (Harlan, J, dissenting).
8 Dr. King famously dreamed that “my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character.” Martin Luther King, Jr., I Have a Dream, in James Melvin Washington, ed, A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 217, 219 (1986). This line was later paraphrased as the title of an influential attack on affirmative action. See Shelby Steele, The Content of Our Character: A New Vision of Race in America (1990).
9 See Brief for Appellants (No. 1) in Brown v Board of Education, 347 US 483 (1954), at 5 (“The State of Kansas has no power . . . to use race as a factor in affording educational opportunities to its citizens.”).
10 Brief of the Committee of Law Teachers Against Segregation in Legal Education in Sweatt v Painter, 339 US 629 (1950), at 8 (emphasis in original). The brief was written chiefly by Thomas I. Emerson of Yale and signed by 187 law professors.
11 Id. But see David A. Strauss, The Myth of Colorblindness, 1986 Supreme Court Review 99 (arguing that Brown “is not rooted in colorblindness at all,” but in a race-conscious nondiscrimination principle that is “logically continuous” with affirmative action).
Funis v Odegaard and its return to the issue in Bakke, Bickel voiced the dismay that many felt at the threat to that ideal: “The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.”

Bickel’s opponents argued that discrimination against minorities and discrimination in their favor were constitutionally different. After all, the “equal protection of the laws” guaranteed by the Fourteenth Amendment had been only recently and imperfectly achieved, and the fuller equality of which “the laws” gave promise remained a distant hope. Racial oppression required more than cessation; it required correction. It required more than a fastidious color-blindness, which did nothing to correct the legacy of a discrimination that had been neither fastidious nor color-blind. In short, wrong required remedy, and as the wrong had been racial, so too must be the remedy. For proponents of affirmative action, the immediate goal was not color-blindness but compensatory justice.

This argument grounded in the social and historical context of racial preferences drew strength from political theory. At least since Carolene Products, constitutional lawyers had posited a special judicial role in the protection of “discrete and insular minorities.” In 1978, arguments drawn from political process theory were much in the air. The series of articles that John Hart Ely would collect and expand in Democracy and Distrust (1980) were beginning to appear, and the idea of a “representation-reinforcing” approach...
to constitutional law was gaining ground. Especially to the extent (much greater in 1978 than today) that racial preferences were seen as disadvantaging an undifferentiated population of “whites,” political process theory had real bite. It countered the demand for the protection of all individuals with an argument against judicial intervention on behalf of majorities. The special judicial concern for those unable to compete in the political arena simply did not apply. Instead of the heightened scrutiny designed to look out for those who could not look out for themselves, benign discrimination should receive more relaxed review. The background rule of deference to majoritarian political decisions cut against strict judicial policing of affirmative action and in favor of permitting compensatory racial preferences approved or tolerated by the political branches.

Both of these positions made their way into the opinions in Bakke. Speaking for himself and three others, Justice Stevens insisted on color-blindness. He based his decision on Title VI of the 1964 Civil Rights Act, but since that statute had been (and still is) construed to follow the Equal Protection Clause, the opinion was read as a precursor of constitutional interpretation. For Stevens, the case was governed by principles of “individual equality” and “individual fairness,” principles that did not allow for efforts to do justice by groups or classes. On the other side, Justices Brennan, White, Marshall, and Blackmun rejected color-blindness and approved race-consciousness to remedy the effects of past dis-

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17 438 US at 418 (Stevens, J, with whom Burger, CJ, and Stewart and Rehnquist, JJ, joined, concurring in the judgment in part and dissenting in part).

18 Title VI forbids racial discrimination by recipients of federal funding, a category that includes most private universities.

19 For early decisions to this effect, see Goodwin v Wyman, 330 F Supp 1038, 1040 n 3 (SDNY 1971), aff’d (without opinion), 406 US 964 (1972) (“Essentially, the same showing is required to establish a violation of [Title VI] as is required to make out a racial discrimination violation of the Fourteenth Amendment’s Equal Protection Clause.”); Gilliam v City of Omaha, 388 F Supp 842, 847 (D Neb 1975) (following Goodwin). For subsequent decisions making the same point, see United States v Fordice, 505 US 717, 732 n 7 (1992) (“Our cases make clear . . . that the reach of Title VI’s protection extends no further than the Fourteenth Amendment.”); Guardians Ass’n v Civil Service Comm’n of City of New York, 463 US 582, 610 (1983) (Powell, J, concurring in the judgment) (“Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment”).

20 438 US at 416 n 19 (emphasis in original).
They relied on *Carolene Products* to justify less-than-strict scrutiny of remedial racial preferences and announced a general readiness to uphold "benign" racial classifications in admissions decisions.

Faced with a choice between these views, Powell rejected both. He stubbornly refused to accept either of the coherent and readily defensible ways of thinking about affirmative action and sent his clerks to search for a middle way. None of the intellectual or analytical difficulties they encountered turned him from his course. He knew precisely where he wanted to go and remained adamantly committed to getting there.

The motivation for Powell's resolve was largely negative. He recoiled from the consequences of both positions taken by his colleagues. On the one hand, he knew that rigorous adherence to color-blind admissions would very nearly eliminate African-Americans from elite institutions of higher education. The prospect of returning to all-white (or at least all non-black) medical schools, law schools, and colleges was repugnant. It would be bad for education and disastrous for race relations. At the very least, this was a step that the Supreme Court should not coerce. On the other hand, Powell also worried about the relaxed approach to racial preferences advocated by Brennan, White, Marshall, and Blackmun. Their approval of admissions quotas validated fixed commitments to various groups based on some metric of past discrimination. Powell feared that quotas would allow racial preferences to ripen into entitlements, to become entrenched as fixed percentages that could not readily be changed. He foresaw, in short, that admissions quotas would degenerate into a racial spoils system in higher education. Moreover, Powell saw little prospect that the compensatory rationale would place any meaningful limit on

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21 Id at 369 (opinion of Brennan, White, Marshall, and Blackmun, JJ, concurring in the judgment in part and dissenting in part) ("a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions otherwise might have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large").

22 Specifically, they borrowed from gender cases the formulation that has become known as "intermediate scrutiny." See 438 US at 359 ("racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives,'" quoting *Califano v Webster*, 430 US 313, 317 (1977) (quoting *Craig v Boren*, 429 US 190, 197 (1976))).

the duration of such preferences. Powell thought of affirmative action as a transition, a short-term departure from the ideal of color-blindness justified only by pressing necessity. Allowing minority set-asides to continue until all effects of past societal discrimination had been eliminated might mean they would last forever.

Powell therefore crafted an approach designed both to permit affirmative action and to constrain it. He wanted to allow racial preferences in higher education while preserving the grounds for objecting to them, to permit race-conscious admissions under current conditions without conceding their long-term future. In short, he wanted to say “yes” now, while implying “no” later.

The components of Powell’s mixed message are well known. On the one hand, he endorsed strict scrutiny. The use of this standard proclaimed that racial preferences were “in principle” unacceptable. It also assured a hospitable doctrinal ground for future attempts to curtail or limit affirmative action. On the other hand, Powell applied strict scrutiny with unexpected pliancy. As a result, racial preferences were allowed in fact, even as they were disapproved in theory. In specifying the compelling interest that justified that result, Powell avoided compensation and embraced diversity. Remediying the effects of past societal discrimination was a rationale that Powell thought justified too much and potentially for too long. Diversity was a softer and more fluid concept. It directed attention to participation rather than to compensation, to the importance of some, though not necessarily perfect, representation from all groups. Because diversity was a less ambitious goal, it could plausibly be the sooner achieved. Most important, diversity put the justification for racial preferences squarely on improving the educational experience of all students, rather than on helping a favored few. If, as educators insisted and Powell believed, racial, ethnic, and other kinds of diversity in the classroom enhanced the education of all students, then the search for minority representation could be seen as sound educational policy, not racial favoritism.

The trouble was that racial and ethnic diversity—which of course was the only sort that raised constitutional concerns—was most readily achieved through the kinds of admissions quotas that Powell had determined to strike down. He solved this problem by the intellectual equivalent of brute force. True diversity, he said,
the diversity “that furthers a compelling state interest,” encompasses qualifications and characteristics beyond race. Quantification of racial preferences (for some unexplained reason) inhibited consideration of other factors. Therefore, setting aside a specified number of places for ethnic or racial minorities “would hinder rather than further attainment of genuine diversity.” In this way, the concept of “genuine” diversity acquired a plastic quality, justifying racial preferences insofar, and only insofar, as Powell did not find them offensive.

Time magazine summarized Bakke as, “Quotas No, Race Yes.” To communicate this ambivalence to the public at large, Powell hit upon a brilliant stratagem. Where the docket showed one case, Powell created two. He struck down the U.C. Davis admissions program with its strict numerical set-aside, but upheld the Harvard College admissions policy, which was not before the Court but which Powell nevertheless quoted at length. “In such an admissions program,” he said approvingly, “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.” Having created two cases where there was in fact one, Powell then split his vote between them. At the suggestion of Justice Brennan, Powell styled his opinion not simply as affirming the decision below, which had struck down the Davis program, but as affirming in part and reversing in part.

As he announced from the bench on decision day: “Insofar as the California Supreme Court held that Bakke must be admitted to the Davis Medical School, we affirm. Insofar as the California Court prohibited Davis from considering race as a factor in admissions,

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24 438 US at 315.
25 Id.
26 Time (July 10, 1978).
28 Id at 317.
29 The story of Brennan’s intervention and Powell’s response is told in Jeffries, Powell Biography at 486–87 (cited in note 2). Subsequently, Chief Justice Burger tried to persuade Powell to join a narrow opinion striking down the Davis admissions quota but leaving the acceptability of other affirmative action programs to another day. Powell rejected the overture and insisted on sticking with his bifurcated approach. See id at 488–89.
we reverse.\textsuperscript{30} The invention of a split result broadcast to the nation in the clearest possible terms Powell’s attempt at compromise.

The result reached by Powell in \textit{Bakke} provoked mixed reactions, as would have been true of any outcome in that case, but many specifically approved the split decision. The \textit{Washington Post} concluded that “everyone won,”\textsuperscript{31} a sentiment echoed by Griffin Bell, who thought “the whole country ought to be pleased.”\textsuperscript{32} When attention turned from the result to the reasoning, reactions changed. Reviews of the intellectual craft of Powell’s opinion were largely negative and sometimes scathing. Guido Calabresi found the decision “totally disappointing. In a deep sense, it settled nothing.”\textsuperscript{33} Vincent Blasi asked whether “Mr. Justice Powell Has a Theory?” and found “a disturbing failure . . . to give coherent, practical meaning to our most important constitutional ideals.”\textsuperscript{34} Harry Edwards gave the opinion “poor marks,”\textsuperscript{35} and Ronald Dworkin found Powell’s compromise “without sound intellectual foundation.”\textsuperscript{36} John Hart Ely thought Powell had forgotten that he was “not being asked to devise an affirmative action program but rather to rule on the constitutionality of the one the California officials have devised.”\textsuperscript{37} Critics from both the left and the right homed in on the difficulty of Powell’s distinction between goals and quotas. As Laurence Tribe asked, “If it is not ‘discriminatory’ in some invidious or otherwise forbidden sense to prefer minorities on a case-by-case basis, why is it ‘discriminatory’ to do so more

\textsuperscript{30} Quoted in Jeffries, \textit{Powell Biography} at 494 (cited in note 2).


\textsuperscript{34} Vincent Blasi, \textit{Bakke as Precedent: Does Mr. Justice Powell Have a Theory?} 67 Cal L Rev 21 (1979).


mechanically and in gross?" Robert Bork made the same point from the other direction: "[W]e have at bottom a statement that the Fourteenth Amendment allows some, but not too much, reverse discrimination. Yet that vision of the Constitution remains unexplained. . . . [I]t must be seen as an uneasy compromise resting upon no constitutional footing of its own." Antonin Scalia's comment was equally negative and characteristically colorful: "Justice Powell's opinion, which we must work with as the law of the land, strikes me as an excellent compromise between two committees of the American Bar Association on some insignificant legislative proposal. But it is thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution."

What no one doubted was that Powell's opinion was, as Scalia put it, "the law of the land." Obviously, the four-one-four split robbed the decision of a clear majority position, but courts and commentators focused on Powell's fifth vote, as did admissions departments across the country. The reason was simple. On any plausible reading of their opinion, Brennan, White, Marshall, and Blackmun were far more tolerant of racial preferences than Lewis Powell. This was evident in their reliance on remedial rationale, which had a broader reach and less flexibility than diversity, and in the "intermediate" standard of scrutiny. Powell's fifth vote rested on a narrower rationale and a more demanding standard of review. Even though no one shared Powell's position, it nevertheless ended up defining the kind of affirmative action that a majority of the Court was prepared to uphold.

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Or at least, for a generation, so we thought. Eventually, anti-affirmative-action activists began to claim not merely that


40 Antonin Scalia, The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race," 1979 Wash U L Q 147, 148.

41 See, for example, UWM Post, Inc. v Bd of Regents of University of Wisconsin System, 774 F Supp 1163, 1176 (ED Wis 1991) (citing Powell's opinion as authority for the proposition that "[i]ncreasing diversity is 'clearly a constitutionally permissible goal for an institution of higher education'"); Davis v Halpern, 768 F Supp 968, 975 (ED NY 1991) (finding that
Powell's position was ill-founded or illogical or unwise—all of which were eminently arguable—but that it was not the law. They sought to annul Bakke as precedent by arguing that the five Justices who approved race-conscious admissions had no common ground and therefore that their votes could not be summed up in favor of any position. The basis for this surprising revisionism was a phrase in a Brennan footnote: "We also agree with Mr. Justice Powell that a plan like the 'Harvard' plan is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." Conceivably, in some other universe, the lingering effects of past discrimination might already have been resolved. If, therefore, one fixed on the phrase from the Brennan footnote and ignored the text to which that footnote was appended, one could come up with an apparently straight-faced argument that Brennan et al. were in fact more restrictive of affirmative action than Powell and that Powell's position therefore did not command five votes. By this reasoning, anti-affirmative-action activists asked the lower courts to disregard Bakke as precedent and to strike down racial preferences without awaiting further

the "proper purposes" for which racial classifications have been upheld by the Supreme Court include "that of a university's obtaining the benefits which flow from enrolling an ethnically diverse student body"); Uzzell v Friday, 592 F Supp 1502, 1516 (MD NC 1984) (holding that "the opinion of Justice Powell [in Bakke] is the one which governs this case").

See, for example, Brief for Petitioner in Grutter v Bollinger, 123 S Ct 2325 (2003), at 28–29 (declaring that "the opinions in Bakke leave unanswered the question of whether interests in academic freedom or diversity are compelling state interests justifying racial preferences in admissions"); Curt A. Levey, Racial Preferences in Admissions: Myths, Harms, and Alternatives, 66 Albany L Rev 489, 492 (2003) (arguing that the Bakke opinions had no "common denominator" and therefore could not be read together).

"438 US 326 n 1 (opinion of Brennan, White, Marshall, and Blackmun, JJ) (citation omitted).

"Id at 326 (opinion of Brennan, White, Marshall, and Blackmun, JJ): We agree with Mr. Justice Powell . . . that the effect of the [California court's judgment] would be to prohibit the University from establishing in the future affirmative-action programs that take race into account. Since we conclude that the affirmative admissions program at the Davis Medical School is constitutional, we would reverse the judgment below in all respects. Mr. Justice Powell agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.

To read this language as expressing reluctance to go as far as Powell in approving affirmative action requires at least one blind eye. Certainly, Powell himself suffered no confusion on whose was the broader and whose the narrower rationale. See 438 US at 294 n 34 (criticizing Brennan et al. for too readily finding justification for racial preferences).
word from the Supreme Court. And they succeeded. The Fifth Circuit professed itself unable to discern that Bakke had upheld racial preferences and declined to "read its fragmented opinions like tea leaves, attempting to divine what the Justices 'would have held'" had they been willing to go as far as Powell. Instead, the Fifth Circuit chose to read the tea leaves of new appointments and to base its decision on a prediction—a quite plausible prediction—that color-blindness would carry the day on the Rehnquist Court.

By the time the Michigan cases reached the Court, Bakke's demise seemed almost certain. As Linda Greenhouse said, "Bakke had been dying an incremental and very public death for fifteen years, and it seemed most unlikely that either of the Michigan programs would survive. . . . Maybe, just maybe, the Court would be persuaded not to shut the door completely, but even that prospect seemed dubious." Oral argument may have given a hint that Bakke was not quite dead, but the strength and clarity with which the Court embraced it took almost everyone by surprise.

What was not surprising was the Justices' dismissal of the debate over Bakke as precedent. Faced with quibbling about how to count to five, they grandly waived the issue aside, saying that Powell's analysis in Bakke, whether previously controlling or not, from this day would be: "[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." Speaking through Jus-

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45 Hopwood v State of Texas, 236 F3d 256, 275 n 66 (5th Cir 2000) (sometimes known as Hopwood II).

46 It is a nice question whether the judges of the Fifth Circuit and others inclined to that view of the Constitution should have felt entitled to disregard Bakke on grounds of age and apparent infirmity, without resort to hypertechnical misinterpretation. My own inclination would be to regard considered rejection of Supreme Court precedent by the lower courts as acceptable in principle, though the Court has cautioned against that view. See, for example, Agostini v Felton, 521 US 203, 237-38 (1997) (reaffirming that, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions," quoting Rodriguez de Quijas v Shearman/Amex, 400 US 477, 485 (1989)).


48 For an anguished recognition of the Supreme Court's take-it-or-leave-it attitude toward prior decisions, read Justice Scalia's account of his colleagues' willingness to accord stare decisis effect to Roe v Wade but not Bowers v Hardwick in Lawrence v Texas, 123 S Ct 2472, 2488-91 (2003).

49 Grutter, 123 S Ct at 2337.
tice O'Connor, the Court then proceeded to recapitulate Powell's analysis and adopt his reasoning. The logical frailty that "genuine" diversity allowed individualized consideration of race but prohibited quantified advantage was enthusiastically embraced. Powell's example of the Harvard admissions approach, which allowed race to be a (potentially decisive) "plus" factor in an applicant's file, was exhumed, restated, and reaffirmed.

In fact the principal focus of debate among the Justices was not whether Powell's was the right approach—on which the agreement was surprisingly broad—but on whether the Michigan admissions programs sufficiently tracked his analysis. On one side, Justice Kennedy agreed with Powell's standard but dissented from the judgment upholding racial preferences on the ground that the Law School had gone too far. On the other side, Justices Souter and Ginsburg dissented from the judgment striking down undergraduate racial preferences, taking the view that the undergraduate admissions program satisfied Powell's approach. However one may characterize these variations on a theme, there seems to be a clear majority on the current Court for Powell's position from 1978.

In other respects as well, last term's affirmative action cases echoed Bakke. In a bit of brilliant lawyering, the University of

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50 123 S Ct at 2342 ("As Justice Powell made clear in Bakke, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks.").

51 Id at 2342–46.

52 Id at 2370 (Kennedy, J, dissenting) ("The [Bakke] opinion by Justice Powell, in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny.").

A similar characterization could be made, albeit less persuasively, of the dissenting opinion of Chief Justice Rehnquist. He cited and quoted Powell opinions in rejecting the Law School's admissions policies as not "narrowly tailored," see, for example, 123 S Ct at 2365 (Rehnquist, CJ, with whom Scalia, Kennedy, and Thomas, JJ, join, dissenting), but he gave less reason to think that any form of racial preference would survive his review. It may be better, therefore, to think of Rehnquist, along with Scalia and Thomas, as adhering to strict color-blindness, which of course is fundamentally at odds with Powell's opinion in Bakke. See 123 S Ct at 2350 (Scalia, J, with whom Thomas, J, joined, concurring in part and dissenting in part) ("The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."); Gratz, 123 S Ct at 2433 (Thomas, J, concurring) ("I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.").

53 Gratz, 123 S Ct at 2439–42 (opinion of Souter, J, joined in relevant part by Ginsburg, J, dissenting) (explaining at length why the undergraduate admissions program should be viewed as "closer to what Grutter approves than to what Bakke condemns").
Michigan litigated two lawsuits simultaneously and acquiesced in rushing the undergraduate admissions case to the Supreme Court by prejudgment certiorari.\(^5\) This strategy gave the Justices something to strike down as well as something (it was hoped) to uphold,\(^5\) thereby allowing the Court to replicate the bifurcated judgment that Powell reached in *Bakke*. The *Grutter* Court also echoed Powell's view, never made publicly explicit, that racial preferences should be temporary and transitional. At the *Bakke* conference, held on December 9, 1977, Powell agreed with Stevens that racial preferences might be acceptable temporarily but not as a permanent solution.\(^6\) As the conversation veered toward common ground with the affirmative action supporters, Justice Marshall broke in to say that the need would last a hundred years. Marshall may have been right, but Powell recoiled at the prospect. Twenty-five years later, the Court gave a more sober estimate of the life of the preferences it upheld:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed improved. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.\(^5\)

In one respect only did *Grutter* depart from *Bakke*, and that was not to confine or curtail Powell's reasoning but to broaden its focus and extend its reach. Justice O'Connor championed diversity not only in the classroom but beyond. After noting that higher education "must be accessible to all individuals regardless of race or ethnicity,"\(^5\) she connected education to leadership: "Effective participation by members of all racial and ethnic groups in the civic life of..."

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\(^5\) Given that the university had won both cases below, it did not, of course, directly encourage Supreme Court review, but it did urge the Court to grant prejudgment certiorari in *Gratz* if it chose to hear *Grutter*. University of Michigan, Brief in Conditional Opposition to Certiorari Before Judgment in *Gratz v Bollinger*, 123 S Ct 2411 (2003), No 02-516 (filed October 29, 2002).

\(^5\) In my view, the University of Michigan’s defeat on the undergraduate admissions program was clearly foreseeable. That, at least, was the judgment reached several years ago when my university abandoned a very similar point system in its undergraduate admissions.

\(^6\) This story is told in Jeffries, *Powell Biography* at 487–88 (cited in note 2).

\(^5\) *Grutter*, 123 S Ct at 2346–47.

\(^5\) Id at 2340.
our Nation is essential if the dream of one Nation, indivisible, is to be realized." And again: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." It may be possible to confine these words to law schools (which, as O'Connor noted, produce a disproportionate share of public officials) or to higher education generally, but it may also be that diversity has now been writ large to include public institutions generally. The Court's emphasis on amici filings from American industry and the miliary reinforces that broad reading. Just how far the Court meant to extend Bakke beyond the sphere of education will be the subject of future litigation. For now, it is enough to note that the debate has shifted from whether Bakke would be overruled to how far it will be extended.

In addition to the unapologetic embrace of Powell's opinion in Bakke, one other aspect of last term's decisions merits mention, and that is the scant attention paid to the misleading suggestion that racial integration of higher education can somehow be maintained without reference to race. Justice Thomas did mention the University of California at Berkeley, noting that Boalt Hall enrolled fourteen African-Americans (and thirty-six Hispanics) in the entering class in 2002, as compared to twenty African-Americans (and twenty-eight Hispanics) in the entering class in 1996, despite the intervention of Proposition 209 prohibiting all consideration of race. What Thomas did not say is that in the year after Proposition 209, African-Americans at Berkeley dropped from twenty to

59 Id at 2340–41.
60 Id at 2341.
61 See id at 2340 (citing and relying on amici briefs filed on behalf of "65 leading American Businesses," including Minnesota Mining & Manufacturing, Coca-Cola, Texaco, and Dow Chemical, and a group of "high-ranking officers and civilian leaders of the Army, Navy, Air Force, and Marine Corps, including former military-academy superintendents, Secretaries of Defense, and present and former members of the U.S. Senate").
62 123 S Ct at 2359 (Thomas, J, dissenting) (noting that "the sky has not fallen at Boalt Hall").

Proposition 209 is now Cal Const, Art 1, s 31(a), which provides:

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
one and that the slow and partial rebound in African-American enrollment has been accompanied by the reemergence of a large gap in numerical qualifications. For the entering class in 2002, the median LSATs for whites and African-Americans at Boalt Hall were 166 and 157, respectively. This gap was the same as that in the same entering class at the University of Michigan, which openly took race into account and litigated to the hilt the necessity of doing so. It is hard to suppress the doubt that Berkeley’s admissions decisions are color-blind. One has only to imagine what would happen if the racial identifications were reversed. Suppose a university or an employer routinely preferred whites with lower numerical qualifications over African-Americans with higher numbers and claimed that this consistent and substantial disparity resulted wholly from individualized assessments having nothing to do with race. One need not pause long before predicting the outcome of that litigation. I think it reasonable to conclude that if all consideration of race were barred from admissions decisions at elite educational institutions and if that policy were enforced with the vigor and resourcefulness.

The figures for the entering classes in 1996 through 2003 are as follows:

<table>
<thead>
<tr>
<th>Fall Entering Class</th>
<th>African-Americans</th>
<th>Mexican-Americans and Other Hispanics</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>20</td>
<td>28</td>
</tr>
<tr>
<td>1997</td>
<td>1</td>
<td>14</td>
</tr>
<tr>
<td>1998</td>
<td>8</td>
<td>23</td>
</tr>
<tr>
<td>1999</td>
<td>7</td>
<td>16</td>
</tr>
<tr>
<td>2000</td>
<td>7</td>
<td>18</td>
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<tr>
<td>2001</td>
<td>14</td>
<td>17</td>
</tr>
<tr>
<td>2002</td>
<td>14</td>
<td>36</td>
</tr>
<tr>
<td>2003</td>
<td>16</td>
<td>38</td>
</tr>
</tbody>
</table>

The data are available at http://www.ucop.edu/acadadv/datamgmt/lawdata/lawschol2.html.


The situation at UCLA is no more encouraging for those who claim to achieve racial diversity without reference to race. In the aftermath of Proposition 209, UCLA, which had the advantage of location in one of the nation’s most diverse cities, made a concerted and sophisticated effort to recruit broadly through consideration of social and economic disadvantage. African-American enrollment fell to a low of three in 1999 and slowly rebounded to sixteen in the 2003 entering class. Data cited in note 63. Much of this improvement seems to have been due to programmatic admissions associated with an academic concentration in Critical Race Studies. Whether an admissions track for Critical Race Studies can fairly be termed color-blind is open to debate.
that anti-affirmative-action activists could bring to bear, the effect on African-American enrollment would be huge.66

Indeed, Thomas and Scalia implicitly concede the point in their remarks on “elite” education. If it were indeed true that racial diversity could somehow be achieved without reference to race, there would be no need to choose between racial diversity and admissions selectivity. Yet under current conditions, color-blindness would force exactly that choice. Thomas and Scalia recognized and confronted that dilemma. They were understandably reluctant to advocate resegregation, so instead they attacked academic selectivity. Thomas said that “Michigan has no compelling interest in having a law school at all, much less an elite one.”67 Scalia dismissed Michigan’s desire to maintain a “prestige” law school, saying “[i]f that is a compelling state interest, everything is.”68 The full measure of their disdain for “elite” institutions became evident in their scorn for those who run them. For Thomas and Scalia, law school administrators are mere “aestheticists,” unconcerned with students’ “knowledge and skills,” seeking only the “facade” of a class that “looks right, even if it does not perform right.”69

In Grutter, the dissenters confined their contempt to elite public institutions,70 leaving the implication that perhaps private universities could do as they pleased. Indeed, the rhetorical plausibility (if any) of their attack on elite public education derives from the unstated assumption that elite private universities would continue to

66 It is interesting to speculate on why anti-affirmative-action activists in California have not tried to enforce Proposition 209 more rigorously. One possibility is that the reemergence of (unacknowledged) racial preferences has occurred gradually and recently, and opponents have not yet had time to mount another attack. Another possibility is that the anti-affirmative-action activists made a tactical decision not to press their victory in California until the Supreme Court ruled in the Michigan cases. Sharp reductions in minority enrollment, of the sort that occurred in the immediate aftermath of Proposition 209, would have hurt their cause in the Supreme Court. A third possibility is that the anti-affirmative-action activists, or at least some of them, care less about the actual practice than about the announced principle.

67 123 S Ct at 2354 (emphasis in original).
68 Id at 2349.
69 Id at 2354 (Thomas, J, with whom Scalia, J, joined (in relevant part), concurring in part and dissenting in part).
70 Id (Thomas, J, with whom Scalia, J, joined (in relevant part), concurring in part and dissenting in part) (“there is no pressing public necessity in maintaining a public law school at all”).
flourish. But if, as has been true to date, the constitutional standards of the Equal Protection Clause end up controlling Title VI, then private institutions would also have to choose between racial representation and academic selectivity. The effects of thoroughgoing color-blindness are therefore difficult to contemplate. The most prestigious, powerful, and enabling universities in the country would be forced either to enroll classes in which certain minorities would be largely absent or to overthrow the principles of selectivity and excellence on which the institutions were built. The willingness of Thomas and Scalia to confront that dilemma at least confirms their intellectual honesty. Whatever may have been said about the experience at Berkeley, they know full well that rigorous exclusion of race from admissions decisions would preclude meaningful racial diversity in the classrooms of all the nation’s leading law schools.

III

This review of the Michigan decisions prompts three comments. All are personal, in the sense that they are matters of opinion, but the first is especially so.

I have come—slowly—to the view that Powell in *Bakke* was exactly right. He was right to allow racial preferences and also right to deploy the Constitution against their formalization and entrenchment. Moreover, the reasons for thinking Powell right in 2003 are essentially the same as those he would have given in 1978—namely, the unacceptability of the alternatives. If all consideration of race were squeezed out of admissions decisions, the prospects of white and Asian applicants would be marginally improved (owing to the impact of a few additional places on their greater numbers), but the prospects of African-American applicants (and certain other minorities) would be drastically reduced. A sharp cutback in African-American enrollment would hurt the law schools and hurt the nation. It would exacerbate a sense of grievance that already has more than adequate foundation. It would deprive the African-American community of a cadre of potential leaders. And it would make it that much harder for minorities to maintain a full commitment to our common future as Americans.

Additionally, rigorous color-blindness would deprive nonminority students of the personal, professional, and educational advan-
tages of living and learning with minorities. This last point is sometimes dismissed by those who are far away from educational institutions, but I believe it is keenly felt by those who work and study in them. There are undoubtedly nonminority students eager for the "last" place in Michigan or Virginia (or Harvard or Yale, if Title VI were so read) and willing to accept that benefit under almost any circumstances, but there are many more students enrolled in those institutions who recognize that their experience would be impoverished by the absence of minorities. Under current conditions, strict color-blindness, if unambiguously adopted and rigorously enforced, would impair the quality of the education of all law students.

Perhaps less obviously, I think we would also have come to rue the more generous approach advocated by Brennan, White, Marshall, and Blackmun. Racial set-asides in higher education, which they were prepared to tolerate, would have been the most efficient way to achieve diversity in the classroom, but they would have proved corrosive. Any allocation of spaces on the basis of race or ethnicity would have been challenged as conditions changed, and those challenges would have been anything but edifying. Imagine the questions that would have been triggered by the growth of the Latino population. It seems obvious that the number of Latinos sought to be enrolled in California (and other) institutions would have increased, but on what calculation and by how many? Would the percentage of Latinos in the nation be the benchmark, or the percentage in California? Would gross population count, or only those over a certain age, or only those with certain minimum (English-language) test scores? And who would meet the ethnic definition? Would European-Americans be included simply because they had Hispanic surnames? Even if they didn’t speak Spanish?

Most damaging of all would be the question of who pays for racial set-asides. If the number of Latino spaces increased, would the additions come from other ethnic minorities with their own claims for special treatment? From African-Americans? From capping the growing Asian population? Or would the category of undifferentiated "whites" become the universal donor for ever-increasing commitments elsewhere?

These are not pretty questions, and the debates occasioned by them could scarcely fail to divide and wound. Plausible arguments could and would be found to support different positions, which
would then become the focus of coalitions organized around ethnic identity. Whatever allocations were made on day one would quickly come to feel like permanent entitlements to those who benefited from them, and whatever adjustments were not made on day two would as quickly become sources of grievance to those who did not prosper. The prospect of perpetual competition over racial and ethnic allocations is one that none should welcome, yet it is hard to see how approval of the Davis “quota” could have led anywhere else.

It is against this prospect that the uses of ambiguity come to the fore. As Paul Mishkin noted, Bakke “amounted to a proclamation of ambivalence that dramatically recognized and proclaimed the existence of legitimate moral and constitutional claims on both sides of the issue.” The refusal to give a clear answer had benefits that are practical and concrete, as well as rhetorical and symbolic. If the advantages accorded racial and ethnic minorities are not explicitly stated, they need not be explicitly undone. If adjustments are not announced and contested, a steady progression of divisive debates can perhaps be avoided. The burying of racial preferences in “plus” factors for certain individuals obscures and softens the sense of injury that even the most dedicated proponents of affirmative action must acknowledge will be felt by those who are disadvantaged for reasons they cannot control. Law schools will be better, happier, and more productive places if the lines separating the students who inhabit them are not harshly drawn.

This endorsement of Powell’s position in Bakke does not depend, however, on ease of academic administration. On the contrary, I think it a virtue of Powell’s compromise that it does not give law school (and other) administrators a perpetually free hand. Racial preferences in admissions may be justified, as I believe, by pressing necessity, but they are not something to which we should readily grow accustomed. They are desirable only in the limited sense that, under current conditions, living with them is better than living without them. As conditions change, we should be alert to the necessity to change with them and to curtail or eliminate racial “plus” factors as soon as possible. This inchoate future negative, the preservation of doctrinal objections and normative under-

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standings that call for racial preferences to end, is also part of Powell's legacy. It is as important—and as valuable—as his willingness to allow racial preferences in the interim.

A second observation prompted by the revivification of Powell's position in Bakke concerns the relationship between Court and country. History-minded scholars (and others) have challenged the notion that it is the business of the Supreme Court to lead the nation out of darkness. I think particularly of my colleague Michael Klarman, who has argued that even Brown v Board of Education, the most mythogenic and justifying of all modern decisions, was in fact more nearly a reflection of an emerging national consensus than a heroic attempt to uproot one. The broad tides of social change sweep the Court along with the country, and rarely do the Justices stand long in the way. There is much to be said for this perspective, not least as a corrective to the extravagant judiciocentrism that pervades constitutional law classrooms, but there are also small acts of individual judgment or personality that profoundly affect the course of events. The division of opinion in Bakke shows that Lewis Powell's view of the matter was, at least among the Justices, idiosyncratic. If there was some broad movement propelling the country toward Powell's peculiar compromise, it seems to have bypassed his colleagues without noticeable effect. Had he not been there—and had the others not been evenly split—it is likely that the Court would have given the great question of affirmative action a clear answer, with the "sound intellectual foundation" that Ronald Dworkin so desired. And the nation would have suffered for it. Bakke's failure to achieve intellectual clarity—or, as I would prefer, its sacrifice of cogency for wisdom—resulted chiefly from the participation of one intransigent moderate who occupied ground he could not adequately defend, save by insisting that it lay between two alternatives he would not accept. Powell's compromise was uniquely his own.

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72 See generally Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality, chaps 6 and 7 (Oxford, 2004). For a more suggestive argument in the same direction, see John C. Jeffries, Jr. and James E. Ryan, A Political History of the Establishment Clause, 100 Mich L Rev 279 (2001) (analyzing modern Establishment Clause decisions "as if they were political" (emphasis in original)).

With due allowance for the ultimate unknowability of historical "what-ifs," it is hard to believe that *Grutter* and *Gratz* would have come to rest on the same ground absent Powell in *Bakke*. Powell's opinion created space and opportunity for support to coalesce around his middle way. Without that opportunity, the Justices in 2003 would not have been confronted with prestigious testimonials for "plus-factor" diversity.\(^7\) They would not have been reassured by a generation of qualified success. Most important, the frailty of reasoning that Powell's contemporary critics found so distressing would not have been shored up by experience. Leading scholars two decades later would not have been rhapsodizing about Powell's "vision of the unique democratic value of diversity in education" and his "powerful theory" of educational benefit,\(^7\) much less defending his much-maligned distinction between quotas and goals.\(^7\) *Bakke* bought time, and in that time a position that had once been perceived as eccentric came to seen as wise.

This is not to say, of course, that Powell's position prevailed in *Grutter* and *Gratz* entirely because of its merits, intellectual or otherwise. At least with the election of the second President Bush, if not before, proponents of affirmative action recognized Powell's compromise as the only game in town. The sometimes bitter criticism leveled against Powell from the left\(^7\) faded in appreciation of the value of half a loaf. In part, therefore, the growth of support for Powell's position was tactical. That said, it is also true that Powell prevailed in part because of who and where he was. His position at the center of an equally divided Court meant that he spoke for the institution. In *Bakke*, Powell's view was decisive on the Court, and the prestige and authority of the institution gave his position weight and prominence that could never have been achieved by strength of reasoning. One need not believe that the Justices can permanently thwart popular conviction or force the nation where it will not go, in order to recognize that the Supreme

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\(^{74}\) See note 61.


\(^{76}\) Id at 1772–74 (arguing that using race "as one consideration among many" minimizes the costs and disadvantages of a more categorical approach).

\(^{77}\) When *Bakke* was announced, Congressman Ronald V. Dellums pronounced himself "appalled" by the "racist decision," and Jesse Jackson called on blacks to "rebels." See Jeffries, *Powell Biography* at 496 (quoting and referencing these reactions) (cited in note 2).
Court has a voice in shaping public opinion. In *Bakke*, the exercise of that voice fell to Lewis Powell, and the results a quarter-century later reveal his impact.

Finally, it is startling to note how little either the insight or the impact of Powell’s opinion in *Bakke* depended on his abilities as a lawyer. That is not to say that he lacked those abilities. Powell was a good lawyer and an uncommonly successful one. But his achievement in *Bakke* came despite, not because of, the constraints of legal reasoning. To the extent that the law as an intellectual craft influenced Powell in *Bakke*, it would have pushed him toward one of the “clear answers” provided by his colleagues. Either the Constitution required color-blindness, now and forever, as the Court itself had so often insisted, or racial preferences in favor of minorities were qualitatively different from discrimination against them and should be judged by a more tolerant constitutional standard. Neither argument is hard to write. What Powell did was to reject both arguments and to consign himself and his clerks to the frustrating and perhaps impossible task of finding an analytically presentable way of splitting the difference. The resulting opinion is well written, admirably clear, anything but slapdash. But beneath the skillful prose and careful exposition lie difficulties that no artful phrasing can resolve. The lesser of those difficulties, at least in retrospect, is the watering-down of strict scrutiny. The notion of rigid tests with definite content has lost ground over the years, so that the departure from doctrine no longer seems as violent as it once did. The greater problem, of course, is the invention of “genuine” diversity as a concept that validated the end of racial preferences but disallowed the use of efficacious means to that end. Powell himself knew the weakness of his position, yet persisted in it. Yet if there was any special foresight in Powell’s view, any gift of wisdom that justifies our later celebration of his position, it lies precisely in the analytic incongruity of “genuine” diversity. Without his willingness to embrace that contradiction—and to live with the criticism it provoked—Powell’s compromise would have failed.

In short, *Bakke* provides a particularly telling example of constitutional adjudication as an appeal to the future. A generation ago,

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78 A narrative of the efforts of Powell’s chambers to produce the *Bakke* opinion appears in Jeffries, *Powell Biography* at 468–78 (cited in note 2).
Alexander Bickel inveighed against the Supreme Court’s “refusal, too often, to submit to the discipline of the analytically tenable distinction . . . .”\(^7\) He insisted on “reason in the judicial process, on analytical coherence, and on principled judgment no matter now narrow its compass.”\(^8\) The problem, as he saw it, lay in the seductiveness of the “idea of progress” and in the Justices’ (he spoke specifically of the Warren Court) willingness to seek vindication in future events rather than validation by contemporary reasoning.\(^9\) In part, of course, Bickel was criticizing judicial triumphalism, and of that Powell—at least in \textit{Bakke}—cannot fairly be accused. His position was not venturesome but fundamentally defensive, trying on the one hand to stave off a radical shift to strictly color-blind admissions while seeking on the other hand to preserve that ideal for future generations. He aimed less to remake the world by his lights than to ease the transition to a world we all agree is better for us all.

But if Powell in \textit{Bakke} cannot fairly be charged with hubris, he does stand rightly accused of subordinating craft to outcome and of discharging the powers of his high office with a bet on the future. Whether such decisions are always unwise, or whether they are even avoidable, are more difficult questions.

Many years later, Richard Posner took a gentler view of such decisions in his defense of legal pragmatism.\(^8\) “Everyday pragmatists,” of whom Powell is surely an exemplar, are not, says Posner, indifferent to systemic concerns, but they are forward-looking, attentive to consequences, and empiricist.\(^9\) Moreover, they are “hostile to the idea of using abstract moral and political theory to guide judicial decisionmaking.”\(^10\) This is as precisely applicable to Powell in \textit{Bakke} as any general description could be. And in this view, Posner emphasizes, “there is no special analytical procedure that

\(^7\) Alexander M. Bickel, \textit{The Supreme Court and the Idea of Progress} 81 (1970).
\(^8\) Id.
\(^9\) Id at 11–12 (“Historians a generation or two hence . . . may barely note, and care little about, method, logic, or intellectual coherence, and may assess results in hindsight—only results, and by their future lights. . . . [O]ne sensed that this was what the Justices of the Warren Court expected, and that they were content to take their chances. They relied on events for vindication more than on the method of reason for contemporary validation.”).
\(^11\) Id at 59–60.
\(^12\) Id.
distinguishes legal reasoning from other practical reasoning.”85 The two are “continuous,” “so that no wide gulf separates judges from other decisionmakers, public and private.”86

As a normative matter, this account of judging is deeply controversial. I have said enough to indicate where my sympathies lie, at least for the occasional great case where much is at stake and little is clear, but I do not wish to enter that debate in any general way. My purpose, rather, is to suggest that Posner’s claim must be stronger and more controversial than he reveals, though surely not than he understands. It is not enough to say that “there is no special analytical procedure that distinguishes legal reasoning from other practical reasoning” nor any “wide gulf” between judges and political actors. As Bickel clearly saw and sharply regretted, sometimes the “special analytic procedure” of legal reasoning thwarts pragmatic decisions. Sometimes, there is indeed a “wide gulf” between legal reasoning and political wisdom. Sometimes, the gap between the conventional criteria of judging—what Bickel called “reason in the judicial process,” “analytic coherence,” and “principled judgment”—and a politically far-sighted decision is unbridgeably large. Where that is true, there is no easy melding of legal craft and political insight. The judge must choose between them.

Regents of the University of California v Allan Bakke was precisely such a case. The choice Powell faced there was not merely between two analytically coherent positions, but between analytical coherence on the one side and his hopes for the nation on the other. His reputation as a judge will stand or fall on the choice he made. So far, the returns look good.

85 Id at 73.
86 Id.