Washington and Lee Law Review

Volume 49 | Issue 1 Article 8

Winter 1-1-1992

# Quotas, Politics, and Judicial Statesmanship: The Civil Rights Act of 1991 and Powell's Bakke

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# QUOTAS, POLITICS, AND JUDICIAL STATESMANSHIP: THE CIVIL RIGHTS ACT OF 1991 AND POWELL'S *BAKKE*

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## INTRODUCTION

The term "quota" as part of national political discourse had its most recent major airing in the legislative process leading to passage of the Civil Rights Act of 1991.[1] The term had more extended, but more muted, airing in the civil rights jurisprudence of the United States Supreme Court in the years just before and just after the retirement of Justice Lewis F. Powell, Jr. The term also underlay, but was not explicitly aired in, Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*.[2] In each of these contexts the rhetorical power of the term was apparent, but only in *Bakke*, a case that touched the core of national anxiety on the question of race and opportunity, was the term "quota" not used for its most powerful political effect. That restraint is an important feature of an opinion that captures much of what makes Justice Powell, in Professor Powe's phrase on the pages of this symposium, "a quintessential centrist."[3]

Centrism, however, suggests a point on the political spectrum. Other common characterizations of Powell's work have less obvious political content—characterizations of the Justice as the pragmatist, the conciliator, and the skilled judicial craftsman.[4] But Powell's particular compromise on the difficult and emotionally charged issue in *Bakke* invites the view that there may be even more—that perhaps the decision transcended the ordinary judicial act and represented a form of statesmanship.[5]

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1. Pub. L. No. 102-166, 105 Stat. 1071.

2. 438 U.S. 265 (1978).

3. L.A. Powe, Jr., *The Court Between Hegemonies*, 49 WASH. & LEE L. REV. 31, 31 (1992).

4. *See, e.g.*, Gerald Gunther, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 409 (1987).

5. The term "statesmanship" is applied to Justice Powell's approach to constitutional adjudication in Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 56-59 (1987). As used there, it is intended as a criticism of an approach that sought to "balance" competing community interests and thereby "usurped the functions of the political institutions of government." *Id.* at 5. This essay does not use the term as a form of criticism, but there is a relationship between Professor Kahn's critique and some of the issues raised here. *See infra* Part II.

This essay is addressed to that question. It first undertakes to establish the contemporary relevance of *Bakke* to issues of state, particularly the rhetoric of racial politics as it developed in the recent passage of new federal civil rights legislation. The essay then considers what statesmanship in that context might mean. Finally, it addresses the content, and the possible internal contradiction, of a notion of statesmanship applied to judging, with particular attention to Powell's *Bakke*.

The term statesmanship is widely and often loosely used in the political process. Despite the vagaries of its meaning there, its use is well-accepted. In the judicial process, however, both the applicability of the term statesmanship and its content are more problematic. It is not the purpose of this essay to resolve those definitional issues; rather, it is to explore in a preliminary fashion possible differences in the concept of statesmanship in the political and the judicial contexts. The use of the term "quota" in the debate over the recent civil rights act and in Powell's *Bakke* provides the vehicle for that exploration.

## I. Civil Rights Politics and the Rhetoric of "Quota"

Underlying the heated political debate that culminated in passage of the Civil Rights Act of 1991 were several somewhat technical and not widely understood elements of one of the two central forms of unlawful conduct under Title VII (the employment title) of the Civil Rights Act of 1964.[6] Under Title VII, unlawful racial discrimination is established (1) if an employment decision is intentionally based on race; or (2) if an employment decisionmaking standard, for example a test score, has a disproportionate racial impact, and its use cannot be justified as a business necessity.

The latter theory of unlawful conduct, not made explicit in the statute, was first articulated by the Court in 1971 in *Griggs v. Duke Power Co.*[7] The *Griggs* Court found that, beyond prohibiting intentional discrimination, Congress intended to prohibit employment practices that "are fair in form, but discriminatory in operation" to avoid creating "built-in headwinds" for minority opportunity.[8] Under *Griggs*, an employment decisionmaking standard that operates disproportionately to exclude members of a racial group is prohibited if it "cannot be shown to be related to job performance."[9] Thus, once the disparate impact of an employment standard is shown the issue becomes the business need for the standard, not employer intent in adopting it.

The *Griggs* decision by its terms required a comparison of the impact of an employment standard on one racial group with the impact of that standard on another and then a determination of whether that impact was "disproportionate." The determination of disproportionality, in turn, often

6. 42 U.S.C. §2000e (1988).
7. 401 U.S. 424 (1971).
8. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).
9. *Id.* at 431.

required reference to "proportions" of those groups in the relevant labor market, for example, the racial distribution in a labor market of persons holding a particular educational degree or professional certificate. Thus, the *Griggs* line of proof made consciousness of the racial composition of selection pools essential to anticipating possible liability from using particular employment criteria.

As long as a single employment standard such as a degree requirement or test score was at issue, attention to the racial composition of the labor market and the impact of the standard on identified racial groups was relatively noncontroversial. Even if a particular standard had a disproportionate impact, and was unjustifiable as a matter of business necessity, the relationship between the racial composition of the existing workforce generally and the labor market was not at issue. Instead, the impact of the single standard was the only issue. But when employment decisionmaking was viewed more broadly as being based on a combination of standards, some objective and others subjective, it appeared to follow under *Griggs* that the impact of the *combined* standards (*e.g.*, the racial distribution of the outcomes of all hiring decisions based on those standards) could be tested against the racial composition of the relevant labor market. If the differential was disproportionate, then presumably the full set of standards had to be business justified to survive challenge.

Because most important employment decisions (hirings and promotions, particularly) are based on multiple factors, this approach, if applied loosely, could be understood to require employment decisionmaking that approximated the racial composition of the relevant labor market. Although this prospect may have been more theoretical than real, it formed a part of the rationale for the 1989 Supreme Court decision in *Wards Cove Packing Co. v. Atonio*,[10] which set a number of limits on the *Griggs* doctrine, at least one of which would have precluded liability based on that broad theory. *Wards Cove* required that employment standards be separated for the purpose of impact analysis and that a causal link be established between each standard and an alleged effect on the outcome of employment decisionmaking in a particular workplace.

The *Wards Cove* decision also emphasized the importance of careful analysis in determining the proportion of "qualified" workers in the relevant labor market against which impact would be tested. Further, the Court redefined "business necessity" and allocated the burden of persuasion on the "business necessity" defense to the plaintiff, essentially making it a burden of establishing the absence of a business need for the employment decisionmaking standard that produced the impact. Explaining its emphasis on close attention to the question of the percentage of "qualified" workers in the relevant labor market, the *Wards Cove* Court observed that any less searching analysis might leave "racial quotas" as "the only practicable option for many employers."[11]

10. 490 U.S. 642 (1989).

11. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 643 (1989).

The *Wards Cove* Court's reference to quotas was in the context of an evidentiary issue that had long been of concern to plaintiffs and defendants in Title VII litigation of both the impact and the intent type. Any consideration of the probative value of a comparison of a selected group with a potential pool for selection requires sensitivity to the question of the characteristics of the pool, particularly "qualifying" characteristics. When the qualifying characteristics are distributed disproportionately among different racial groups, any disproportionate outcomes in employment decisionmaking would likely be explained on the basis of qualification rather than race. The determination of the distribution of characteristics, however, is itself a difficult evidentiary matter and often must be made on the basis of less than ideal data. Despite the fact that the Court's reference to quotas was in this proof context, it provided some basis for viewing the entire opinion as being addressed to concern about race-oriented employment quotas.[12]

The notable reaction to *Wards Cove* was not so much relief from the employer community that the proof process for disparate impact cases had been made more "exacting," but outrage from the civil rights community that *Griggs* had been "undermined." Reversing *Wards Cove*, along with several other Supreme Court decisions from the late 1980s that were viewed by civil rights organizations, among others, as hostile to vigorous enforcement of the civil rights law,[13] became a political objective that met generally with Democratic support and Republican resistance. The overall theme in the legislative effort was the restoration of employment discrimination law that had been restricted by the Supreme Court, but a number of the bills introduced in Congress went beyond merely reversing Court decisions and thus widened the range of policy choices.[14] The timing of these political developments virtually assured that the underlying issues would be aired in the 1990 congressional campaigns.

Shortly after the major Democratic bills were introduced in Congress in 1989, the White House adopted a legislative strategy that continued for the next two years, initially leading to a presidential veto and ultimately resulting in the compromise legislation that became the Civil Rights Act of 1991. In its simplest and most effective form, the strategy was to label the Democratic proposals as "quota bills" and to offer a less far-reaching bill as a reasonable, "nonquota" alternative. Putting aside for a moment the question of the accuracy of the label or the nature of the differences in the bill the President vetoed and the bill he finally signed, the strategy clearly

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12: Whether or not that concern in fact motivated the other principles established in *Wards Cove*, a formal connection of those principles to possible defensive reliance by employers on quotas would have required different analysis and was not made explicit by the Court.

13. *E.g.*, Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989).

14. The most significant proposed expansion of the original act was the inclusion of a provision for compensatory and punitive damages for intentional discrimination and a jury trial right to implement the damages provision.

worked. The label, and the negative imagery it created, became the focal point for public discourse on the proposed legislation. The consistent message from the White House was that the President wanted a "civil rights" bill but would not agree to a "quota" bill. Congressional Democrats supporting the original measure were forced to respond in those terms and defend their initiative against the quota charge.

Throughout the period the legislation was pending, little effort was made by those charging "quota" to explain what that term meant or why the bill should be characterized in that fashion. The term itself, particularly in the context of civil rights, easily tapped into a large reservoir of negative public sentiment without the need for elaboration or explanation. In a sense, the broad policy questions that had been before the nation for more than two decades under the rubric of affirmative action and all the fears and hopes that concept entailed were collapsed into a single term. Some politicians quickly realized the power of the term and, whatever may have been the intentions of the White House, exploited its value in furthering what have come to be called "wedge" issues.

One of the most extreme forms of this campaign technique appeared in the Senatorial race between incumbent North Carolina Senator Jesse Helms and challenger Harvey Gantt. A Helms' television ad showed a white man's hand crumpling a job rejection letter. "You needed that job and you were the best qualified," a background voice intones. "But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. Gantt supports Ted Kennedy's racial quota law that makes the color of your skin more important than your qualifications."[15]

It was not particularly surprising that a candidate who began his political career as a critic of civil rights legislation would, when sensing a threat to his incumbency, return to old themes. But the thought that the same imagery might have been intended by the President, or those close to him, raised the stakes for understanding just what was meant by "quota" as applied to the pending legislation.

The answer never came, or at least never in a form that could compete with the sheer power of the term "quota." The real answer was bound up in the details of relatively complex legislation and an even more complex body of judicial opinion that had developed under Title VII. The statute had long been construed to recognize as probative on the issue of intentional discrimination the racial composition of the employer's workforce as compared to the qualified workforce in the relevant labor market.[16] A disparity

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15. Thomas B. Edsall, *Helms Injects Race Issue Into Carolina Campaign*, WASH. POST, Nov. 1, 1990, at A1.

16. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 n.19 (1973). The *Green* Court noted:

> The District Court [on remand] may . . . determine, after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." . . . We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring

between the workforce and the relevant labor market did not constitute a violation of the statute; it was only one form of evidence among many that was thought to bear on employer intent. Its possible evidentiary role, however, could be thought of as having the potential to encourage employers to match labor market statistics in hiring to avoid liability. Similarly, as noted earlier, the *Griggs* disparate impact analysis required some attention to labor market statistics. In those cases, employer concern with such data might also be thought of as encouraging defensive behavior. Finally, the very existence of an antidiscrimination statute such as Title VII, which could lead to substantial monetary liability, might trigger defensive employment decisionmaking, and some caselaw upholding voluntary affirmative action programs was predicated on that presumed employer purpose.[17]

Given this background, understanding what in fact *Wards Cove* had done and, in turn, what the proposed legislation might undo was a question that could only be answered by a more sophisticated understanding of the issues than the term "quota" would permit. Furthermore, it was clear that if the label was to be applied to the pending bill and the labeler was not to be understood simply as proposing general retrenchment in employment discrimination law, then "quota bill" had to mean more than a bill that would continue to encourage the defensive posturing that had been stimulated by the original Act and that had been maintained by the judicial construction given the Act over more than twenty-five years. Those important and not so subtle differences were not ones opponents of the legislation felt any need to address as long as the quota label could generate wide negative reaction to the bill.

The term "quota" had developed a negative connotation in American politics at least as early as the 1920s and 1930s as the term used to describe limitations on the number of immigrants from particular countries.[18] At the same time, the term was used with less opprobrium to describe import restrictions on foreign commercial goods. The negative connotation was reinforced by association of the term with the practice of many institutions of higher education of limiting the number of students and faculty of particular religions. The negativity of the term in these and other similar instances of its use presumably flowed not only from the particular characteristic chosen as the basis for the linedrawing, but also from discomfort with the subsidiary notion that a group's representation in the general population should constitute the limit of its access to educational or employment opportunities.

From this background, it was sometimes argued that an "inclusionary," as opposed to an "exclusionary," quota was less objectionable, and that

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decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

*Id.* (citations omitted).

17. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 209-216 (1979) (Blackmun, J., concurring).

18. *See* 3 OXFORD ENGLISH DICTIONARY 988 (Supp. 1982).

such a quota was particularly "benign" if the newly included group had itself previously suffered exclusionary discrimination and the quota was established to remedy the prior exclusion. Despite some appeal, this argument generally fell victim to the logic that, at least where quotas are simply numerical formulas for decisionmaking, one person's inclusion is no more than another's exclusion. The less negative term for decisional targets that were conscious of, and intended in part to remedy, prior discrimination became "goal." While that term never fully overcame a similar intimation of reverse exclusion, the connotation was generally more favorable because of the absence of the sense of numerical rigidity.

One might then argue that as long as the proposed civil rights legislation did not *require* fixed hiring percentages based on relevant labor market data, the bill was not a "quota bill." In fact the bill did not, and the White House virtually conceded as much when the President signed a quite similar subsequent bill. The most the vetoed measure could be said to have done in this regard was restructure the proof process for disparate impact cases in a way that would make employers to some unspecified degree more likely than under *Wards Cove* to engage in goal-setting behavior. The revisions in the bill that became law had the virtue, from the President's perspective, of less strongly encouraging that behavior to an equally unspecified degree. Could one then conclude that the quota label was clearly wrong and was simply dangerous and divisive rhetorical excess designed to appeal to voters along racial lines?

The answer seems largely a function of one's level of tolerance for expedient discourse in the political process. For instance, the White House might have argued that, despite questions about the accuracy of the powerful label it used, the use of the term quota was dictated by the need to obtain a political compromise when the other side was invoking the equally powerful term "civil rights restoration." That reaction has considerable force if one expects no more of political actors than to invoke publicly the most powerful symbol or imagery that serves their policy objectives, despite how seriously that may obscure for the public the substance of the policy. That reaction has even more force if one is also convinced that the complexity of the underlying issues makes them generally inaccessible to all but expert segments of the public. Yet, however reasonable those reactions may be for some policy issues, they pose special risks for others. Race discrimination and its possible remedies present uniquely difficult issues on which to achieve public consensus if political discourse is conducted in dichotomous code. In essence, the exchange begins to mirror a sort of name-calling behavior that is itself more reflective of the disease than the cure.

Without question, however, there were limits to the interest and capacity of the lay public to understand the nuances of change in a complex legal regime such as Title VII. Moreover, efforts to speak more directly to those issues would have posed risks for politicians on either side, including the most immediate risk of failing in the legislative objective. Yet even if such efforts had accomplished no more than making the public better aware of

that complexity, they might fairly have been labeled acts of statesmanship—acts in which immediate political advantage is sacrificed to larger issues of state.

Both the President's ultimate support for a revised form of the bill as the political context became more complicated and emotionally charged[19] and his assertion that the bill was no longer a quota bill do not now seem likely to be remembered as acts of statesmanship. The final judgment should not, however, turn on speculation as to what may in the end have motivated his decision to approve the bill, but on an assessment of the balance he struck between personal political risk and the opportunity to enhance public understanding of the issues at stake in the legislation.

## II. *BAKKE*, QUOTAS, AND JUDICIAL STATESMANSHIP

In *Bakke*, the Court had been invited by the arguments of the parties and the decisions of the courts below to address the important issue of state the case presented by using the label "quota." Justice Powell formally declined that invitation while proceeding to declare unconstitutional the conduct to which the label might have been applied. In the political process, that act without more might have been viewed as one of statesmanship—sacrificing the opportunity to advance one's own position, by assigning to the opposing position a convenient and powerfully negative label, and, thereby, obliging oneself to address the issue more deeply. That act, coupled with Powell's approval of the objective, but not the particular form, of the challenged conduct, could be viewed in even more political terms as a statesmanlike substantive compromise. But those views raise the question whether the same model of statesmanship should apply to acts of judging as apply to the more openly political acts of state. The beginning of an answer lies in a fuller understanding of Powell's approach to the case.

Allan Bakke's case was a challenge to the constitutionality of the "special admissions program" of the Medical School of the University of California at Davis on the ground the program operated to exclude him from a place in the school because he was white. In essence, the program treated the applications of members of racial minorities who wished to be considered under the program differently from those of white applicants, virtually insuring that 16 of 100 places in the entering class would be filled by those minorities. At an early point in his opinion holding the admissions program to be unconstitutional as structured, Justice Powell pointed to the significance the parties attached to their respective characterizations of the central numerical feature of the program:

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19. Near the end of the legislative process the Louisiana gubernatorial campaign of David Duke as the Republican candidate had become highly visible and included frequent reference to quotas. At about the same time, the nomination of Clarence Thomas to the Supreme Court encountered charges of sexual harassment and became the subject of televised Senate hearings which then-Judge Thomas called a "high-tech lynching."

> Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota.
>
> This semantic distinction is beside the point: The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.[20]

Powell's refusal to accept the parties' effort to address the controversy by drawing a distinction between quota and goal had considerable appeal; it not only represented the rejection of a term with overwhelmingly negative connotations but also suggested that something more substantive than "labeling" was at stake. Nevertheless, as the opinion developed, this simple rhetorical move instead may have represented a significant lost opportunity.

Having found that the program constituted a racial classification, Powell went on to determine whether the program served a "permissible and substantial" State purpose and was "necessary" to the accomplishment of that purpose.[21] After rejecting three purposes argued by the State,[22] Powell found the fourth—attainment of a diverse student body—to be "compelling."[23] He then turned to the question whether the program was necessary to serve this purpose and determined that it was not.

While the program focused on racial or ethnic diversity, Powell found that the State's permissible interest in having a heterogeneous student body was different:

> It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.[24]

Quoting with approval from a description of the Harvard College program for diversity in admissions,[25] Powell concluded that in a constitutionally

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20. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 288-89 (1978) (footnotes omitted).

21. *Id.* at 305.

22. *Id.* at 307-11. Powell rejected the avowed purposes of (1) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession, (2) countering the effects of societal discrimination, and (3) increasing the number of physicians who will practice in communities currently underserved. *Id.*

23. *Id.* at 314-15.

24. *Id.* at 315.

25. *Id.* at 316-17. The quote read in part:

permissible program "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it [can] not insulate the individual from comparison with all other candidates for the available seats."[26]

In this description arguably lies the distinction that one might see between the terms "quota" and "goal." It would go: A quota reserves a fixed number of places; a goal allows a range of factors to be considered and uses a number only as a frame of reference. But having implicitly taken the position at the outset that there was no meaningful distinction between quota and goal, that option was no longer available to Powell. Equally important, Powell's characterization of the permissible program admits of *no* use of numbers; race may be a factor, but how large a factor and how that factor is to be related to other factors are left entirely unaddressed. Presumably there is broad discretion to weigh race in the admissions process, so long as the program is not "operate[ed] . . . as a cover for the functional equivalent of a quota system."[27]

The point here, however, is not that Powell should have made more of the quota-goal distinction or that the opinion should have held admissions decisionmakers to a meaningful and enforceable constitutional standard in such programs. Rather, it is that having found the numerical rigidity of the Davis program to be its flaw, Powell chose thereafter to avoid completely discussing the question of the role, if any, numbers might play in the process. One easily could understand the message to be that "numbers" should not be discussed, and, with that etiquette observed, programs aimed at achieving diversity could proceed unobstructed by judicial intervention.

This dimension of the decision could also be viewed in political terms as part of the previously described substantive compromise. Having approved the objective of diversity, but having rejected the particular Davis implementation, Powell might then have gone on to explain that rejection in terms that explicitly would have precluded any numerical frame of reference or, instead, in terms that explicitly would have permitted some less rigid use of numbers. If read purely as compromise, however, a part of the compromise was to leave the role of numbers ambiguous. The

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> In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year . . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

*Id.* (quoting Appendix to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae 2-3).

26. *Id.* at 317. For an interesting analysis of the rhetoric of this portion of Powell's opinion, see L.H. LaRue, *The Rhetoric of Powell's* Bakke, 38 WASH. & LEE L. REV. 43, 54-61 (1981).

27. *Id.* at 318.

opposing sides could find some immediate comfort in the ambiguity, and resolution of the more difficult and sensitive details would be left for the future. When the compromise then is evaluated as a political act, the designation of statesmanship would continue to seem apt, but is the act fairly regarded as one of judicial statesmanship?

Having formally rejected the quota-goal distinction, Powell had occasion to address, at a constitutional level, the reality that numerical references *will* be used in evaluating the fairness of allocation of opportunity whenever the issue of opportunity is expressed in group terms. If nothing else, a quantifiable measure of change is irresistible as a matter of human nature. Whether initiated by legal requirement or by voluntary undertaking, the success of any effort to extend opportunities to groups, even the opportunity for individual members of the group to be considered neutrally (*i.e.*, without regard to group membership), will for lack of any credible alternative be measured against the standard of the proportion of eligible (or qualified) individual members of the group who could have been selected. Unless the notion of what makes one eligible (or qualified) is fixed, and so soundly fixed that under scrutiny it will admit of no discretion and withstand all arguments of reasonable, less exclusionary alternatives, numbers will be relevant even when the argument seems formally about eligibility or qualification. But to effect the political compromise of *Bakke*, it was necessary for Powell to avoid the issue of numbers. Ironically, this left the term "quota" with its particularly negative connotations available for use in political discourse for presumably any approach that took into account the racial composition of an eligible pool.

Of course, Powell's immediate responsibility was to give or withhold constitutional sanction for the underlying conduct. The traditional view of the judicial function would have required that he make and explain that choice and do no more. But in *Bakke*, Powell sought to perform a further act—to offer a vision of policy that neither party had pressed and in doing so to offer to the nation a compromise for dealing with one of its most troubling problems. If it had been made in the normal political process, it might have been criticized by purists for being incomplete or even slightly disingenuous, but it would also have been praised by realists for the very same reasons. And because it ultimately was based on the rejection of divisive labels in a particularly delicate setting, it might fairly have been viewed as an act of political statesmanship. But the context of the compromise at least formally was not political; it was judicial. If it was to be recognized as an act of statesmanship, it would be as an act of judicial, not political, statesmanship.

How then should that distinction be drawn to evaluate Powell's compromise? First, it might seem important that the central method of the act be judicial. In *Bakke*, Powell drew his vision of a solution from the Harvard College admissions publication, not from the arguments of the parties or the immediate record of the case.[28] If, however, this departure from tradi-

28. *See supra* note 23 and accompanying text.

tional judicial method is to be treated as significant, its significance should follow from the substance of the departure rather than its form. In this instance substance is implicated to some extent. The speaker upon whom Powell relied is in context much like a political speaker, possibly more concerned with the public appeal of the prose than with frank and complete description. Second, it might seem important that the act reflect some marks of the critical analysis a court would traditionally apply to a "solution" pressed by a litigant. In *Bakke*, Powell described a solution that realistically could be implemented only with some numerical frame of reference, but he chose to constrain the solution only with the caveat that it should not become the "functional equivalent of a quota system." If the gap between description and reality was too wide, the solution would have unusual potential for breeding cynicism, particularly among lay readers in educational administration who might have expected more penetrating scrutiny from a court. Neither of these distinctions, however, is in essence anything other than a particularized form of the more general concern about sources of legitimacy in judicial decisionmaking.

Thus, a choice of sorts is posed in pursuing the question of judicial statesmanship. Is the concept one that should go more to the mediative value of the substantive decision or more to the similar value that might flow from the content of judicial expression? If it is the latter, statesmanship as a distinct value in the judicial context may in essence be the willingness to accept the opportunity to participate in framing the terms of political discourse even when that participation would convey some doubt as to the completeness of one's opinion. In *Bakke*, Powell indirectly associated the term "quota" with any numerical framework in a selection process while at the same time approving a selection process that furthered racial and ethnic diversity. The result, in terms of participation in political discourse, was to leave a powerful negative term in a highly ambiguous posture.

It is possible, however, that the notion of judicial statesmanship is simply a contradiction in terms. Conceptually the role of a judge in affairs of state is circumscribed. By observing, or at least appearing to observe, the conventions of the judicial role, the judge is generally understood to enhance respect for his position. Political-like compromise, without more, is vulnerable to the criticism of judicial usurpation of the functions of other institutions of government.[29] Yet, as long as what is understood as judicial statesmanship is firmly within the traditional judicial role, it may be difficult to understand what really makes the act notable. Put somewhat loosely: Is judicial statesmanship just good judging or is it more? If it is more, is it good judging?

## CONCLUSION

A part of the answer may lie in the previously described rhetoric that controlled political discourse on the Civil Rights Act of 1991 and a possible

29. *See supra* note 5.

strand of relationship to Powell's *Bakke*. The critical issue in the *Wards Cove* case was not whether numbers were relevant but *how* they would be used. If one believes that using the racial composition of the relevant labor market as a frame of reference inevitably devolves into quota-setting, then it was the original statute itself, or at least the most well-accepted early decisions under it, that encouraged the use of quotas. On the other hand, if one recognizes the inevitability of this sort of frame of reference for evaluating action under a statute aimed at providing equal opportunity for previously excluded groups, then the inaptness of the term "quota" in its most pejorative and offensive sense is apparent. To apply that term simply to describe relatively subtle changes in *how* numbers are used, when in fact the use of numbers was firmly established, is disingenuous at best. The politicians applied it in this fashion and to some extent succeeded. This application avoided the need to engage the public more frankly on how antidiscrimination standards operate. The power of the term made that easy. But could more have been expected from politicians? Probably not. Too much turns on the ability to give easy answers to hard questions and on the availability of a simple word or phase to convey that answer. To revere statesmanship in political acts may simply be to express hope for more.

For the judge, the traditional role gives the freedom and protection necessary to speak more fully—to explain even where to do so reveals discomforting complexity. But the ultimate power of the judicial act also means the judge can effect a political compromise even if its formal rationale is incomplete. One approach aims consciously to contribute to political discourse, the other aims primarily to set the terms of the compromise. Either, in a particular context, may rise above the ordinary act of judging. Powell's *Bakke* does in one of those ways. It is virtually an open compromise on an issue of state perhaps too delicate and complex to *resolve* any other way. But in its most obvious area of incompleteness it continues to trouble political discourse. In the end, it may be that to revere statesmanship in judicial acts is no more than to express ambivalence about the appropriate source for decisions on fundamental issues of state.