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THE RHETORIC OF POWELL'S *BAKKE*

L. H. LARUE*

By now, much has been written on the *Bakke* case,[1] and particularly on Justice Lewis Powell's opinion. Even so, much more needs to be written, for much is at stake. Consequently, we should turn away from legalisms and turn ourselves towards the different ways in which the opinion persuades or fails to persuade.

Why study the opinion as an act of persuasion, as a piece of rhetoric? We are all familiar with the trivial commonplace that judicial opinions are not very good reports of how and why the judge reached a decision. Opinions do not report the order in which the judge learned things, nor the work done to solve the problems of the case. Instead, an opinion explains and justifies in a different sort of way: we do not get very much of the biography of the decision; we generally get only an argument that the decision is correct.

However, the fact that judicial opinions are, in part, attempts to persuade does no more than make rhetorical analysis possible. The real question is whether such analysis is desirable. One can differ on this, but one very important question about an argument is: what sort of world does it assume that we live in?; or that we should live in? This question can be restated in a more personal and less abstract way by asking: what sort of people will we become if we are persuaded by this argument?; what sort of community will we have for our sharing?

I.

Part I of the opinion is the statement of facts, some of which are well known. The Medical School of the University of California at Davis had a "special admissions program." The Medical School received about 3,000 applicants a year for admission; there were 100 places in each class. If applicants were to be selected for admission on the basis of indexing numbers such as Grade Point Average (GPA) or the Medical College Admissions Test (MCAT), then few or no blacks would be admitted. In order to avoid this result, the faculty voted to reserve sixteen places in each class for "disadvantaged" or "minority group" applicants, a category that included Negroes, Chicanos, Asians, and American Indians. Allan Bakke, a Caucasian, who had a strong record based on his GPA and MCAT, applied and was denied admission; he sued.

A statement of facts can be put together in many different ways, and the persuasiveness of a judicial opinion can be increased or decreased

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[1] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

markedly by the skill with which the statement of facts has been assembled. One of the ways in which this statement of facts can have an impact is by unsettling expectations. In the first place, most judicial observers knew, or thought they knew, the facts of *Bakke*; but Justice Powell's statement of facts takes approximately nine pages.[2] This can persuade by disarming; one is met with facts as to which one was ignorant, and this may have the effect of inducing some lessening of preconceptions. On another level, the length of the statement of facts might by association of ideas lead one to posit care in the author of the opinion and thus give rise to some presumption of credibility.

Aside from this subliminal persuasion by length, are there any other parts of the statement of facts that might appeal to the reader? Several pages[3] of Powell's statement of facts are devoted to showing how qualified Bakke was. For example, when he first applied in 1973, his qualifications, judging by grades and test scores, were as good as most of those who were admitted, and in 1974, he was clearly better. However, he had complained about the special admissions program in 1974 and the Dean to whom he complained was his faculty interviewer. The Dean gave him a low rating and after he was rejected, the Dean did not exercise his discretion to put Bakke on the waiting list. When I read those facts, am I supposed to conclude that Bakke was unfairly treated? If so, what about the omission of any mention of these facts when the rationale of the decision is explained?

II.

In the second part of the opinion, Justice Powell, in a lawyer-like fashion, takes up a statutory issue before he reaches the constitutional problem. As a performance, this enacts the values of caution and restraint, and so it might be expected to have some persuasive value by increasing our confidence in Justice Powell. However, one suspects that most readers of the opinion had too much prior knowledge for Part II to work in this way. One knows that it is a constitutional case; one already knows from the newspapers that it was not disposed of on statutory grounds; and so the average reader probably thumbs through these pages rather quickly, not attending to any of the details of the language or of the argument.

III.

Most readers probably begin to pay close attention in Part III when they sense that the opinion is now settling into the key constitutional issue. The delay in getting this far perhaps has piqued interest, has in-

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[2] *Id.* at 272-81.

[3] *Id.* at 276-77.

[4] *Id.* at 288.

creased tension and suspense. In Part III, Powell begins by stating the issues, posing them by way of a report on the parties' disagreement. The issue, as stated, is whether or not there should be strict scrutiny of the racial classification used in the Davis plan. In the next two paragraphs, he turns aside from this issue to a separate one: he states that the parties disagree as to the "proper characterization of the special admissions program."[4] The school called it a goal, Bakke called it a quota. Powell's response is to say: "this semantic distinction is beside the point."[5] He asserts that whatever you call it, it is a classification based on race.

As a piece of rhetoric, this was a nice move. The semantic distinction conceals a larger issue. Quota has a nasty ring to it, whereas goal sounds more harmless. By finessing the point, and saying that it is a classification, Powell creates the impression that he is not a man to be bogged down in trivia or quibbles, but one who wishes to get to the larger issues of principle that are at stake. One nods in agreement, and, of course, it is always good strategy for a writer to start with statements with which the audience will agree.

But before these larger issues of principle can be decided, some preliminary matters are relevant. Powell asserts: "The guarantees of the Fourteenth Amendment extend to all persons."[6] However, even accepting this conclusion, there is a subtle ambiguity: on the one hand, there is the question of the persons protected by the equal protection clause, that is, whether the entire population can claim rights under that clause; on the other hand, there is the question of the content of the rights created by the equal protection clause, that is, whether all members of the population have the same sorts of rights protected by that clause.

Powell addresses this issue by reporting it as an argument that is advanced by the lawyers; he reports that they argue that "white males, such as [Bakke], are not a 'discrete and insular minority' requiring extraordinary protection from the majoritarian political process."[7] Powell's response is that the cases do not hold that minority status is a necessary prerequisite to strict scrutiny and that racial distinctions have been declared suspect without expressing any qualifications as to minority status.[8]

If is, of course, true that the cases say what Powell says that they say, at least in the sense that the language that he quotes is indeed in the opinions from which he quotes them. However, it is also true that, on the facts, these cases did involve discriminations that were invidious and hostile and that fell with harsh force upon a group that could be fairly

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[5] *Id.* at 289.

[6] *Id.*

[7] *Id.* at 290.

[8] *Id.* at 291; *see, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944); Kirabayashi v. United States, 320 U.S. 81, 100 (1943).

described as a discrete minority. In these cases, the judges have tended to avoid harsh characterizations. *Brown v. Board of Education*[9] constitutes the very paradigm of this bland style. The judges who wrote these opinions wanted to lower tempers, not raise them, and so they adopted a rhetorical style that seemed appropriate to that end. Moreover, they perhaps saw their job as educating the public into higher aspirations, and so they stated the principles of decision in terms of abstract aspirations which could be future goals. The rhetorical strategy here has often seemed to be an attempt to change the facts for the future by moderating one's description of the facts of the past; the plea for the future being a plea for moderation, the facts as to the past have typically been described in moderate language. However, this strategy left an opening to Powell. He is able to claim that the generality of the language in these opinions constitutes the actual holding of the cases.

In studying this rhetorical technique, the most important thing we should notice is that the technique of the argument corresponds with the desired result. The result is to be that racial distinctions are suspect without regard to historical context. It fits with this result to argue from the words of prior cases without using the context of those words.

However, Lewis Powell understands that persuasion requires more than citation of authority, and so he asserts in Part III.B. of his opinion that his conclusion "is rooted in our nation's constitutional and demographic history."[10] In support of this thesis, he offers approximately four pages of history.

The history begins with a paragraph about the history of the fourteenth amendment as interpreted by the Supreme Court. He points out that the earliest cases interpreting the equal protection clause stated that it was enacted for the protection of the newly freed slaves. He admits that judges in fact failed to keep this promise of protection of the freedmen and instead turned away from the equal protection clause to the due process clause, which they used for the protection of business. He claims that only in modern times has the Court abandoned its use of the due process clause to impose substantive economic doctrines upon a legislature and begun to use the equal protection clause as an important source of restraint upon political action.

A possible response to this story could be to assert that it was now time to revive the original and correct interpretation. However the next paragraph starts off with a rather different proposition. "By that time it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority."[11] Of course, one cannot turn back the clock; we can never make time or history run

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[9] 347 U.S. 483 (1954).

[10] 438 U.S. at 291.

[11] *Id.* at 292.

backwards. If indeed, history has made it impossible to revive the original understanding, then we should not do it.

What counts for impossibility? There are two strands to Powell's argument. First, the original interpretation was itself not historically necessary, since the text permits a much broader interpretation. Second, the continued flow of immigration into the country has made our nation a nation of minorities. Logically, there are several ways of using this evidence. If immigration has indeed brought other minorities to our shores, then one can use the broad language of the equal protection clause as authorization to extend its substantive protections to them also. The question would be whether their case is fairly analogous. Thus, if some racial or ethnic group could show that it was suffering from invidious and hostile discrimination of the sort that the freed slaves suffered under, then a case would be made for extending the protections of the clause to them. In short, the historical events that are cited by Powell do nothing more than establish another historical problem. They do not establish that the historical context of racial distinctions should be irrelevant.

Having argued from authority and from history, Powell next makes an argument based upon institutional limits. Starting from the assertion that our nation is multi-racial and multi-ethnic, he proceeds to the observation that a person's status is not a permanent feature of the political landscape but one that can shift as we locate individuals in time and place, in history and geography. In this context, the Court has no principled way of judging to whom special solicitude may justly be given. His own words are: "The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence. . . ."[12] Does this mean that judges cannot understand history?

Justice Powell's next step is to link this argument about institutional competence with grand theories about the constitution itself. He states: "By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces."[13] Powell offers the following as a reason for believing that such variability is bad: "Also, the mutability of constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation."[14] And he cites Archibald Cox for the proposition that, "In expounding the Constitution, the Court's role is to discern principles sufficiently absolute to give them roots throughout

[12] *Id.* at 297.
[13] *Id.* at 298.
[14] *Id.* at 299.

the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place."[15]

The problem with discerning such principles is that we cannot see into the future and know what principles will have continuity in the generations to come. Indeed, predicting the future course of history would seem far more difficult than understanding the present historical context of racial discrimination. Even so, this rhetoric can persuade by appealing to that great American hope that the law can be above politics. The Constitution is a symbol of the continuity of the nation, and judicial independence is the political technique for guaranteeing that this symbol of continuity is not dragged down into partisan politics. This symbolic need is so deep in the American imagination as to be above argument. Unfortunately, it does not fit well with the facts. The Burger Court has not maintained smooth historical continuity with the decisions of the Warren Court, but has made some abrupt departures. And of course, the Warren Court in its turn did what it could to bury the legacy of the Vinson Court and establish its own vision. Indeed, one could go back further, drawing other lines of division and break, seeing the Constitutional history of our country in terms of discontinuity and not continuity. Should we wish to escape from these historical facts?

In this connection, it is useful to recall some words of John Marshall. In *Marbury v. Madison*,[16] he asserted: "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."[17]

Powell's contrast of the permanent versus the transitory finds its roots in John Marshall's rhetoric about change. Despite the fact that both arguments are equally nonsensical, they are both equally persuasive. My own experience of teaching *Marbury v. Madison* is that this is the single most persuasive part of Marshall's opinion to the average student. When I teach the case, I often ask students what arguments they can offer in defense of judicial review. There are numerous arguments that are offered, many of which are different from, and perhaps better than, those offered by Marshall. However, once I limit the students and get them to distinguish between the arguments that they have offered and those that Marshall offers, then they choose more often than not Marshall's remarks about the unchangeable Constitution.

However, the practical issue is who is to have the final say as to the

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[15] *Id.* (quoting A. Cox, The Role of the Supreme Court in American Government 114 (1976)).

[16] 5 U.S. (1 Cranch) 137 (1803).

[17] *Id.* at 177.

constitutionality of a piece of legislation: the legislature or the court. It is true, as John Marshall said, that if the legislature has the final say, then the legislature can change the Constitution, for all practical purposes, by the ordinary act of passing a statute. What John Marshall failed to point out is that if the Supreme Court has the final say, then it can change the Constitution by the ordinary act of deciding a case. Furthermore, one can see that they have done it. As a practical matter, the issue is not whether the Constitution will change. The only practical issue is to whom we should trust the power of changing the Constitution: the Congress, or the Supreme Court. Alternatively, we might sometimes trust one, sometimes the other.

A question like this one can not be decided by logic. The political question of whether the Supreme Court or the Congress should be able to change the Constitution must have a political answer and not a logical one. It also seems to be true that political questions get tangled with rhetorical questions: I do not mean that rhetoric will shape politics or vice versa, but that it is hard to distinguish the two. If we give judges the responsibility for changing the Constitution, we shall have to argue about changes with a different sort of rhetoric. This seems to entail that our basic political questions include a question of how we should talk.

In Part III.C., Powell returns to case analysis. Lawyers for the university had cited precedents in which preferential classifications,[18] were approved without being subjected to strict scrutiny.[19] Powell dealt with these cases by distinguishing each of them. Of course, the cases cited were in fact distinguishable; cases generally are.[20] Powell is surely correct when he says that the problems involved in those cases were altogether different from the problem involved in the case at bar. Even so, the performance is rather shabby; earlier he picked out language from cases without reference to their facts, and he then used the language as authority for the proposition that a classification alone, without regard to its hostility or invidiousness, should trigger strict scrutiny. In this section, he refuses to generalize in this way, but instead he demands that cases be read in light of their facts and understood in light of the particular context. This schizophrenia in technique seems to presuppose amnesia in the reader.

IV.

Having established to his own satisfaction that strict scrutiny is appropriate, Powell next states what this entails: "We have held that in

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[18] "Preferential classifications" are classifications that operate to the advantage of a minority group, rather than to its detriment.

[19] *See, e.g.*, Califano v. Webster, 430 U.S. 316 (1977) (gender based classifications); Franks v. Bowman Transp., Co., 424 U.S. 747 (1976) (racial classifications as remedy for employment discrimination); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (racial classifications in school desegregation).

[20] 438 U.S. at 300-05.

'order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest.' "[21] This is the orthodox two-prong test: examine the end; test the fitness of means to end.

This sort of rhetoric does not persuade everyone. First, there are reasons for doubting the whole enterprise. It is a curious anthropomorphism to imagine that a 'law' or a 'state' is the sort of thing that can have a purpose. Of course, the people who enact laws can and do have purposes. To establish what purposes different people had when they engaged in lawmaking and the degree to which those different persons had common or disparate purposes requires that one engage in a difficult historical inquiry. One can doubt whether the court is searching for something that is existent, and even if it is existent, one can criticize the skill with which the search is conducted.

Despite these criticisms, there are numerous rhetorical appeals in an argument such as this. One appeal arises from its analogy to scientific and technological talk, which is, of course, an important part of our civilization. In technology, this sort of argument is called means-end rationality, and there are those who are tempted to identify rationality solely with this way of proceeding. By association, an argument cast in this form can seem rigorous. Since dispassionate logical rigor is one of the forms that judicial independence can take, this form of argument perhaps has some resonance with many people's image of the appropriate judicial role.

A second source of persuasiveness can be the analogues which this argument has in ordinary life. We are often met with the quandry of what to do when someone proposes to do something with which we are uneasy, and yet we do not wish to give an outright No as an answer. We often try to avoid giving either a Yes or No, but instead attempt to reshape the proposal; we quite often open our persuasion by asking questions such as: What are you trying to do?; Is this really the most important thing to you? Such rhetorical moves are often quite effective: it may force a redescription; it may open avenues for negotiation. As a result of such questions, we are often able to say such things as: you can do the same thing in another way, and done in this other way, you will not be doing those things that are offensive to us; or, why don't you leave out some of these things that are not really centrally important to you, especially since these less important things are what make your proposal offensive to us. The appeal is to moderate behavior, to reasonableness. This is a powerful appeal as it works in ordinary life, and a judicial opinion that embodies it will strike us most likely as persuasive.

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[21] *Id.* at 305 (quoting In re Griffiths, 413 U.S. 717, 721-22 (1973)).

For my purposes, the test is less important than the way it is used. First, I must emphasize that the purposes that Powell discusses have not been established by evidence as matters of historical fact. They exist only in the world of litigation. Perhaps a more realistic way of viewing them would be to use the word 'excuses' instead of the word 'purposes.' Viewed in this way, Powell's way of proceeding can be seen to overlap with ordinary life. When we are challenged for doing what we have done, we often try to justify it by offering excuses. These excuses do not constitute the biography of our action. The reason for this is simple enough: we often do not know exactly why we have done the things that we have done. The real reasons for action perhaps can never be known, but we can ask whether there are good reasons, whether we are justified in doing what we have done. There are dangers in doing this. Hypocrisy can be encouraged; one can be led into talking about one's life as though it were an abstract intellectual problem, as opposed to something one must live. But at times we know of no other way to proceed. Here too, we might be persuaded that Powell is proceeding correctly. He does not know, and perhaps there is no way to find out, exactly why the medical faculty of Davis did what it did. So he can consider various hypothetical reasons why they might have done what they did, and then he can judge the action in this hypothetical mode. Of course, we must still have some expectation that the hypotheses are not altogether removed from reality.

Four purposes ('excuses'?) are stated, the first being "'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession.'"[22] However within one page it is restated as follows: "If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be regarded not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[23] This appears to change rather substantially the statement of purpose as originally hypothesized. As restated, Powell makes it appear as though the first purpose is including blacks because of a mere preference for blacks as such. However, the purpose as originally stated was related to a particular historical problem.

We see here in microcosm one of the problems of translating the ordinary means-end rationality of technology into the classification-purpose rhetoric of constitutional law. When one states a purpose, it is hard to get it to stand still. Technological ends can be clearly stated. Purposes are hard to state, and we see here how their vagueness of statement can lead to subtle shifts of language that seem to make a dif-

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[22] 438 U.S. at 306 (quoting Brief for Petitioner, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

[23] 438 U.S. at 307.

ference. However, in this particular case, it does not make any substantial difference since the issue of history is raised in the next subpart of the opinion.

The second hypothesized purpose is stated as "countering the effects of societal discrimination."[24] Powell responds to this stated purpose by stating a dichotomy: he approves action to remedy "the disabling effects of identified discrimination;"[25] he disapproves of action to remedy societal discrimination, which he characterized as an "amorphous concept of injury that may be ageless in its reach into the past."[26]

The dichotomy is historically unrealistic. We do not normally get acts that are specific instances of discrimination in isolation from a cultural context in which discrimination is a pervasive feature of life. The acts of identified discrimination, to which Powell has referred, are not historical anomalies, unexplained exceptions to the generally benign course of racial relations in this country. Consequently, the dichotomy separates two things that occur together in our world.

As a piece of rhetoric, this dichotomy recapitulates the flight from history that characterized earlier parts of Powell's opinion. Examples of this are the way he read cases to take abstract language from them without regard to their historical context, and his use of the institutional incompetence thesis to assert that the court must not be involved in assessing particular historical circumstances. However, in this subpart of the opinion, some arguments are offered that reveal an important set of values at work that previously have not been enacted in the opinion.

Powell does not simply present the dichotomy. He also argues that the government has an interest that is more substantial in remedying the effects of identified discrimination as distinguished from remedying the effects of generalized societal discrimination. First, there are legal rights of victims to be vindicated whenever there is identified discrimination. Second, there is an official definition of the extent of the injury and of the consequent remedy. Third, courts can exercise continuing oversight to keep the remedy sharply focused so as to do minimum harm to innocent third parties. A fourth reason is offered that appears to be a restatement of the first from a slightly different angle: unless there is a constitutional violation, the government does not have any greater interest in helping one individual than in refraining from harming another.[27]

The puzzle is why these statements are thought to be reasons. In philosophical terms, the argument seems to be that corrective justice is permissible, but distributive justice is not. On the face of it, this seems to be an astonishing proposition.

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[24] *Id.* at 306.

[25] *Id.* at 307.

[26] *Id.*

[27] *Id.* at 307-309.

As rhetoric, the paragraph proceeds on the assumption that the model for government action ought to be judicial action. The grammar of the paragraph is the grammer of rights, of violation of rights which in turn cause injury and for which there can be a remedy. This is a routine description of the way judges think about problems, and as rhetoric, it invites us to act as judges act, to think as judges think. The general appeal of the law as an institution above politics, as neutral to partisan concerns, may lend some derivative prestige to this sort of rhetoric. Even so, the ordinary respect for law in our culture is bounded by an assumption that it will not be all-pervasive. You can test this proposition for yourself in ordinary social interchange. Try talking about the normal problems that one faces in life in the language of rights and rules, or in the language of precedent. You are likely to find your interlocutor becoming impatient, and you probably will be dismissed with a sneer as being excessively legalistic. It is one thing to be able to think like a lawyer, it is another thing altogether to be unable to think in any other way.

The third purpose is stated as: "increasing the number of physicians who will practice in communities currently underserved."[28] Powell assumes without deciding that this purpose is satisfactory for purposes of the two part test, but then he holds that there is no evidence in the record that shows how Davis' special admissions program will achieve this goal.[29]

Whether or not one is persuaded by this part of the argument, however, will turn on many other things. Are we to read what Justice Powell has said as a comment, however indefinite, about the requirements of making a record in future cases? The problem is that much legislative and administrative action is necessarily based on intuition and on those indefinite feelings and ideas about the way the world goes together which we often dignify by classifying as "common experience." Sometimes, these matters are not subject to proof. Whether or not Powell means to declare illegitimate these customary sources of action cannot be judged by this short excerpt.

The fourth purpose is stated as: "obtaining the educational benefits that flow from an ethnically diverse student body."[30] Powell declares that this purpose is permissible. It certainly seems to be a sound principle that an educational institution ought to be permitted to educate and thus to do those things that will let it educate well. And, as Powell points out, it is widely believed that an ethnically diverse studentry is a good thing. Should one assent to the "common experience" of conventional wisdom? Powell cites for this conventional wisdom the President of

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[28] *Id.* at 306.

[29] *Id.* at 310-311.

[30] *Id.* at 306.

Princeton University and language drawn from previous opinions as printed in the United States Reports.[31]

The more skeptical observer might wonder how the argument would go if the matter were reversed. Suppose someone came before a court on such issue and argued that inverse-diversity (a homogeneous student body) would be educationally desirable. Imagine ourselves back to 1954; what was the conventional wisdom then on the relative merits of diversity and inverse-diversity in education?

How would we test the conventional wisdom in a matter such as this? What would proof of a thesis one way or the other look like? Presumably, one would need to specify what it is to be educated and find some examples of the species. One would then conduct an investigation of the variables in the educational background of the educated. One would want to ascertain the relative diversity or homogeneity of the peers in the educational process, and control all the other variables that could contribute toward educational growth. One would also need to do the same with a sample of people whom we would specify to be the uneducated, seeing how they can be profiled on the same set of variables. I am not aware that such a study has ever been done, nor do I believe it likely that it could ever be done in a way that would live up to rigorous standards of scientific evidence.

Even so, the rhetoric of diversity is persuasive; it appeals to our notions of democracy, especially the sort of democracy that we have. Our nation is diverse, all parts of it are legitimate, and so the notion that one should be put in touch with a representative cross-sample of it strikes most of us as a good thing. If we cross-examine ourselves, we probably believe that it is a good thing in and of itself, and not really because it leads to education, one way or another.

Assuming the educational value of ethnic diversity, there is still a problem: "As the interest of diversity is compelling in the context of a University's admissions program, the question remains whether a program's racial classification is necessary to promote this interest."[32]

V.

At this point, the analysis takes a turn. Given the statement of the problem, one might assume that the topic would turn to whether the special admissions program was a necessary means of achieving a diverse student body. Instead, the discussion in Part V.A. turns towards a redefinition of the concept of diversity; Powell argues that a diversity that is nothing more than mere ethnic or racial diversity does not constitute the "genuine" diversity which is the legitimate goal of a university. Moreover, he concludes that a program that focuses solely on ethnic

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[31] *Id.* at 312-314; *see* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

[32] 438 U.S. at 314-315.

diversity achieves only a spurious substitute for genuine diversity, and in fact hinders rather than helps education.[33] This immediately raises two questions: what constitutes genuine diversity, as distinguished from the spurious kind?; and, how does one achieve it? By way of answering both of these questions, Powell introduces the example of the Harvard College program. As Powell presents it, by way of quotation from the *Amici Curiae* brief and by way of redescription of his understanding of that brief, genuine diversity seeks pluralism not merely in race, but also in geography, work experience, age, personality traits, and so forth. This multiplies the variables, and may seem suspicious in that it seems to suggest that all variables are equal. Despite such suspicions, however, it seems persuasive; the appeal is to our sense of the complexity of our nation, and to our sense that being black and middle class is different from being black and poor.

Unfortunately, we should be cynical. It is hard to believe that Harvard College administers the program in the way in which Powell describes it. First, it should be noted that the description of the Harvard College program is taken from an appendix to the *Amici* brief; it has not been tested by cross-examination nor supported by competent evidence. In fact, the appendix does not differ from publications of Harvard that are directed towards its alumni.[34] Surely, we can all agree that a University's explanation of a special admissions program to alumni, especially one that may mean that fewer alumni sons and daughters will be admitted, is not a document that comes with built-in guarantees of credibility.

A final and perhaps most salient source of cynicism is the sense that it would be physically and mentally impossible for an admissions officer to proceed in the way that Powell describes. He describes it as follows:

> In [the Harvard College] admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his particular contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way

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[33] *Id.* at 315.

[34] My only authority for this sentence is my own observation of the circumstantial evidence. I have seen some of the alumni publications, and the same sort of statements have appeared in them.

> is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class.[35]

This description presupposes that an admissions officer can pick up a file, examine it for the dozen or so diversity variables, and then make a judgment as to whether the student represented by the file would contribute toward the diversity of the prospective entering class. But how could this be done? If one could assign a numerical value for the set of variables, or even an on-off judgment for each of them, one might construct a formula and feed the whole mess into a computer. But no University has ever claimed that it has constructed such a mechanical procedure.

In fact, the operation of an admissions process depends upon the fallabilities of human memory. When one looks at a file, it cannot be compared to other files unless one can remember them. And how many files can be remembered? Presumably the rational admissions officer would compare a small set of files with each other, proceeding through the files in lots, making detailed comparisons only within the small lots, not the entire group of files as a whole. How then will one lot be compared with another? A suspicious person might suspect that informal "targets" or "quotas" might be used to measure success or failure in achieving diversity.

Perhaps it is relevant in this regard to consider the way in which Justice Powell edited the statement in the *Amici Curiae* brief. As it appears in Powell's opinion, the quotation reads as follows:

> '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.'[36]

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[35] 438 U.S. at 317-318 (footnote omitted).

[36] *Id.* at 316-317 (quoting Appendix to Brief for Columbia University, Harvard University, Stanford University and the University of Pennsylvania, as *Amici Curiae* at 2-3, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)) [hereinafter cited as *Amici Curiae*].

In the appendix to Powell's opinion the omitted portions, which he summarized in the square brackets, can be read. After the sentence about no target-quotas, the following appears:

> 'At the same time the Committee is aware that if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students cannot begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. The small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.'[37]

And then it goes on as quoted in the opinion, "But that awareness 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." If this is not an example of Orwellian Newspeak, then I do not know what is. It is hard to read such prose and conclude anything other than that Harvard has a quota, but will not say what it is, or precisely how flexible it is. It is also hard to imagine that Bakke would have had a better chance of getting into medical school if Davis had been using the Harvard plan.

In all fairness, I must say that I find it inconceivable that Powell really believed all of that. It is hard to believe that he could have been as successful in the practice of law as he was without being able to tell evasive and equivocating language when he sees it, and without becoming suspicious when presented with such statements.

Indeed, I think that something deeper is going on. What is probably at work here is Justice Powell's sense of what is fair and unfair and the way in which his search for fairness has led him to neglect the presence of certain facts. If the Davis plan struck him as unfair, and the Harvard plan as more fair, there would be an understandable tendency to describe the Harvard plan in terms more glowing than it fairly deserves. As evidence of what Powell's sense of fairness is, I quote the following paragraph that I believe to be crucial for understanding his attitude toward this case:

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[37] 438 U.S. at 323 (quoting *Amici Curiae*, *supra* note 36, at 2). Aside from other critiques that one could make, there are reasons to be suspicious of Harvard's geographic quota, since there is evidence suggesting that it was intended as a Jewish quota. *See* R. STEEL, WALTER LIPPMAN AND THE AMERICAN CENTURY 194 (1980).

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and then he would have no basis to complain of unequal treatment under the Fourteenth Amendment.[38]

And in a footnote to this paragraph, the following two sentences appear: "The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of the petitioner's special admissions program. Nowhere in the opinion of [the dissenters] is this denial even addressed."[39]

This constitutes a powerful appeal in the rhetoric of our culture. All of us feel that we are somehow different, and we always hope that we can be judged in the richness of our difference and not viewed as though we were a cardboard stereotype. Indeed, if the Harvard plan and Powell's opinion could contribute toward the goal of treating applicants as individuals, instead of as ciphers, one could easily say that it would have made a contribution to civilization. But is this rhetoric a genuine expression of these values, or is it merely a hollow play with verbal counters?

What do we mean when we say: "one should treat another as an individual." As a start on this investigation, one might compare the phrases: "treat as a person," or "treat as a human." What is the change in meaning that we get when we substitute human or person for individual? Compare them when used as adjectives, for example in the contrast: we want individual treatment; personal treatment; human treatment. One can conduct a similar experiment by making them into adverbs, as in: he treated her individually, or personally, or humanly.

"Human" has connotations that slide off into the similar sounding humane, which is more like decent. "Personal" treatment has a different set of connotations. It suggests that the treatment might be based on private or special knowledge not generally shared in the community about the person being treated. Or perhaps the connotation is that the treatment is intimate as in the phrase "this was a deep, personal relationship." In contrast to both of these, the connotations of "individual" slide off into the near synonym of unique. Individualized treatment is unique, different from that given to the rest of those who are being treated.

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[38] *Id.* at 318 (footnote omitted).

[39] *Id.* at 318 n.52.

This analysis suggests how we might begin to understand what would constitute treating someone as an individual. We treat others as individuals when we regard them as unique persons, as unique human beings. How would we do that? Each of us has a biography that is different in some way from those of our fellow citizens, and so our memories of the past and our hopes for the future are different. The appeal to individuality is the claim that these differences should make a difference. What history is for a nation, biography is for a human: uniqueness is to be found therein.

Unfortunately, the mulitplication of variables is not a means toward this end. I suppose one could say it seems more individualized than judging the applicant on the basis of a single criteria, such as surname or color. But to say this sort of thing is to abandon the conclusions of the last paragraph as to uniqueness. For the living reality is that the variables are variables of comparison. That which Powell referred to as "the combined qualifications" is not a listing that is meant to recognize uniqueness, but rather a scale that can be used to establish comparability. It is a multi-dimensional ruler for the purpose of ranking files. Once again, to be fair about it, I doubt if the admissions officers at Harvard read files so as to sense the presence and absence of variables. If they are any good at it, I rather suspect that they do not read the data as a set of variables, but rather that they read between the lines of the data, searching for some sense as to what sort of human stands behind this file.

If the rhetoric of the previously quoted paragraph does not fairly constitute judging an individual as a unique person, then what is the sense of individual that he has in mind? Individual has a sense other than unique; the other meaning of individual lies in the relationship of the word 'individual' to the word 'class.' We can speak of the individual considered separately from the class, or that an individual stands out from the class, or that the individual is being considered in isolation from the class. In the first sense of individual, that of unique, the line of comparison was historical in that in order to understand what is unique about this individual one goes back through the time of this individual's biography, comparing then and now, understanding in this way. For this second sense of individual, the comparison is to peers, to contemporaneous comparisons with other members of the class.

The rhetoric of the paragraph that I quoted from Powell's opinion accords with this second meaning. The first sentence says that the procedure will treat the applicant as an individual; there are three more sentences that are offered as justifications for this conclusion. Note the rhetorical structure of these sentences. "The applicant who loses out on the last available seat to another candidate . . . ." losing and winning are the theme. "It would mean . . . combined qualifications . . . did not outweigh . . . ." "His qualifications would have been weighed fairly and competitively . . . ." We proceed from losing to weighing qualifications to

competition. This theory of fairness is of fair competition in a market, and this accords with the second meaning of individual that I have identified. In a market, we are each treated as isolated individuals but not as unique individuals.

The rhetorical appeal of this sort of language is to our residual loyalties to classical liberalism, to John Stuart Mill for example. There are some historical ironies in the use of classical liberalism to interpret the civil war amendments. The persistent hopes of the blacks who were in slavery were summed up in the old spiritual with its line, "let my people go," a spiritual that pretended to be about the Exodus of the Jews from Egypt but was sung with deep emotion as applicable to their own case of the Egypt of slavery. It is a strange irony that the title, "let my people go," can be transmuted into the claim "laissez-faire."

The rhetoric of this paragraph, with its reference to the isolated individual, is consistent with the rhetoric of the opinion as a whole. For example, in the earlier parts of the opinion in which Justice Powell presented his thesis about the proper judicial role, he argued that judges should step out of the quagmire of a particular time and place. The appeal of the isolated individual functions somewhat in the same way. Furthermore, classical liberalism is a nonhistorical way of proceeding in analysis of social affairs. For example, the economic analysis with which we are familiar as the successor to classical liberalism, neoclassical micro-economics, has as one of its most conspicuous features the neglect of history. As it works out, the appeal to transcend history and the appeal to the isolated individual often go hand in hand.

One should not be tempted to take cheap shots at such a powerful rhetorical tradition, for it appears in many guises and is deep in the imagination of many whom one would not think of as identifying with the tradition. Consider, for example, Huck Finn on the raft floating down the Mississippi. He and Jim are alone, unable because of the difference of race to establish a new community, and also unable to find ways to fit into the civilization on the shore, the Missouri frontier. Consider as well how many novels written since that time are nothing more than variations upon the theme of Huck and Jim alone upon the raft, floating down the Mississippi River. We could also remember that, as the novel ends, Huck Finn is unable to find a way to live with Tom Sawyer and Aunt Polly that is tolerable. And so his only action is flight, of "lighting out for the territory ahead of the rest." Mark Twain presented for our imagination a richly drawn portrait of frontier society. He presented to us in Huck Finn one of the most vibrant individuals of our literature. And neither he as a novelist nor we as readers can imagine Huck Finn existing in that society; we can only imagine him as existing outside of it, off into the territories, away in a place where the rest have not yet been.[40]

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[40] My interpretation of HUCKLEBERRY FINN is completely derivative. *See* Poirier, *Mark Twain, Jane Austen, and the Imagination of Society*, in IN DEFENSE OF READING 112 (R. Brower & R. Poirier, eds., 1962).

It would be altogether discreditable of me to mock the imagination that conceives of an individual in competition as a model for a good society, or that conceives of the proper role for a judge as being that of transcending history. To do so would be to mock something too important for satire, cynicism, or mockery. Even so, I would say clearly that I dissent. One cannot transcend history, especially not in the law. The same seems true for ethics in general.

VI.

In fairness to Justice Powell, I must point out that he does not always talk in this way. Consider the following, taken from one of his opinions in a recent establishment clause case:

> It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of analytical tidiness, then that too is entirely tolerable.[41]

In this passage, Justice Powell describes himself as one who is in history, not above it, and thus as one who makes decisions that are historically relative, not absolute. One might explain the contrast by surmising that he is not anxious about religion whereas he is about race. However one explains it, the fact remains that in *Bakke* he used a rhetoric that required him to give a nonhistorical reading to cases, to see the ideal judge as transcending history, and see the individual as isolated from history. This rhetoric won't work; the words can be said, but our lives and our problems occur in history, not outside of it.

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[41] Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring and dissenting) (citation omitted).