EQUAL PROTECTION AND THE SEARCH FOR JUSTICE*

Julius Stone**

Amid the confrontations which agitate many societies in our age, the cry for justice rings out stridently from all the protagonists. As each identifies "justice" with his own demands, what can be said about justice for all of them becomes more and more impenetrable. This has, of course, always been so to some extent, especially during the convulsive struggles from which most new states emerged at their origins.

This is not to say that in our older and stabler Western democracies people have not in the past contended about particular applications of the norms of justice, especially and increasingly today in areas of social and economic change. Yet it has still been true, for instance in England or the United States, that in great segments of human relations the disputations revolved around norms of justice of which the contents were accepted by all hands.

I have elsewhere used the metaphor "enclaves of justice" to refer to such areas of relations within a society in which men's expectations from each other have become clothed with general approval.[1] But I have also warned that, even in the comparatively stable West, these enclaves of justice are not won and held once and for all; that they never cease to be open and vulnerable to chaos and brute force encroaching from the wilderness that surrounds them, and from the social psychological changes which stress may produce in a particular generation.[2] The enclaves of justice won and held at a particular time remain ever fragile in this sense.

---

* Excerpted from the inaugural Isaac Marks Lecture delivered on February 4, 1980 at the University of Arizona College of Law, Tucson, Arizona.

** Distinguished Professor of Jurisprudence and International Law, Hastings College of Law; Professor of Law, University of New South Wales. O.B.E., B.A., B.C.L., D.C.L., Oxford University; L.L.M. Leeds; S.J.D. Harvard.

1. J. STONE, HUMAN LAW AND HUMAN JUSTICE 344-55 (1965).
2. J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 546-65, 795-98 (1966).

Both stability and change in the enclaves of justice in a country like the United States arise from cross-checking by each generation between the enclaves as experienced in social living, and the current theories of justice which have intellectualised this experience, and between the past and present of both of these. In view of this, and of the changes proceeding even in a stable society, it is to be expected that men's understanding of justice should be ever in constant change and travail.

One part of the explanation of the sharp and ubiquitous confrontations of our own age, and for the tendency for justice to split into competing versions, certainly lies in the headlong rate of social change, powered above all by accelerated technological change, and by changes in human communication. If values such as justice, and theorisings about them, seem to become increasingly chaotic, this is in important part a side-effect of the unprecedented rate of change. Future shock bears down on our concern with justice as much as it does on other aspects of our lives together. Headlong changes such as we are experiencing undermine faith in absolute values. And, if they are headlong enough, they render even relativist values unworkable since judgment never has time to reassess the variables on which relativism seeks to base itself.

II.

A notable tendency of lay as well as juristic and philosophical thinking in an age of this kind has been to try and accommodate the rapid shifts and intractabilities of current questions of justice within notions like "equality." This symbol, indeed, stands out with notable clarity. It beckons as a kind of guide and asylum from the intellectually perplexed, and as a *tabula in naufragio* for the socially shipwrecked.

There are at least two aspects of the equality notion which may make this beckoning seem so seductive—one logical, the other historical.

The logical reason is that if and when we can somehow reduce justice to equality, it might help the judgment to move from the perplexities of mobile and conflicting imponderables, into a realm of quantitative, logical or even mathematical demonstration. And this guides us back (or on) to the one kind of faith which commands a degree of general acceptance even today, the faith in mathematics and exact science. Partially because of its kinship to mathematics, equality seems to have a definite meaning in a sense in which notions of "justice" or even "fairness" do not.

On the side of history, advocates of equality-as-justice can point to the idea's success in practice through the story, particularly the recent story, of the Western world. And it is certainly true that the appeal to the symbol of equality in some form or another has been a formidable weapon in some of the landmark struggles of the Western world. A few of these victories may be recalled:

—the equality of all *legales homines* in England after Magna Carta;
—the equality of personal monarchs and their States (*i.e.*, personal domains) in Christendom after the Treaty of Westphalia, 1648;
—the *égalite* (joined with the liberty and fraternity) of citizens proclaimed by the French Revolution;
—the equality of endowment by the Creator of all free Americans with certain inalienable rights, proclaimed by the American Revolution;
—the legal emancipation and attempted grant of civil rights to the southern blacks by the Civil War, the fourteenth amendment and the early civil rights laws;
—the equality of comradeship of peasants and workers as seen in the powerful mainstream of Marxist thought and their notional equality of access to the means of production and the needs of life;
—the struggle for equality in voting power of women and young adults;
—the resumed struggle of American blacks after World War II to achieve an actual equality that would give "reality" to their legal equality;
—the central drives for equality of the "women's liberation" movements.

It would be a mistake though, as I shall shortly suggest, to treat these victories for which equality was a battlecry, as proving the adequacy of equality as a criterion of justice.

III.

I must however, before that, inquire what theoretical basis there can be for thinking that the notion of equality is the decisive element in the judgment of justice. It is certainly the case that many leading thinkers are committed in various ways to the view that "the presumption of equality" stands at the centre of justice, so that equality must be the rule until this presumption is rebutted.[3] Their claim is that, even before we have examined the empirical facts about people, and in particular their similarities and differences, justice requires us to treat all individuals, until the contrary is shown, as entitled to an equal distribution or to equal treatment. This presumption, be it noted, is different

3. *See generally* Browne, *The Presumption of Equality*, 53 AUSTRALASIAN J. PHILOSOPHY 46, 46-53 (1975).

from Aristotle's classical position that equals are to be treated equally and unequals unequally. Aristotle's formula leaves it to the proponents both of equality and inequality to prove empirically whether the persons among whom justice is to be done have characteristics (which I may here term "badges of entitlement") entitling them to similar (equal) or different (unequal) treatment.

None of the grounds which have been offered for such a meta-empirical "presumption of equality," to be indulged without preliminary regard to the facts, seems sustainable.

A first such ground, based on the Kantian *a priori* proof of the equal innate freedom of all individuals, proves far too much (or far too little) to be accepted as helpful at the present juncture of social and political intervention in Western societies. This kind of ground would proceed through the *a priori* proof of individual free will from the nature of ethical inquiry, to a proof of the free will of all individuals, and thus to a proof of the equal free will of all, and finally to a proof of equality as such, all without reference to empirical findings. The difficulty with this is that it also tends to establish the *laissez faire* doctrine maximizing individual free will, and most of the thinkers concerned really desire to escape, by the presumption of equality, from the consequences of this very doctrine. In modern parlance, they tend usually to be advocates of "affirmative action."[4]

Second, there is the argument from the essential nature of rules by which justice must be dispensed. The very nature of rules, the argument runs, means that they apply equally to all who fall within their terms. But, of course, any legal or ethical order consists of a multitude of rules, and a substantial part of this multitude is concerned, by the very differences of fact on which the rules are predicated, to dispense *un*equal shares or treatment among individuals, according to differences in their relevant badges of entitlement. In its neglect of this discriminating function of *rules*, as distinct from the equality innate in *a single rule*, this second argument begs the question it is used to prove.

This is also the case with the third argument used to base the presumption of equality, namely that all persons have humanness—they are, as we commonly say, all human—and should therefore be treated equally. For this argument assumes without empirical enquiry not only that humanness is a relevant badge of entitlement, but also that *it is the one that is dominantly relevant* in issues of just distribution or treatment. J.R. Lucas has observed that to derive an equality norm from the humanist observation that "a man is a man for' that," we would have to frame an argument somewhat in the form:

4. *See* J. STONE, *supra* note 1, at 82-104.

All men are men
All men are equally men
∴All men are equal.[5]

And he observes wittily that if we substituted "numbers" for "men" in this syllogism, we would have the obviously fallacious argument;

All numbers are numbers
All numbers are equally numbers
∴All numbers are equal.[6]

Such a conclusion is, of course, absurd on its face. Yet the argument from common humanness still maintains its attractiveness, for a reason unrelated to its logical weakness. I mean, of course, that the association of the notion of "humanness" with symbols like "humanity" or "common humanity" exposes those who reject this argument to charges of "*inhumanity*," that is, of lack of kindly (humane) sentiment. (This exposure is only reduced and is not wholly removed by our substitution of the word "humanness" for "humanity."). Yet it is critical to make the rejection because, far from being a sign of inhumanity, the rejection is essential if we are to remove a blockage of thought which (as I shall show) hampers the tasks of justice, and of compassion as well.

IV.

I must pause at this point to make clear that while the arguments I am rejecting are inconclusive when offered to prove (by way of a presumption of equality) what share or treatment individuals are in justice entitled to, they are still meaningful for another very different purpose. They are ways of stating *an important presupposition* of all inquiries into justice. Such inquiries cannot begin until the range of individuals among whom justice is to be done has been delimited, until, in short, "the justice-constituency" has been identified. And the arguments (for example) from *a priori* free will and common humanness do, at this preliminary level, afford the directive that all human beings physically in or in the control of a given justice-constituency *ought to be counted within it also for the purpose of doing justice*.[7] This question of the exclusion of some persons or groups from consideration in the doing of justice was, of course, a great question in many ancient societies, including Aristotle's Greece, based upon slave labour. It remains so in some contemporary societies. It was for and in such societies that the battle-cry of equality helped to produce the triumphant historical

5. Lucas, *Against Equality*, 40 PHILOSOPHY 296 (1965).
6. *Id.*
7. Intensified of course, by religious ideals of "the brotherhood of man" and "the Fatherhood of God."

landmarks to which I referred in opening. It is, however, certainly not this kind of question which is central to the struggles for justice in Western democractic polities today. The questions pressing in these polities are concerned, rather, to ask when persons *already* included in a justice community shall be treated unequally or equally, that is, what shares and treatments they should have according to their respective bodies of entitlement.

V.

The justice-relevant similarities or differences which determine entitlements of individuals already included in such a community cannot be derived from the equality notion (nor from equality in free will or in humanness, offered as its basis). They escape its ambit in two vital respects. First, the notion of equality itself cannot determine for us what features are to be seen as similarities or differences *relevant to justice* (that is, as constituting badges of entitlement) in particular kinds of issues between particular classes of individuals. Second, the equality notion cannot determine for us *the incidence in empirical fact* of relevant similarities or differences among the individuals concerned. Yet this incidence must surely affect the question whether it is sensible to begin in an actual society with the presumption, here under question, that equality prevails, that is, that relevant similarities overwhelmingly predominate.

VI.

I shall shortly show that the above limits affect the usefulness of the notion of equality for problems of justice even when, as under the equal protection clause, the question is not whether justice can be resolved into equality but is rather one of applying an express constitutional directive that equality shall govern state action. The limits have become very apparent to all who work with or study that clause, especially since we entered the era of "affirmative action" and "reverse discrimination."[8]

This poor performance of the notion of equality even for implementing the equal protection clause is due in major part (as is its inadequacy as a core criterion of justice), to the treacherous ambiguities and self-contradictions which it conceals.[9] The notion may be taken to refer, first (and, as just seen, very usefully) to the threshold task of delim-

8. Notably since Brown v. Board of Education, 347 U.S. 483 (1954).

9. In relation to this notion in international justice, see Stone, *Approaches to the Notion of International Justice*, in THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: THEORIES AND PRACTICE 372-460 (R. Falk & C.E. Black, ed. 1969).

iting the membership of the justice-constituency. It is other multiple references concealed within it which mainly cause the trouble.

For equality may refer, second, to the demand that all members of a justice-constituency come under the same uniform rules. And in that second reference it ignores the plain injustice to any human beings who might still be *excluded* from the constituency. It also ignores the fact that all may be subject to uniform rules, and yet those rules be *unjust* to all of them; as when all are equally subjected to tyrannous oppression. And it further ignores the fact that a uniform rule superimposed on pre-existing relevant differences between the factual situations of members, may also be grossly unjust; as when, to adapt Anatole France's aphorism, the rich equally with the poor are permitted (or forbidden) to sleep under the bridges of the Seine.

Third, equality may refer to a requirement (quite at loggerheads with the second reference above to uniformity of rule) that the rule differentiate among individuals according to the diversity of their situations *so as to produce a greater degree of equality among them after the rule has been applied.* The feature designated as equality under this third reference is not application of a uniform rule, but involves the very opposite of that. The graduation of income tax rates is a simple and pervasive example. Equality in this third sense of *greater resultant equality* is achievable only insofar as the applicable rules of law *do discriminate* in favour of those actually initially disadvantaged.

We have thus seen that there are two main and probably interrelated reasons why the equality notion fails as an adequate guide to just decision. First, insofar as we cannot interpret the notion to mean exclusively that a uniform rule on all matters must be applied to all persons regardless of relevant similarities or differences in their circumstances, we are compelled, as soon as we try to use it, to resort to some value other than inequality before we can come to judgment. We always have to ask whether there are similarities and differences between this case and the cases to which the uniform rule applies, which afford a sufficiently relevant reason for treating this case the same or differently. This judgment of relevance can in turn only be made by reference to some goal or policy or value (*other than equality*) which justifies applying a different rule in this case. The heart of the judgment of justice is the relevance of the factual differences among justice-claimants to other goals than equality also approved by law. Second, as seen a moment ago, equality may mean not only uniformity of rule, but, *inter alia*, equality of factual outcome after applying *discriminating* rules. And nothing in the notion of equality itself tells us when each of

these rather contradictory meanings is the appropriate one to use in the particular case.

VII.

I proceed now to develop the point that it has not been possible to apply even the equal protection of the laws clause merely in terms of the ideal of equality until a choice has been made between the rather contradictory versions of the meaning of equality just mentioned. As Ronald Dworkin has well observed,[10] that clause makes the concept of equality a test of State action, but *it does not stipulate any particular conception of that concept*. In this light it ceases to be surprising that Dworkin's own valiant effort to explain how De Funis's or Bakke's exclusion in favour of a less intellectually qualified black ended in the conclusion that unequal treatment will be justified as long as the victim still is "treated as an equal." He is concerned here to assert (on grounds far from self-evident) a distinction between "treatment as an equal" and "equal treatment," and that the "right to treatment as an equal" is fundamental, and "the right to equal treatment" merely "derivative" from it.

This distinction begs the question which of the possible references of "equal" protection examined above is the predominant one, though (as just seen) Dworkin himself recognises the choice to be open under the equal protection clause. Moreover, the very right to "equal treatment" which he is at pains to derive from his Kant-like axiom about "treatment as an equal," has itself at least two potentially conflicting meanings. The meaning Dworkin assumes is that "equal treatment" means equal distribution under a uniform rule.[11] But "equal treatment" can also mean, as just seen, treatment by a differentiating rule which results in a greater residual equality between the persons concerned. And resort to this latter meaning would succour the minority claims in *De Funis* and *Bakke* situations, without even any need to resort to Dworkin's vague notion of "treatment as an equal," here in question. In the Welfare State, this second kind of residual greater equality produced by deliberately discriminatory rules is an everyday phenomenon. But, of course, for Dworkin to have relied on *this* mean-

10. *The De Funis Case: the Right to go to Law School*, N.Y. REV. BOOKS, Feb. 5, 1970, at 23, 29, *reprinted in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 226 (1977). *See also* R. Dworkin, *Why Bakke Has no Case*, N.Y. REV. BOOKS, Nov. 10, 1977, at 11. The use of Professor Dworkin's efforts to justify reverse discrimination to illustrate what I term the slough of equality is not intended to denigrate his efforts to marshal learning to contemporary issues and the courage and imagination which have often drawn admiration to his expositions.

11. See the much clearer statements of J.R. Lucas who exposes in general the unavoidable built-in contraditions, as well as overlappings, between these two modalities of "equality." Lucas, *supra* note 5, at 297-98.

ing of "equal treatment" (rather than on the overriding primacy of "treatment as an equal") would still require him to give good reasons for choosing it. And those reasons could *not* be in *terms of equality*. They would have to involve *other* justice-related values.

This intellectual impasse in the outcomes of equality as a criterion of justice has climaxed for the moment in the confrontation of whites and blacks in *Regents of the University of California v. Bakke*.[12] No doubt the impasse may seem to have been avoided in the past by a presumption, analogous to that mentioned in Section III above, that equality prevails until this presumption is rebutted, with the implicit addendum that "equality" means equality *by virtue of general application of a uniform rule*. The courts have a better basis for this presumption, namely, the equal protection constitutional precept, than do the philosophers; but their preference of the uniform rule version of equality rather than other versions available, is no less question-begging.[13]

Amid the doubts and controversies surrounding the Supreme Court's decision, its outcome rings clear in support of the present position. Even when the Court is applying the constitutional precept of the equal protection clause, still, at the critical watersheds of judgment, it is not equality but some wider notion such as "justice," or "policy" or the removal of "oppression," or "arbitrariness" or "invidiousness" which is decisive. The five judges who constitute the majority which held that the Supreme Court of California erred in prohibiting the University from establishing race-conscious programs in the future,[14] consisted of Justice Powell (who announced the judgment of the Court), and Justices Brennan, White, Marshall and Blackmun who concurred on this issue in a single joint opinion ("the Brennan Four").[15] Justice Powell and the Brennan Four, all proceeded on the basis that the prohibition of section 601 of the Civil Rights Act of 1964 was co-terminous as to race discrimination with the equal protection clause.[16]

12. 438 U.S. 265 (1978). For this writer's full analysis of this case see Stone, *Equal Protection in Special Admissions Programs—Forward from Bakke*, 6 HAST. CONST. L.Q. 719-50 (1979) [hereinafter Stone, *Bakke*]. *See also* Stone, *Justice in the Slough of Equality*, 29 HAST. L.J. 995 (1978); Stone, *Justice Not Equality*, in JUSTICE 97-115 (1979).

13. For a thoughtful (and thought-provoking) discussion of the outcome-determining burden of proof issues raised by the presumption, see Spece, *A Purposive Analysis of Constitutional Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating DNA Research*, 51 S. CAL. L. REV. 1283, at 1325-1331 (1978). That author would probably agree that if the courts had preferred the competing "greater resultant equality" rather than the "uniform rule" version of equality, most of the supposed burdens of proof would have to be changed from those at present judicially indicated. So that it is not finally the burdens of proof that determine outcomes, but the version of equality preferred by the courts.

14. 438 U.S. at 320.

15. *Id.* at 272. The remaining four Justices—Stevens, Burger, Stewart and Rehnquist—disposed of the case without reference to equal protection by treating as a case of "exclusion" of Bakke, forbidden expressly by Section 601 of the Civil Rights Act of 1964. *Id.* at 412-421 (Stevens, J., concurring and dissenting in part).

16. *Id.* at 287; *id.* at 325 (Brennan, J., concurring and dissenting).

How did the five latter judges draw from the equal protection clause their view that the use of race as a criterion is not prohibited in "benign" discrimination remedying disadvantages of members of a group resulting from past unlawful discrimination?

For Justice Powell the decisive point was that the benign discriminatory provision must be shown to be necessary for protecting a substantial and constitutionally permissible purpose or interest of the state.[17] Since what was to be justified in the *Bakke* case was the *departure* from equality involved in benign discrimination, his justifying "purpose" or "interest" could not be the attainment of equality in that same sense. At nearest, it might be the approximation to that condition—*i.e.*, in this case, to a percentage of minority entrants proportionate to that of the minority in the general population. But this was precisely the purpose which Powell denied ever to be permissible.[18] There were other purposes than percentage representation offered by the University of California in *Bakke* which Justice Powell *did* regard as permissible. These were (1) to ameliorate "the disabling effects of identified discrimination";[19] (2) to improve delivery of minority health services;[20] and (3) to diversify the student body so as to produce a robust exchange of ideas, speculation, experiment and creativity.[21] Since the values which these represent cannot be contained within a mere norm of equality, some value other than equality was finally decisive for this judge.

The same may be said of the assertion by the Brennan Four that "our cases have always implied that an 'overriding statutory purpose could be found that would justify racial classification."[22] Unless this "overriding purpose" refers to values other than equality, why should it be said to be "overriding"? And their more favourable attitude towards "affirmative action" clearly indicates that at least the same "important political objectives" which would satisfy Justice Powell would also satisfy them.[23]

Can it be said to rebut this that the Brennan Four (disagreeing in this respect with Justice Powell) held that even the fixing of numerical quotas proportionate to population was a permissible remedial meas-

17. *Id.* at 315 (citing *In re* Griffiths, 413 U.S. 717, 721-23 (1973)).
18. 438 U.S. at 307.
19. *Id.* at 307-10.
20. *Id.* at 310-11.
21. *Id.* at 311-15.
22. *Id.* at 356. The Brennan Four cited a string of cases ending with McDaniel v. Barresi, 402 U.S. 39 (1971) and North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971), supporting race-conscious desegregation plans in schools. *Id.* For the formula "important political objectives" they referred to Califano v. Webster, 430 U.S. 313, 316 (1977). 438 U.S. at 359.
23. 438 U.S. at 357-62.

ure against effects of past discrimination?[24] Could it be said that in approving quotas the "overriding purpose" was still the achievement of "equality," albeit in a sense of "equality" different from that in title of which Bakke claimed, or which Justice Blackmun called "idealistic equality."[25] Even this in-some-sense quality-seeking purpose cannot, however, rehabilitate equality as the *decisive* value in play. For, by hypothesis, race-conscious criteria in remedial discriminatory preferences impair the equality of the nonpreferred. So that the confrontation is between two vindications of "equality." Equality, being on both sides of the argument, cannot decide it as long as its meaning does not shift—as indeed it here does—from equality in the sense of application of a uniform rule, to equality in the sense of application of discriminating rules which (precisely by their discrimination) increase the resultant factual equality.[26] Even if the only critical point is whether one meaning of equality still overrides the other, careful analysis must conclude that this point itself cannot be decided without reference to a value other than equality.

Justice Blackmun's sensitively eloquent separate opinion indeed almost expresses the present thesis. He pointed out that "governmental preference has not been a stranger to our legal life," instancing veterans, handicapped persons, and Indians, quite apart from the constitutionally protected progressive income tax.[27] Further, "in order to treat some persons equally, we have to treat them unequally. We cannot—we dare not—let the equal protection clause perpetrate racial supremacy."[28] The inference seems clear that he was conscious that the equality notion is no more decisive for legitimating preference for victims of the effects of past racial discrimination, than it is for legitimating preference for veterans or handicapped persons or Indians.

IX.

Justice Powell's attempted escape from the apparent contradiction of approving "race-conscious criteria" yet condemning "racial quotas" lies in the anchorage which he found for his decision in the relation of Universities to the first amendment guarantees and their function of promoting robust intellectual exchange.[29] It is tempting accordingly to treat him as playing off one constitutional provision against another, thus leaving equality as still the decisive criterion at any rate when

24. *Id.* at 378.
25. *Id.* at 405 (Blackmun, J., concurring).
26. See Section VI in text *supra*.
27. 438 U.S. at 406.
28. *Id.*
29. *Id.* at 405.

there is no contrary *constitutional* provision. The fact that the Universities are thus functionally related to the values enshrined in the first amendment did of course facilitate Justice Powell's adoption of the diversity ground. Yet it is important to observe that what was here decisive was the value of free inquiry and expression itself, rather than the fact of its enshrinement in the Constitution.

Constitutional or statutory enshrinement is of course one emphatic way in which community acceptance of a value is manifest, but it is not the only way. And the deeper import for the future is the point that equal protection decisions, at any rate in relation to "affirmative action," cannot escape being based finally on the justice of outcomes, rather than on the equality criterion itself. Moreover, it is very understandable that such a judgment of justice cannot be held within mere calculations of equality. Such a judgment necessitates advertence to the whole context and circumstances of the case under consideration, including other value-commitments of the society with regard to the particular arena of social life in which the cases arises.

The functional arena involved in *Bakke* centred on the intellectual life of the community, involving the value-commitments to testing and extending knowledge and understanding. Universities are *par excellence* the means by which we institutionalise those commitments. Americans would almost certainly have these value-commitments even if Justice Powell had not been able to find them enshrined by implication in the First Amendment. Englishmen and Australians have them without any First Amendment. And such community value-commitments will inevitably figure as a component of the judgment of justice, if for no other reason than the ambivalent impotence of the equality notion to decide the case without them.

I move now to my conclusions on the two related problems which have concerned us. The first concerns the contribution of the *Bakke* decision, despite much criticism of it, to "equal protection" principles of admission to Universities. The second concerns the perils of continuing to indulge the illusion that questions of justice can be reduced to questions of equality.

X.

We have seen that the focal element of Justice Powell's position which joined him with the Brennan Four in a majority-vindicating "race-conscious" programs (where race is one among a wider basket of admission criteria), was his recognition of the countervailing interest, anchored in the First Amendment, in speculation, experiment, creativeness, and robust exchange. While this interest is compelling through-

out the polity, he emphasised that universities have special responsibilities in furthering it: "Academic freedom . . . long has been viewed as a special concern of the First Amendment."[30] Justice Powell held that since the diversity thus sanctified is far wider than mere racial diversity, racial quotas were neither a necessary nor a feasible means toward it, although race could figure among the wider range of relevant factors.[31]

It must be said that this approach, assuming it to be otherwise tenable, is jurisprudentially attractive. For it may offer a path by which equal protection can be functionally molded through principles appropriate to that segment of national life, embracing universities and similar institutions, dedicated to the transmission and expansion of knowledge. It must be clear that reasoned elaborations designed to give equal protection sufficient meaning to function within *each* arena is essential if the jungle threatening to engulf that clause is to be reduced. To require that *every* equal protection determination in one arena be mechanically transferable to *every* other social arena is to compound progressively all the numerous problems rather than to solve any of them.

Accordingly, claims that Justice Powell's First Amendment diversity principle is not transferable to the employment arena may point to a strength rather than a weakness.[32] And it is, of course, consistent with this *desideratum* that neither the majority nor the minority in *United Steelworkers of America v. Weber*[33] allowed constitutional issues, as distinct from the mere construction of title VII of the Civil Rights Act, to play a part in the decision.[34] There is obviously no First Amendment nexus, similar to that for universities, which calls for a manufacturer of aircraft or refrigerators to have a culturally or educationally diversified board of directors.[35]

Professor Sindler has sought to dismiss Justice Powell's diversity ground as idiosyncratic and not viable as a general rule.[36] But this can-

30. *Id.* at 316; *see* Stone, *Bakke*, *supra* note 12, at 747-50.
31. 438 U.S. at 319-20.
32. A. SINDLER, BAKKE, DEFUNIS AND MINORITY ADMISSIONS 320 (1978).
33. 99 S. Ct. 2721 (1979).
34. Of course the employer's impugned action in *Weber* was not state action. It is nevertheless noteworthy that there appears to have been no such references to the relation of title VII to constitutional restraints as were made in *Bakke* to the relation of title VI, section 601, to them. In fact, the majority in *Weber* specifically noted that title VII and title VI "cannot be read *in pari materia*." *Id.* at 2729 n.6. By this they appear to mean at least that insofar as title VI refers to education, an area of direct federal-state involvement, the constitutional standards of the fifth and fourteenth amendments are attracted to it. There is no such necessary attraction in the context of private employment, to which title VII is addressed. I am here adding a further functional differentiation.
35. *Cf.* Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 CALIF. L. REV. 171, 188-89 (1979) (providing examples).
36. A. SINDLER, *supra* note 32, at 311-12. His main ground is that if the First Amendment

not be accepted. For the Justice's elaboration from Justice Frankfurter's words in *Sweezy v. New Hampshire*,[37] makes it clear that it is the goal of diversity as a means to further robust exchange which is protected by the first amendment, and that university admission policies *are protected insofar as they promote this goal of diversity*.[38] So that what the Powell diversity ground establishes is that criteria for race-conscious university admissions will be entitled to first amendment protection only if they are actually (or at any rate "rationally") related to the goal of educational diversity. Though the criteria may include race, they must also include a sufficient range of other criteria which genuinely serve to measure *the potential contributions to diversity of all applicants for admissions*.[39]

The clarity of this *ratio decidendi*—its "rationality" in current jargon—should not be concealed by the cynical observation that preference indirectly produced by a basket of factors, including race, is indistinguishable from that produced by racial quotas. For this observation is false in a crucial respect.[40] It is false even when exactly the same percentage representation of the disadvantaged racial group is achieved by both approaches. The identity of outcome in this sense is only as to the relative sizes of minority and majority groups. When the impact of the two approaches on individual applicants is examined, however, the direct and indirect preferences are seen to be massively

---

did indeed provide the compelling interest underlying the freedom of universities to promote diversity, universities could use this freedom, not to pursue diversity in the student body as approved by Justice Powell and the Brennan Four in *Bakke*, but instead to pursue conformity and homogeneity, e.g., in removing inhibitions on discussion of members of an "in-group" of gender or race. *Id.* In the writer's view this is not necessary or even likely outcome of Powell's position. Professor Sindler, as well as Professor Dixon, can only conjure up the dread possibility they envisage by interpreting Powell to mean that the First Amendment legitimizes the enterprise which we know as a university, *including whatever objectives a university chooses to pursue, whether these be to promote uniformity or to promote diversity. See* Dixon, *Bakke: A Constitutional Analysis*, 67 CALIF. L. REV. 69, 75-78 (1979).

37. 354 U.S. 234, 263 (1957).

38. Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

438 U.S. at 313.

39. *Cf.* Blasi, *Bakke as Precedent: Does Mr. Justice Powell have a Theory?*, 67 CALIF. L. REV. 21, 61, 66 (1979) (another view on the effects of quotas in exacerbating fears of lower and middle class whites and the injury to self-esteem arising from dual systems in admissions and classrooms). See *id.* at 62-67 on various types of race-conscious programs in this light. In preferring the diversity ground to grounds based on dignity of applicants or reducing racial prejudice, he insufficiently stresses that this expresses the thrust of first amendment freedom of expression for which universities are a conduit *par excellence*.

40. So is Professor Dworkin's overly facile assertion that it is "either hypocritical or unrealistic" to recommend "that universities pursue racially explicit goals through racially neutral means." Dworkin, *The Bakke Case: An Exchange*, N.Y. REV. BOOKS, Jan. 26, 1978, at 44 & n.1. And see Professor Dworkin's rather unprophetically titled article, *Why Bakke Has No Case*, N.Y. REV. BOOKS, Nov. 10, 1977, at 11.

different. They are likely to be different as regards which individual applicants win admission, especially in the minority track. More importantly, however, they have different psychological effects on applicants, especially white applicants, who do not gain admission.[41]

In the face of direct racial quotas, as indeed Justice Powell as well as the Brennan Four pointed out, exclusion is felt to be based on an immutable characteristic of the applicant for which he neither can nor should feel any responsibility. It must consequently be felt to be openly and blatantly unjust by him, by his family, and widely (if more diffusely) throughout the white community. The fact that many in the white community are conscious of the grievous past wrongs for which the quota is intended to compensate, does not neutralize the new cause and sense of injustice which, at a certain point, may exacerbate rather than pacify racial tensions.

When, on the other hand, numerous factors are used as evidence of disadvantage of particular applicants, or of possible contributions by them, many of these factors may not have the immutability of race. As to some of them, applicants may even be able to make efforts to improve their prospective scores, and thus their chance of admission. Justice Powell himself listed "unique work or service experience, leadership potential, maturity . . ability to communicate with the poor."[42] One might add capacity to contribute to minority, urban or other social problems, bilingualism, and the like. And all this would remain true however deliberately the various factors are weighted in order to assure that the entrants include the desired number from minorities. Corresponding real benefits in terms of dignity, self-esteem, and a sense of the worthwhileness of effort, would also seem likely to flow to minority applicants as a result of following indirect rather than direct techniques in granting racial preference.

The final question, be it added, as between the direct "two-track" and indirect multi-factor approaches, concerns neither analytical power nor constitutional or legal propriety. It is the question of what is administratively feasible in the institutions concerned, especially when the number of applicants to be processed is sometimes as much as eight to ten times greater than the number of places. That, however, is not part of my subject today.[43]

41. Professor Sindler gives too little attention to these different psychological impacts and to the related effects of multi-factoral criteria. *See* A. SINDLER, *supra* note 32, at 312-14.

42. 438 U.S. at 317.

43. The diversity multifactoral approach calls, of course, for constant anxiety and vigilance against abuse and *detournement* of the wide discretions involved. Yet it is also true that the very shortcomings of this approach, which stir this anxiety, may also have the redeeming virtues of inviting or even compelling a period of enlightened and imaginative experimentation.

The anxiety stems, of course, from the very width, and therefore difficulty of control, of these

XI.

I have argued that there is no pot of justice at the end of the rainbow of equality. Even when the equality notion is explicitly sanctified as a constitutional precept, wider concepts of justice have to be invoked to give it meaning. This should the less surprise us in view of the treacherous nests of ambiguities, antinomies and even contradictions, concealed within the equality notion.

Finally, I wish now to identify some dangers and distortions to justice which may result when, despite all this, equality is treated, without adequate empirical basis, even if only presumptively, as the equivalent of justice.

First, when we indulge the presumption of equality, and this presumption is unrebutted, justice may be going the way of equality on a mere mechanical test of burden of proof. Yet lawyers, at least, do not need to be reminded that the mere test of the burden of proof does not warrant a conclusion as true. Similarly, this mechanical test of burden of proof about justice does not warrant a conclusion *as just*.

Second, conversely, when the opponent in the contest for justice does succeed in rebutting the presumption of equality by showing justice-relevant differences, equality still does not, even then, guide us to justice. For it is admitted on all sides that when relevant differences are shown, justice requires not equality but rather differentiation in distribution or treatment. We then still have to look for criteria other than equality corresponding to the justice-relevant differences.

The evils of the presumption of equality, however, are not merely these negative ones that it may direct us to an "equality" which is unjust, or leave us stranded on shores of justice for which equality has no maps. A more positive evil is that insofar as we thus reduce justice to equality, we may fall into habits of thought which obfuscate the real tasks basic to the doing of justice in contemporary Western democracies. These are, first and above all, the identification and explication of differences between human beings which are relevant to making justifiable discriminations between them, and of the values basing this justification; and, second, the structuring of justice-precepts corresponding to these differences and the related values. The appeal to justice, which is so persistent and endless, prods us to provide reasons why some solu-

discretions. This stirs fears of informal measures against particular groups alleged to be "overrepresented," as notoriously occurred in the 1920's and 30's. *See, e.g.*, A. SINDLER, *supra* note 32, at 316-17; Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87 (1979). *See also* O'Neil, *Bakke in Balance: Some Preliminary Thoughts*, 67 CALIF. L. REV. 3, 14-19 (1979). *See* Blasi, *supra* note 39, at 64-66.

On the complex interplay of burdens and benefits between blacks and whites in any case, see Bell, *Minority Admissions and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 14-19 (1979). *See also* Blasi, *supra* note 39, at 64-66.

tions proposed deserve more approval than others or than the *status quo*. The processes involved of recognition, articulation, and persuasion by such reasons, and of selection and adjustment among them, are all critical parts of the maturation and refinement of human society. And the effect of simplifying justice into equality is to conceal, truncate, foreclose, or disguise by fictional, arbitrary, or ambiguous formulae, the range of values involved in justice-controversies, and to impede or block or confuse these essential processes.

No Western people has shown the drive and the sweep of concern with justice, or pressed it more deeply into all aspects of complex economically organized democratic society, than the people of the United States. None has struggled more earnestly to hold and extend the enclaves of justice which it has won against the surrounding wilderness and against the divisions within itself. It is the more important that this drive and concern be not confused or blocked by demonic searching for shortcuts to justice through the mirages of the slough of equality.