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Author

Acosta, José M.

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BENIGN DISCRIMINATION AND EQUAL PROTECTION: ALTERNATIVE STANDARDS OF REVIEW*

Race in the American culture has played a major role in the conduct of our lives. This broad classification of a group of people related by common descent, has determined an individual's community, housing, economic opportunities and expectations on life. In essence it had been the determinant factor in establishing a person's legal rights. It even decided the quality of education a person should receive. More seriously, it decided whether a person should receive any education at all.¹ Yet, race stands for more than a historical oppression of American minorities. It represents culture, community, a mental perspective, and an economic mean.²

Race is not so simplistic as to merely determine the color of man's skin. It also represents years of struggle for American minorities, and it has shaped the outlook of their world. Race in this context means a common language, a cultural understanding, and a history of shared experiences.

Race has two faces, one battered by its irrational application to serve a prejudiced public purpose and another turning slowly toward the remedy of those evils, and representing the common life experiences of a group related by common descent. It is this distinction between racial classifications which needs to be explored.

The courts cannot be color blind and ignore the benign character of remedial discrimination. Perhaps racial discrimination has such an oppressive history in America that its mere mention prompts discomfort. However, racial classifications have been upheld and encouraged by the courts to relieve the abuse by historical invidious discriminations.³ It is not the same thing

* The Chicano Law Review is pleased to publish this "First Award" winning essay in the Mexican American Legal Defense and Education Fund's legal essay contest.

1. *Brown v. Board of Education*, 347 U.S. 483, 490 (1954).

2. In 1973, the median income for black families was \$7,269 compared to \$12,595 for white families. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SPECIAL STUDIES, Series P-23 No. 48. *The Social and Economic Status of the Black Population in the United States 1973*, at 17 (1974).

3. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968); *State ex rel. Citizens Against Mandatory Busing v. Brooks*, 80 Wash. 2d 121 (1972).

for a state to use a racial classification to prohibit the education of an American minority as to use a racial classification to assure its representation within a majority. It is this special character of benign discrimination cases that make it necessary for the courts to adopt a new standard of review.

In *Bakke v. Regents of the University of California*,⁴ Justice Tobriner expressed his dissent with the majority for ignoring the fundamental distinction between benign and invidious racial classifications. Moreover, Justice Tobriner disagrees with the majority's conclusion that "the use of racial classifications, even to promote integration is presumptively unconstitutional and 'suspect.'"⁵ He argues that the governing authorities lend no support for such a conclusion. Rather, courts have encouraged benign discrimination to overcome past discrimination and exclusion of American minorities.⁶

The concern of Justice Tobriner is justified, especially in light of the trend toward so-called reverse discrimination cases. The focus of this work is to examine benign discrimination and possible standards of review under the equal protection clause.

It is only appropriate that we begin this examination with the considerations in *Brown v. Board of Education*.⁷

It was not until 1954 that the Court held that the use of racial classification, resulting in the segregation of public schools, was unconstitutional.⁸ A unanimous Court in *Brown, supra*, said, "Today, education is perhaps the most important function of state and local governments It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."⁹ Chief Justice Warren recognized the flaw and irrationality of the "separate but equal" doctrine in public education. He concluded that to separate children solely based upon their race generated "a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone."¹⁰ There should be no doubt that the Court is proscribing the use of invidious discrimination.

The distinction between invidious and benign racial classifi-

4. 18 Cal.3d 34; 132 Cal. Rptr. 680; 553 P.2d 1152 (1976), (cert. granted No. 76-811).

5. *Id.* at 67; 132 Cal. Rptr. at 701; 553 P.2d at 1174.

6. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968).

7. 347 U.S. 483 (1954).

8. *Id.* at 495.

9. *Id.* at 493.

10. *Id.* at 494.

cations is important because invidious racial classifications are considered extremely suspect. Therefore, a racial classification will prompt a strict scrutiny review of the classification. However, because of their invidious nature, the suspect classification has been the courts' primary means of insuring equality.

The Court has, nonetheless, refused to exactly define a suspect class, although according to *United States v. Caroline Products Co.*,¹¹ the class must be a "discrete and insular"¹² minority. According to Professor J. Harvie Wilkinson, *Frontiero v. Richardson*,¹³ offers three further relevant factors:

1. That the suspect class suffer from 'an immutable characteristic determined solely by the accident of birth,' which 'bears no relationship to ability to perform or contribute to society,'
2. That suspect classes have suffered historical vilification,
3. That the suspect class, largely because of past discrimination, lacks effective political power and redress.¹⁴

Yet the elements of a suspect classification remain ambiguous and as Chief Justice Burger in *In re Griffiths*¹⁵ points out, "In recent years the Court, in a rather casual way, has articulated the code phrase 'suspect classification' as though it embraced a reasoned constitutional concept . . . but it tends to stop analysis while appearing to suggest an analytical process."¹⁶

Along with those classifications considered suspect are those identified as fundamental interests which also merit strict scrutiny. These include voting,¹⁷ travel,¹⁸ procedural rights¹⁹ and right to procreate.²⁰ However, the right to education has been rejected as a fundamental interest hence not subject to strict scrutiny.²¹

The fact that a classification is suspect or impinges upon a fundamental interest does not mean it is illegal. Rather it may be justified by establishing a compelling state interest.²² The

11. 304 U.S. 144 (1938).

12. *Id.* at 153, n.4.

13. 411 U.S. 677 (1973).

14. See Wilkinson, *The Supreme Court, The Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 980 (1975).

15. 413 U.S. 717 (1973).

16. *Id.* at 730. (Burger, C.J. dissenting).

17. *E.g.*, *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966).

18. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969).

19. *E.g.*, *Douglas v. California*, 372 U.S. 353 (1966).

20. *E.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

21. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

22. See Peterson, *Constitutional Law: Affirmative Action — Does It Afford Equal Protection Under Law?* 16 WASHBURN L.J. 190, 193, n.23 (1976). Basic elements of the compelling interest include: (1) Compatible with aims of the fourteenth amendment, (2) state instrumentality should have to show a strong governmental interest in the classification, (3) classification should bear a mean-

states' showing of a compelling interest has led to an implied approval of benign discrimination in law school admissions.²³ However, subjection of a racial classification to strict scrutiny has virtually assured invalidation. The rigidity of this standard has only been met twice and then justified on the basis of national security.²⁴

Where there is no suspect classification or fundamental interest involved, the courts apply a minimal scrutiny. This standard of review merely requires the showing of a rational relationship to a legitimate state objective.²⁵ Unlike strict scrutiny, this standard of review virtually assures the classification will be upheld.

This two-tiered approach of the courts in considering the fourteenth amendment's equal protection clause has been justly criticized and labeled by some legal scholars as 'outcome determinant' and 'result-oriented.'²⁶

It is for this reason, along with the belief that benign discrimination cases need a separate standard of review, that consideration be given to exploring alternative standards of review.

Dissatisfaction with the two-tiered approach was first expressed by Justice Marshall in his dissent in *Dandridge v. Williams*.²⁷ Justice Marshall offers the formulation of a sliding scale for cases of this nature. He believes there are cases which defy easy characterization, such as *Dandridge, supra*, when considered as minimal scrutiny cases. Marshall goes on to say that "equal protection analysis of the case is not appreciably advanced by the *a priori* definition of a right fundamental or otherwise. Rather concentration must be placed upon the character of the classification in question, the relative importance to the individuals in the class discriminated against the governmental benefits that they do not receive, and the asserted state interests in support of the classification."²⁸ Justice Marshall goes on to say the Court must consider, "the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification."²⁹

Although *Dandridge, supra*, was reviewed as a minimal

ingful relationship to the interest found substantial, (4) no means of alternatives satisfying governmental interest.

23. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

24. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

25. *E.g.*, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973).

26. *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 333; 348 N.E.2d 537, 543; 384 N.Y.S.2d 82, 88 (1976). *Also see*, Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. of CHI. L. REV. 723 (1974).

27. 397 U.S. 471, 508 (1970).

28. *Dandridge v. Williams*, 397 U.S. 471, 510 (1970). (Marshall, J. dissenting).

29. *Id.* at 521.

scrutiny case, Justice Marshall's theory falls between the extremes of review. The suggested considerations of this theory make such review appealing for benign discrimination cases. In *Bakke*,³⁰ *supra*, one would consider the racial classification against the importance to those deprived admission to medical school, along with the need for minority representation, diversification of the student body and integration of the medical school and profession. This suggested standard would certainly improve the more limited two-tiered approach.

It would be especially useful in allowing benign discrimination cases to consider the importance of both minority and governmental interests in lieu of merely apprehending a suspect classification and reviewing the compelling interest.

Another intermediate standard of review was suggested in *Alevy v. Downstate Medical Center*.³¹ In this case, the New York Circuit Court of Appeals by way of dicta said, ". . . in proper circumstances, reverse discrimination is constitutional."³² Judge Gabrielli rejected the strict scrutiny test for benign discrimination because "an application would be contrary to the salutary purposes for which the Fourteenth Amendment was intended."³³ The case involved a claim that the plaintiff was denied equal protection of the laws when Downstate Medical Center allegedly admitted the minority applicants with lower scores. The trial court found the racial classification involved had not been based exclusively on race but had also considered financial and economic disadvantages.

Applying a standard of equal protection suggested by Justice Douglas,³⁴ the trial court found no constitutional violation. The New York Supreme Court found the plaintiff failed to establish his right to relief,³⁵ but more importantly it articulated an intermediate level of review for benign discrimination cases.

The court said that it was only necessary that the classification satisfy a substantial state interest:

30. Plaintiff challenged the constitutionality of a special admissions program for disadvantaged minority students. The Supreme Court of California held that the deprivation based on race should be subject to strict scrutiny. Absent proof of past discrimination, the admissions program denied equal protection to non-minority applicants, especially when the university failed to prove the basic goals could not be substantially achieved by a less detrimental means.

31. 39 N.Y.2d 326; 348 N.E.2d 537; 384 N.Y.S.2d 82 (1976).

32. *Id.* at 336; 348 N.E.2d at 546; 384 N.Y.S.2d at 90.

33. *Id.* at 335; 348 N.E.2d at 545; 384 N.Y.S.2d at 89.

34. *DeFunis v. Odegaard*, 416 U.S. 312, 321-344 (1974). (Douglas, J. dissenting). There is no superior person by constitutional standards. *DeFunis* who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

35. *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326; 348 N.E.2d 537, 547; 384 N.Y.S.2d 82, 91 (1976).

This interest need not be compelling, urgent or paramount If it can be determined that the gain to be derived from the use of the classification outweighs its possible detrimental effects, the interest is sufficient.³⁶

Although the court stipulated that a determination would need to be made on whether a less objectionable means could advance the purpose of the classification, the standard, nonetheless, makes for a more appropriate review of benign discrimination cases. A substantial interest would be a more realistic consideration given that so few cases have withstood the strict scrutiny review.³⁷

The California Supreme Court in *Bakke, supra*, contradicted the New York court's opinion. It followed the strict scrutiny review and limited its consideration to the holding that the petitioner had failed to establish his right to relief in not showing he would have been admitted if no preference had been extended to minority applicants. The court in *Bakke, supra*, admits a conflict of analysis. Nonetheless, it dismisses the conflict as "more apparent than real."³⁸

This intermediate standard requiring a substantial interest is a more realistic one for review, especially in light of the harshness of strict scrutiny. It offers a logical expansion of the two-tiered approach being currently applied.

However, Professor John Hart Ely offers still another alternative to the two-tiered approach of the equal protection clause.³⁹ Reasoning that the courts should not interpret the equal protection clause as preventing the majority from discriminating between itself and a minority to the advantage of the minority, Professor Ely suggests that such a determination should be properly left to the political process. He points out that there is reason to suspect that as a result of past prejudices which generated "plainly irrational legislation, present classifications are 'facially more palatable.'" However, he contends that, "When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and consequently, employing a stringent brand of review, are lacking."⁴⁰ This, he insists, is the special scrutiny which should be applied to benign discrimination cases.

Even if the courts refuse to defer to the political process in

36. *Id.* at 336; 348 N.E.2d at 545; 384 N.Y.S.2d at 90.

37. *Id.* at 333; 348 N.E.2d at 543; 384 N.Y.S.2d at 88.

38. *Bakke v. Regents of University of California*, 18 Cal. 3d 34, 61; 132 Cal. Rptr. 680, 698, 553 P.2d 1152, 1170 (1976). (cert. granted No. 76-811).

39. See Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. of CHI. L. REV. 723, 727 (1974).

40. *Id.* at 735.

considering benign discrimination cases, Professor Ely's reasoning is certainly contrary to the application of strict scrutiny review by the courts for benign discrimination cases.

However, caution would be advised in determining whether depriving the courts of setting social policy is to the advantage of American minorities. Moreover, serious reflection should come before making the political process the arena for benign discrimination cases.

Perhaps the most comprehensive standard of review for benign discrimination cases thus far suggested, is a balancing test. It is especially appropriate for areas where individual interests confront governmental ones. *Weber v. Aetna Casualty & Surety Co.*,⁴¹ suggested the basic theory. Justice Powell states, "The essential inquiry . . . is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"⁴²

Professor J. Harvie Wilkinson suggests the implementation of this balancing test. This test takes into account three factors. In testing governmental denials of equal protection, the Court should balance: "1) the importance of the opportunity being unequally burdened or denied; 2) the strength of the state interest served in denying it; and 3) the character of the group whose opportunity is denied."⁴³

Unlike the two-tiered approach, the balancing test goes beyond mere consideration of the character of the group being denied equal opportunity. It allows for a more complete accessment of all the competing interests.

In regard to benign discrimination cases, this theory allows an examination of the character of those benefiting from the classification. In the two-tiered approach, however, we have a focus on the classification itself and consideration only of those groups being denied equal protection.

This suggested means of review provides a much more complete picture of the issues in a denial of equal protection. The balancing test would not mean the adoption of a third level of review but a complete change in the standard for equal protection cases.

In a case like *Bakke, supra*, the interests of the state along with the right to higher education would take the forefront. The interests of the state would probably be those same interests being offered to prove a "compelling interest."

41. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

42. *Id.* at 173.

43. See Wilkinson, *The Supreme Court, Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 991 (1975).

However, the validity of the criterion used for admittance to higher education would become a central question. The courts would have to determine whether only those having the highest combined scores should be allowed to enter medical school, or whether those historically denied admittance should be given an equal opportunity. The whole question of the validity of standardized testing and criterion for admission would fall in review. Given this extensive review, the adoption of the balancing test would probably be advantageous in benign discrimination cases. However, there should be concern about abandoning the concept of the suspect class. Traditionally, it has worked toward achieving an equality of opportunity. Professor Wilkinson suggests today's problem stands on the fact that the equal protection analysis "fails to focus on and develop from the notion of equality itself."⁴⁴

Another approach is suggested by Professor Gerald Gunther in his survey of the Supreme Court's 1971 term.⁴⁵ In reviewing the equal protection cases, Gunther finds that a new "bite" has been given to the usually toothless deference to legislative enactments, in applying minimal scrutiny.

He suggests a model of means scrutiny. In applying this standard, the Court is to insure that the means chosen by the legislature will substantially further some articulated, rather than a judicially imagined, state purpose.

"After the years in which the strict scrutiny-invalidation and minimal scrutiny-nonintervention, correlations were virtually perfect," now, said Gunther, "the pattern has suddenly become unsettled."⁴⁶ The indicators of a trend toward a middle of the road review in 1971, did not become a reality. The Court continues to follow the two-tier analysis.⁴⁷

This analysis would not go far enough to accommodate a benign discrimination case. Even if this standard became a reality, it would not be applicable to cases like *Bakke, supra*, because of the immediate suspect classification given to racial classifications. Emphasis should be on the Court recognizing an exception for benign racial classifications and going beyond a tangential examination of the objectives being sought.

It has been proposed that *Weber v. Aetna Casualty & Security Co., supra*, demonstrated an effort by Justice Powell to

44. *Id.* at 998.

45. See Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972).

46. *Id.* at 19.

47. *E.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

formulate an overreaching inquiry applicable to all equal protection cases. The approach is given a "carefully scrutinized" character but Justice Powell fails to adequately articulate this third standard of review suggesting a balance between the state interest and the fundamental right involved.⁴⁸

Finally, it has been suggested that benign discrimination cases adopt a labor law approach for review.⁴⁹ The concern stems from the degree of sophistication which groups favoring discrimination have reached. In some circumstances, criterion has been composed so that it serves the purpose of racial selection while not being a racial classification. Professor Michael Perry urges the fourteenth amendment not only prohibits the use of race as a criterion for selection but this prohibition is not avoided by merely making the racial classification a covert one.

This disproportionate racial impact review would allow a closer scrutiny of racial selections having no motivational elements. Its concern is that laws which employ no racial criterion, but are not racially neutral, have been found to be constitutionally legitimate, once they were demonstrated to have a rational basis.

The elements to be considered in assessing whether the disproportionate racial impact review should be applied as according to Perry are the following:

1. The degree of the disproportionate impact,
2. The private interest being disadvantaged,
3. The efficiency of the law toward the objective, the availability of alternative means having a less disproportionate impact, and
4. The government objective sought to be advanced.

Once a disproportionate impact is found, it would not necessarily call for an allocation of preference to minorities. Rather it calls for the application of the disproportionate impact standard of review. The standard consists of the disproportionate impact along with factors of "private interest in relation to which there is a disproportionate impact and the public interest, the pursuit of which by means of the challenged law or practice has a disproportionate impact."⁵⁰

The disproportionate impact theory would not imply a substantive constitutional right to a particular degree of racial mixture in public education. It would merely require school officials to take steps toward improving the racial balance.

48. *Weber v. Aetna Casualty & Security Co.*, 406 U.S. 164, 173 (1972).

49. *See Perry, The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PENN. L. REV. 540 (1977).

50. *Id.* at 563.

Considering the disproportionate minority representation in public colleges and universities⁵¹ as well as law⁵² and medical schools⁵³ perhaps the disproportionate impact theory would benefit benign discrimination cases. However, it would then shift the question to what constitutes a proportionate representation.

There is an inherent danger that at some point disproportionate impact becomes a limiting doctrine rather than one flexible enough to adapt to changing times. Moreover, its effectiveness would be greater only when a substantial disproportionate impact could be established. In California, the gradual increase in minority representation in higher education⁵⁴ indicates a need for a standard of review which is not dependent on a disproportional impact.

Instead, the benign discrimination cases should be viewed as affirmative steps to ensure the representation of minorities in higher education. Although criterion which is racially selective but not apparently a racial classification should be of concern. It nonetheless, needs to be of secondary concern in view of the overt racial discrimination remaining in American society. Covert racial selections will always be hard to establish in a court of law. This theory would be overly burdensome to those persons having to establish a disproportionate impact to prove covert discrimination.

CONCLUSION

Given the spectrum of standards⁵⁵ which the Supreme Court

51. See, OFFICE OF CIVIL RIGHTS, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, RACIAL AND ETHNIC ENROLLMENT DATA FOR INSTITUTIONS OF HIGHER EDUCATION FALL 1974, p. 110 (Nov. 1976). The total national enrollment of 2808 institutions for the fall of 1974 show a total minority enrollment of 763,051 or 13.5% of 5,638,633 full-time students. The minority breakdown was 0.6% American Indians, 9.0% Black, 1.1% Asian American and 2.8% Spanish Surnamed American. All other students were 4,875,582 or 86.5%.

52. See *Id.* at 688. The national total of 450 institutions full-time and part-time law students enrolled for the fall 1974 show a total minority enrollment of 6,942 or 7.5% of 92,837 students. The minority breakdown being 0.3% American Indian, 4.7% Black, 0.8% Asian American, and 1.7% Spanish Surnamed American. All other students were 85,895 or 92.5% of the total enrollment.

53. See *Id.* at 600. The national total of 250 institutions, full-time and part-time medical students enrolled for the fall 1974, show a total minority enrollment of 4,874 or 9.7% of 50,228 students. The minority breakdown was 0.3% American Indian, 6.1% Black, 1.7% Asian American and 1.7% Spanish Surnamed American. All other students were 45,354 or 90.3% of the enrollment.

54. See *Id.* at 188. The total enrollment for California undergraduate students in the fall of 1974 were 142,075 or 20.2% minority students enrolled on a full-time basis in 215 institutions. In 1972 there had been 114,419 or 19.1% in 200 surveyed institutions. However, full-time graduate enrollment dropped from 6,481 or 12.4% in 1972 to 4,855 or 12.3% in 1974, *Id.* at 192. Also, full-time professional enrollment in the fields of law, medicine, dentistry, veterinary medicine and theology showed 3112 or 18.2% minority students in 1972 but only 3201 or 14.3% minority students in 1974, *Id.* at 196.

55. See *Vlandis v. Kline*, 412 U.S. 441, 458 (1973). (White, J. concurring). Justice White said, ". . . it is clear that we employ not just one, or two, but

has acknowledged, it is only appropriate that the Court give penetrating consideration to the question of benign discrimination.

Preferential admissions to higher education has meant no more than equality of opportunity to America's minorities. In order to culture a truly integrated society, accommodations must be made to cure past discrimination.

Even though the concept of affirmative action has echoed since 1954, the reality of integration is still embryonic. To abort the foundation of equal opportunity will only deny America the peace of congeniality.

In order that equal protection be given to all those situated similarly, one must first reach an even plane. Equality at one time meant nothing more than freedom.⁵⁶ Yet freedom with the shackles of bias has meant nothing but a state of purgatory for American minorities.

An epoch of American prejudice created the fear of racial classifications. Centuries of struggle and years of violence forced benign discrimination. The Supreme Court's anachronistic two-tiered approach to equal protection must find a mid-scrutiny for benign discrimination cases.

The approach taken by Judge Gabrielli in *Alevy, supra*, seems to be the most appropriate extension of the two-tiered approach. It insures retention of the concept of suspect class, while allowing a more careful review of benign discrimination.

Race taken as the sole criterion for any purpose, especially higher education admittance is unquestionably unconstitutional.⁵⁷ However, minority admissions programs use race as only one of many factors reviewed. If most colleges and universities in the United States can justify special admissions of the children of alumni, faculty and staff, minority admissions should be viewed from the same perspective. A legitimate complaint can be expressed when two similarly non-minority applicants are considered, and the one being accepted has a lower test score, but is the son of an alumni.⁵⁸ The courts applying the minimal scrutiny test would have no problem in finding a rational basis for such a program.

as my brother Marshall has so ably demonstrated, 'a spectrum of standards in reviewing discrimination allegedly violative of the equal protection clause'".

56. *E.g.*, Slaughter House cases, 83 U.S. 36, 71 (1873).

57. *See Brown, supra* at n.1.

58. The sons and daughters of alumni, as well as sons and daughters of full-time faculty, and staff members of three years or more in service may be classified as special interest cases at Georgetown University Law Center. Special interest cases are not to exceed eight per cent of the projected class; and special interest cases may be admitted at the discretion of the Dean although these cases may not exceed one per cent of the projected class.

Higher education continues to be an elite institution; it guarantees no one admittance. Even those with proper credentials may be rejected. The discretion of colleges and universities allows for consideration of special qualities its applicants. Some of these special qualities are found by considering a person's background.

The fourteenth amendment does not guarantee a literal reading of equality, for America is not a monolithic society. Higher education is not only for those who are most qualified but for those of most merit.

JOSÉ M. ACOSTA

