

## MEMORANDUM

### Hampton, et al. v. Board of Education, et al.

*Bakke* is subtle and practical. It is a compromise. Race could be a factor in achieving diversity, Powell said, but it could not be the only factor. Race can be considered at the margins but not at the heart of the admissions decision. A racial quota was unconstitutional, but not the use of race entirely. This is an uncertain precedent. Powell rejected all compelling justifications except the need to establish a diverse student body. Diversity cannot pertain only to race.

The *Hopgood* decision seems to go beyond what the Supreme Court has said and should not be followed.

A tension exists within the Fourteenth Amendment between the anti-discrimination meaning and the anti-caste meaning. However, it seems that the Supreme Court has not accepted the argument that equal protection only prevents unequal treatment that establishes a caste or subordinates a racial group.

When courts decide discrimination cases, they operate on the edge of our social tolerance. In writing such a decision, one should not "sweep all the chessmen off the board."

There is an overwhelming amount of controversy about the American idea of equality. That controversy extends to the Fourteenth Amendment Equal Protection Clause expression of that idea. The founders long ago declared that all men were created. The debate about equality is complicated by the fact that people often refer to different aspects of it. Equality requires that "alikes" be treated alike but not that everyone be treated alike in all circumstances. One aspect of equality is, in fact, an ethical to democracy and capitalism. Our economic system causes and even encourages a certain amount of inequality. While we celebrate those who achieve