The University of California v. Bakke

THE COURT'S THREE DECISIONS

Allan P. Sindler

WHEN THE University of California's medical school at Davis found that hardly any minority applicants (particularly blacks and chicanos) were being admitted, their academic credentials being much lower than those of most white applicants, it voluntarily decided to reserve sixteen of its one-hundred entering places for minorities. Subsequently Allan Bakke, a white applicant, was denied admission by the school in 1973 and again in 1974. He thereupon claimed that he had been rejected, even though his academic qualifications were greatly superior to those of the special admittees, because he had not been allowed to compete for any of the sixteen set-aside seats. Since it was the factor of race that underlay the school's reservation of seats and precluded him from contesting for all one-hundred seats, Bakke asked the courts to strike down the special admissions program as impermissible racial classification and preference and to order the Davis medical school to admit him.

Two aspects of the *Bakke* case gave it landmark potential. The validity of pro-minority racial classifications had already been established, to a large degree, if they were used as remedies to redress proven past discrimination or if they were "add-on" benefits without adverse effects on others. The Davis program, however, could not be justified on either ground. First, at no time during the litigation was it alleged or shown that the medical school had discriminated against minorities; indeed, the school had only been in operation for two years when it instituted special admissions. Second, there was no way the setting aside of sixteen seats could be construed as an "add-on" benefit. Because Davis, like other medical schools, had far too many applicants for the available places, the assignment of sixteen seats to minorities inescapably meant the exclusion of sixteen nonminority candidates. In sum, the *Bakke* situation involved the use by government (the University of California) of a racial quota that harmed whites and was not a remedy for specific previous discrimination.

The California Supreme Court, by reputation a liberal court, made its *Bakke* decision a landmark ruling. By a six-to-one vote, it overturned the Davis program as a violation of Bakke's equal protection rights under the Fourteenth Amendment and directed the university to conduct its admissions in a racially neutral manner. It was not surprising, therefore, that when the U.S. Supreme Court agreed in early 1977 to review the case, *Bakke* became a magnet for all the contending forces swirling about the hotly disputed issues of affirmative action and reverse discrimination. One result was to inflate public expectations about the pending Court decision. A blockbuster decision was widely anticipated, something comparable to the school desegregation opinions of 1954–55.

The *Bakke* decision, delivered on June 28, falls considerably short of these expectations.

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Moreover, it leaves many questions unresolved about the limits on affirmative action for minorities disadvantaged by past discrimination. The decision is instructive, nonetheless, in suggesting what the key issue for the Court is likely to be in the near future. Above all, it is instructive in elaborating the view of equal opportunity in particular and of American society in general that is implicit in a constitutional justification of racial preferences.

The Court's Several Opinions

The Court's *Bakke* decision involved an unusual three-way split—four-one-four—in which Justice Lewis Powell played the pivotal role in the construction of the three majority judgments: on Bakke's admission, on the Davis program, and on the use of race as a factor in admissions. Justice John Paul Stevens's opinion, joined in by Chief Justice Warren Burger and Justices Potter Stewart and William H. Rehnquist, held the Davis special admissions program invalid as a violation of Title VI of the Civil Rights Act. Justice William Brennan's opinion, joined in by Justices Byron White, Thurgood Marshall, and Harry Blackmun, upheld the Davis program under both the equal protection clause of the Fourteenth Amendment and Title VI. With eight justices evenly divided, the critical swing vote rested with Justice Powell. Believing the Davis program to be impermissible under both equal protection and Title VI, Powell added his vote on this issue to the Stevens group; as a consequence, five justices voted to strike down the minority preferential admissions program and to order the admission of Allan Bakke to the Davis medical school. But Justice Powell also believed that equal protection and Title VI countenanced a university's use of race as one among many admissions factors. Since the Brennan group approved of more extreme race preferences than that, those justices voted to support Powell's position on the matter. Hence a different majority of five justices produced the Court's third judgment, which condoned some consideration of race in admissions. Accordingly, the Court reversed the portion of the California Supreme Court's decision that prohibited the university from taking race into account in the admissions process.

Majority positions in *Bakke* can be said to exist, however, only in the nominal sense that five votes produced each of the foregoing three judgments. Powell, who provided the fifth vote in each instance, is the only one of the justices who agreed with all three judgments. The four-one-four division characterized the reasoning underlying the voting pattern; both the Stevens and the Brennan groups failed to endorse Powell's reasoning on key sections of his opinion. By not developing a controlling rationale subscribed to by at least a bare majority of its members, the Court precluded *Bakke* from being a landmark case. Indeed, with three disparate minority opinions and no doctrine-setting majority opinion, *Bakke* does not serve particularly well even in meeting the more modest objective of providing clear guidelines and principles for future resolution of similar problems.

Title VI Forbids Quotas: The Stevens Opinion

Justice Stevens's opinion (joined in by Burger, Stewart, and Rehnquist) adopted a determinedly narrow view of the case. Stevens viewed *Bakke* as a "controversy between two specific litigants" that could appropriately be settled by reference solely to Title VI of the Civil Rights Act, without need to consider constitutional questions. Title VI was not merely a statutory restatement of the equal protection clause; it had "independent force, with language and emphasis in addition to that found in the Constitution." The "plain language" of Title VI meant that "race cannot be the basis of excluding anyone from participation in a federally funded program." Since the Davis program "excluded Bakke . . . because of his race," it was obviously unlawful. Having disposed of the matter on statutory grounds, Stevens's opinion concluded that "one need not decide the congruence—or lack of congruence—of the controlling statute [Title VI] and the Constitution [equal protection] . . . ."

The Stevens opinion took an even narrower view to avoid dealing with the question whether Davis could use race some other way. Arguing the technical point that there was no outstanding injunction in the California courts to forbid any consideration of racial criteria in processing applications, Stevens concluded:

"it is perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate."

The posture taken by Justices Stevens, Burger, Stewart, and Rehnquist is in keeping with the Court's general practice of trying to avoid constitutional or broad grounds when deciding cases, especially cases involving contentious issues on which the Court has not yet developed a position. As a sensible strategy, however, it would have been better suited to a Court majority than to a minority. In *Bakke,* once five justices held Title VI to mean what equal protection meant and then proceeded to decide the case on constitutional grounds, it was ineffective for the remaining four justices to refuse to consider the problem's constitutional dimensions. In like manner, it was unhelpful for the Stevens group to duck the question of what nonquota uses of race, if any, could be applied in school admissions. Technicalities aside, the California Supreme Court had not simply invalidated Davis's program but had required the university to operate its admissions process in a racially neutral way. The Court was obligated, therefore, to face up to the questions whether and how race could be considered in the admissions process.

Equal Protection and Title VI Permit Quotas: The Brennan Opinion

Justice Brennan's opinion (joined in by White, Marshall, and Blackmun) demonstrated an expansive view of Title VI and equal protection as justifying remedial race preferences. The context for their view was established at the outset of the opinion: "We cannot let colorblindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."

The Brennan argument began by merging Title VI and equal protection: just as the discrimination prohibited under the statute was unconstitutional under the Fourteenth Amendment, so also whatever remedial use of race was constitutionally permissible under the equal protection clause was allowable under Title VI. Both Title VI and equal protection permitted the broad remedial use of race-conscious measures to help minority groups overcome their past mistreatment by society. The justices found support for this position in their reading of congressional intent and of the implementing regulations by the Department of Health, Education, and Welfare, especially (though not exclusively) the encouraging of voluntary efforts to eliminate racial discrimination that was in violation of the Constitution.

Turning next to the analysis of equal protection, Brennan had to determine whether "benign" racial classifications merited a review standard other than the "strict scrutiny" that the Court had developed in connection with traditional anti-minority discrimination. Under the strict scrutiny standard, the Court treated a racial classification as constitutionally suspect, to be allowed only if the state could demonstrate a "compelling state interest" in using it. No less important, the state also had to show that the classification was necessary to achieve its compelling objective. If other means "less burdensome" to the valid rights or interests of others could be used, then the racial classification was invalid. This was obviously a stringent standard; with it the Court had invariably struck down state racial discrimination *against* minorities.

Rejecting strict scrutiny as inappropriate for racial classifications designed to further remedial purposes, Justice Brennan chose the less severe review standard the Court had developed for sex discrimination challenges: the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives" (*Craig* v. *Boren,* 1976). That part of this standard relating to the objectives of classification required that two conditions be met: (1) "an important and articulated purpose for its use" had to be shown and, above all, (2) it could not "stigmatize any group or . . . single out those least well represented in the political process to bear the brunt of a benign program."

Justice Brennan had no difficulty in finding the Davis program constitutional under this standard. On the first of the two conditions—"an important and articulated purpose"—he observed:

> Davis' articulated purpose of remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions pro-

> grams where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school.

On the second condition—whether any discrete group or individual was stigmatized—whatever injury the Davis program caused rejected white applicants, it plainly did not include attributing racial or personal inferiority to them. And although race preferences raised genuine and troubling questions about the stigmatization of minorities as unable to meet the standards set for others, Justice Brennan flatly rejected the view that preferential admissions could "reasonably be regarded as stigmatizing the program's beneficiaries or their race as inferior."

The Davis program passed the test as to means—was the means "substantially related" to achieving the objective?—no less easily. First, only race-conscious measures could reduce the underrepresentation of minorities within the medical school. Second, there was no significant constitutional difference between Davis's mode of racial preferences, which involved the setting aside of a predetermined number of entering places, and ostensibly more moderate forms of preference. (This last point was a direct response to a key position taken by Justice Powell, which is discussed below.)

Group Proportional Equality: Comment on Brennan

If there is anything of a "landmark" quality about the *Bakke* decision, it lies in the joint opinion of Justices Brennan, White, Marshall, and Blackmun. For the first time, four justices of the Supreme Court—just one short of a majority—developed and subscribed to a constitutional justification of pro-minority racial preferences and reverse discrimination that would transform the meaning of equal protection and equal opportunity. Since they did not label their thesis in those terms, it must be reconstructed before it can be appraised to determine whether my characterization of it is warranted.

In reviewing the Court's treatment of Title VII (employment discrimination) cases, the Brennan opinion argued that the Court's decisions demonstrate that the permissibility of race-conscious actions does *not* turn on *any* of the following four conditions: First, recipients of preferential advancement do not have to be confined to those who have been individually discriminated against; "it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." Second, the fact that minority preferences would "upset the settled expectations of nonminorities" constitutes no effective objection to the preferences. Third, "judicial findings of discrimination" are not required to justify preferences. Fourth, "the entity using explicit racial classifications" does not itself have to have been in violation of equal protection or an antidiscrimination regulation.

Summing up their reading of Title VII case law, the Brennan justices concluded:

> Properly construed . . . our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.

This position is nothing less than a redefinition of equal opportunity in terms of group proportional equality. The second condition specified above—"if there is reason to believe that the disparate impact is itself the product of past discrimination"—has no independent standing. It is rather a tautology meriting rejection because the prevailing explanation for disparate racial impact is that it is the product of previous discrimination, broadly defined. In effect, then, the Brennan thesis posits that disparate racial impact in and of itself provides sufficient constitutional justification for race-conscious activities intended to modify or eliminate that impact.

Let us look again, in this connection, at the previously quoted excerpt from the Brennan opinion dealing with "Davis' articulated purpose." The second condition set—"where there is a sound basis for concluding . . . that the handicap of past discrimination is impeding access of minorities to the medical school"—is not a genuine condition at all. What reason other than "the handicap of past discrimina-

tion" would Brennan consider an acceptable explanation for the inability of minorities to compete effectively with nonminorities according to traditional admissions criteria? Hence Brennan's position really means that any university having persistent and severe minority underrepresentation can adopt racial preferences to reduce or end that underrepresentation.

Following through on its implicit endorsement of group proportional equality, the Brennan opinion carried the idea to its logical conclusion: whites displaced by racial preferences are really not "innocent victims," because they would not have won out in the competition had minorities not been handicapped by previous discrimination. Such a view resolves the problem of reconciling the claims of racial preferences and of no reverse discrimination by defining reverse discrimination out of existence.

The argument proceeded by analogy to the adverse effects on white employees of remedial race preferences required of a company that has violated the antidiscrimination provisions of Title VII (remedial race preferences such as seniority adjustments and promotions favoring minorities). Even though the employer was to blame and the employees were technically innocent, those expectations of nonminority workers (as to seniority, promotions, and so on) that were upset by the racial preferences were "themselves products of discrimination and hence 'tainted.'" The claims of the burdened white employees are thus entitled to less deference as a limitation on racial preferences; the white worker whose promotion opportunity is delayed or lost is not really harmed because if the minority employees had not been discriminated against, they would have been ahead of him anyway. "The same argument," asserted Justice Brennan, "can be made with respect to [Allan Bakke]."

> If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, [Bakke] would have failed to qualify for admission even in the absence of Davis' special admissions program.

"The breadth of this hypothesis," observed Justice Powell, "is unprecedented in our constitutional system." Brennan's thesis flies in the face of the *Griggs* ruling, which provides the governing principle for Title VII cases (*Griggs* v. *Duke Power Co.*, 1971). In *Griggs*, a unanimous Court (Justice Brennan not participating) carefully rejected racial preference in employment:

> [Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed . . . .

Under *Griggs*, findings of disparate racial impact trigger the requirement that both job qualifications and tests to measure them be validated. Once validated, however, the qualifications and tests are entirely proper, regardless of their disparate impact on racial groups. In short, *Griggs* repudiates the notion that minority underrepresentation in itself justifies the adoption of racial preferences.

How can preferences, once legitimated, be restricted to certain groups and denied to others? According to Brennan, if a white ethnic group also demands preferential admissions treatment on constitutional grounds, all a court has to do is determine whether the school had a rational basis for concluding "that the groups it preferred had a greater claim to compensation than the groups it excluded." Consequently, in Brennan's view, "claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts."

The fallacy of this position becomes evident when the dynamics of rival group claims are more fully considered. In response to group pressures, the political process is likely to expand the number of groups offered preferred treatment. The problem for the courts, therefore, would probably be the opposite of what Brennan supposed. Whereas the problem posed by Brennan is whether the courts could easily support a school's denial of preferential treatment to other groups, the real problem is more probably whether the courts could do anything to contain or strike down the preferences extended to other groups in accordance with political decisions already made. Under Bren-

nan's formula, the courts would not be able to halt the proliferation of preferences so long as each newly preferred group could demonstrate (to both the legislature and the courts) that it was significantly underrepresented as a group —the essential justification for racial preferences set by the Brennan thesis. In sum, if Brennan's vindication of racial preferences should be adopted, and if political considerations then led to a multiplication of group preferences, his criterion for justifying group preferences would not provide an effective basis for either courts or legislatures to stop them from multiplying.

The position taken by Justices Brennan, White, Marshall, and Blackmun must be considered a remarkable major effort, not simply to legitimate racial preferences intended to reduce minority underrepresentation as presumptively constitutional, but to redefine equality of opportunity and equal protection in group parity terms. Their thesis would enshrine as a constitutional standard the speculative premise that, in the absence of discrimination, the distribution of members of all racial and ethnic groups would be about the same in specific areas—in academic credentials, in particular occupations, and the like—as in the population as a whole. By treating equality in terms of statistical parity among groups, Brennan's position inescapably implies a definition of equal protection as providing rights for persons in their capacity as members of racial or ethnic groups, and not as individuals.

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Quotas Prohibited but the Use of Race Allowed: The Powell Opinion

Justice Powell, who created the majority judgments of the Court, also addressed the constitutional dimensions of *Bakke*. Powell began by agreeing with the Brennan opinion that Title VI has no independent force: "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause." Equal protection is an individual, personal right whose meaning is clear:

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

It follows that racial classifications of any sort, "benign" or otherwise, are inherently suspect and are subject to the same standard of constitutional review, namely, the strict scrutiny standard. "When [public policies] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."

Do the objectives of the Davis program satisfy the "compelling interest" test? Justice Powell discussed what he took to be the four objectives argued by Davis, three of which he turned down. He dismissed the purpose of securing "some specified percentages of a particular group merely because of its race" as "facially invalid" and as "discrimination for its own sake." Another objective, that of improving the delivery of health care services to under-served communities, was said to meet the "compelling interest" test. But Powell agreed with the California Supreme Court that the university had not shown that the Davis program was likely to have a significant effect on achieving that objective, let alone being necessary for its achievement.

The third objective Powell cited was the amelioration or elimination of "the disabling effects of identified discrimination," in which, likewise, the state has a compelling interest. But this, in Powell's view, meant a focused and bounded approach of racial remedies for specific racial wrongs, not the "societal discrimination" approach taken by the Brennan opinion. In rejecting Brennan's approach, Powell stated:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of . . . findings of constitutional or

> statutory violations. . . . Without such findings . . . it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. . . . [R]emedying . . . the effects of "societal discrimination" [is] an amorphous concept of injury that may be ageless in its reach into the past.

Applying these arguments to the *Bakke* situation, Powell concluded:

> [T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent [Allan Bakke], who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

It was the remaining objective of the Davis program—"the attainment of a diverse student body"—that Powell seized on as fully meeting the "compelling interest" test. He considered this purpose a countervailing constitutional interest: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a a special concern of the First Amendment." The relationship of student diversity to fulfillment of a university's mission is obvious, as is the relationship of admissions criteria to achieving diversity. With the "compelling interest" segment of strict scrutiny satisfied, the final step of the analysis was to apply the "less burdensome means" test to the Davis program.

In Powell's judgment, the Davis program failed the "less burdensome means" test because it denied Bakke his equal protection right "to individualized consideration without regard to his race." The program

> involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or "Chicano" that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admission seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

Powell's condemnation of the Davis program reflected his recognition that some universities consider race as an admissions factor without assigning a fixed number of places to minorities. Powell was much taken, in particular, by the Harvard College admissions program, which emphasizes the importance of student diversity, including students from "disadvantaged economic, racial and ethnic groups." In that program, race is a factor "in some admissions decisions" in selecting from among the large middle group of admissible applicants. While "target-quotas" are not fixed for the number of minorities to be admitted and while candidates are compared competitively, some attention is paid to numbers (though minimum numbers are not set) in order to promote meaningful diversity and to prevent a "sense of isolation" among the minority enrollees. Using the Harvard plan as his model, Powell concluded by laying out in some detail how race could be used as one among many admissions factors in a constitutionally acceptable way to enable a university to achieve its compelling objective of student diversity.

The Student Diversity Theme: Comment on Powell

In his approval of Harvard-type programs, Powell was joined by the Brennan justices, who were seeking thereby to ensure that universities would be allowed to consider race in their admissions decisions. To the Brennan group, the goal of student diversity did not by itself justify racial preferences. The difference between Powell and Brennan on this point is indicated by Brennan's comment that the Harvard plan is constitutional "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." In a sense, then, Powell's

reliance on the diversity thesis can be understood as providing an escape from, or a substitute for, an affirmative action approach to the problem of achieving greater minority enrollment in higher education. It is clear, in any event, that Powell's formula is not transferable to employment and other fields where diversity has neither relevance nor any connection to the First Amendment.

From a constitutional viewpoint, Powell's argument that the differences between the Harvard plan and the Davis quota are of constitutional significance appears dubious. Race is a substantive qualification and the determining factor in admissions decisions under both types of programs. So far as adversely affected whites are concerned, their race-related rejection under either procedure would be indistinguishably "burdensome" to their constitutional rights.

The deficiency of Powell's position in this regard points up a general characteristic of those situations where (as in *Bakke*) a racial preference harms others and no remedy for specific racial wrongs is involved. A principled position on that issue can be more persuasively and consistently developed by arguing for preferences or against preferences than by seeking to discriminate among racial preferences to justify some kinds and repudiate others. It is no accident, therefore, that Justice Powell's effort to develop an in-between position can be better defended on political than on constitutional grounds.

The Impact of *Bakke*

Impact on College Admissions. The practical consequences of the *Bakke* decision for higher education were summed up in the majority judgment endorsed by Justice Powell and the Brennan group: "The State has a substantial interest that may legitimately be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." Clearly forbidden, but by a different majority (consisting of Powell and the Stevens group), were quota reservations of places for minorities and separate insulated evaluations of minority applicants without comparison to other applicants. The Harvard plan provides the model for what a university should emphasize for an acceptable program, including a statement of admissions objectives, with special reference to diversity and how it would be assessed in the admissions process.

Although these broad guidelines may be helpful, the design and operation of admissions programs consistent with them is hardly the uncomplicated task that Justice Powell's opinion implies. (Several associations of professional schools and other higher education organizations have set up task forces or conferences to evaluate the effects of *Bakke* on admissions programs.) There is no certainty, for example, that the Harvard College model can usefully be transferred to less selective colleges or to professional schools. Moreover, even with the best "good faith" effort to implement (rather than to circumvent) what Powell and the Harvard plan call for, it is not self-evidently clear how race can be used competitively as but one factor in a genuine comparative assessment of all candidates when the admissions objective is to enroll a sizable number of minority students. Despite the ready assurance of higher-education spokesmen that the admissions standards set by *Bakke* are consistent with those already in force at most schools, considerable reassessment and revamping of existing practices are likely to occur, together with a persistent effort to puzzle out just what an acceptable program involves.

The higher education community can take comfort from the Court's affirmation that, apart from matters of race and ethnicity, admissions policies are the responsibility of educators. Universities retain maximum flexibility in selecting admissions criteria and applying them. The Court's opinions do not instruct educational institutions how to weigh academic credentials or how to determine the better qualified from the lesser qualified among those deemed admissible. In addition, the decision affirms that a university that has not itself discriminated is not obliged to undertake remedial race-conscious activities to increase minority enrollment. The effect of the *Bakke* ruling on minority admissions to professional schools, and to other higher education units as well, thus depends largely on the decisions and actions of those schools.

Impact on Affirmative Action. In their *Bakke* opinion, the Brennan justices undertook to

meld Powell's views with their own in an attempt to state "the central meaning of today's opinions":

> Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

This action provoked a tart response from the Stevens group: "It is hardly necessary to state that only a majority can speak for the Court or determine what is the 'central meaning' of any judgment of the Court." Still, putting the feuding to the side, the Brennan group's statement is accurate enough. What it portends for affirmative action hinges on how the critical ambiguities in the statement will be resolved—namely, what do "appropriate findings" mean and by what means can government act to "remedy disadvantages"?

Since findings of past discrimination justify the remedy of preferential treatment, the question of "appropriate findings" boils down to determining what will be accepted as proof of past discrimination. (The Brennan group argued that disparate racial impact attributed to societal discrimination is sufficient proof, but Powell's opinion thoroughly rejects that view.) The question is particularly critical for the fate of affirmative action employment programs based on contracts with the federal government—programs that are built on statistical measures of "underutilization" and require corporations to adopt goals and timetables to remedy underutilization of minority and women workers. To date, a finding of underutilization has not meant proven past discrimination. It is arguable that, without proven discrimination, goals and timetables may be invalid by analogy to the *Bakke* ban on racial quotas. On the other hand, perhaps the hardiest perennial in the long-standing dispute over affirmative action is the question whether goals are significantly different from quotas. The more the distinction between them is given legal recognition, the less likely that the *Bakke* decision will affect the setting of numerical employment goals to correct underutilization.

On the other hand, a Court majority might choose to accept findings of underutilization as a sufficient measure of specific discrimination (by a firm or industry) to justify the use of remedial racial preferences. Should that occur, the Brennan opinion's position on "societal discrimination" would, in effect, have won out. The concept of underutilization is merely a narrower version of the "societal discrimination" thesis; they both focus on disparate racial proportion as the measure, though the base for determining underutilization is the proportion of minorities in the job availability pool, not in the total population. Both concepts rest, ultimately, on treating equal opportunity and equal protection in terms of statistical parity among groups.

Bakke and the Political Process

In resolving conflicts like that in *Bakke*, the courts have a proper—indeed indispensable—role to play. Equal protection rights are individual rights, and since they are affected by racial preferences the availability of judicial protection must be maintained. Yet it is no less clear that the problems addressed in *Bakke* are, at bottom, profoundly political in character. It follows that, in any such case, a decision to provide reparations for societal discrimination is a decision that properly should be made by political bodies accountable to the society, and not (at least not in the first instance) by courts or by medical school faculties. The Court might consider a policy of prohibiting racial reparations that lack explicit political authorization and of reviewing authorized reparations to ensure that the racial preferences employed are the least burdensome means of achieving the designated ends. What limits are to be set on affirmative action will depend greatly on what limits the Court chooses to impose on its own role in that task. They will depend, especially, on whether the Court decides to let the political process help determine the decision or insists upon going it alone. ■

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