The Battle for Color-Blind Public Policy

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IN NO STATE was the liberal Democratic tide more evident on November 2, 1998, than in Washington. There, Senator Patty Murray, widely believed to be in jeopardy in her race against Representative Linda Smith, a conservative Republican, sailed to reelection with 58 percent of the vote. Democrats unseated Republicans in two of the state's congressional districts, bringing their total to six of Washington's nine House seats. A bid by "Right to Life" advocates to ban so-called "partial-birth" abortions was voted down handily.

That makes all the more remarkable the victory of Initiative 200, the move to end race preferences in public education, employment, and contracting. The measure, patterned after California's Proposition 209—adopted by that state's voters in 1996—captured 59 percent of the vote. Only in Houston's 1997 referendum did voters reject a ban on race preferences, and here opponents of the measure, led by Mayor Bob Lanier, so distorted the language on the ballot that the result was thrown out in court and a new vote ordered. The result in Washington is thus further evidence

that when voters are presented with a clearly defined, up or down decision on race preferences, they will vote "no."

Further, the effort in Washington faced obstacles far more formidable than those that confronted backers of the California proposition. For one thing, in California the political and economic resources of the two sides were relatively equal. Governor Pete Wilson supported the measure and was able to pressure many big corporate opponents to keep their mouths and their wallets out of the fight. And though opposition groups still mounted an impressive campaign, the state Republican establishment, looking for some activity more rewarding than attempting to elect Bob Dole, campaigned actively for passage of the proposition.

In Washington, Democratic Governor Gary Locke was a fervent opponent of the antipreference measure and, as the *Seattle Times* reported, "implored corporate leaders to fight I-200 with their clout and the checkbooks." Among those making major contributions to the anti-I-200 campaign were Boeing, Microsoft, Hewlett-Packard, Costico, and Starbucks. According to the *Seattle Times*, in late July, "Eddie Bauer President and CEO Rick Fersch invited dozens of executives from the technology, communications, manufacturing and retail fields to his Redmond headquarters to discuss ways to defeat I-200." The group was treated to a guest lecture by Andrew Young, Jimmy Carter's U.N. ambassador and a long-time player in Georgia politics. In the end, opponents of I-200 outspent supporters by roughly four to one.

Yet opponents of race preferences can take only limited solace from the Washington vote. The very fact that Initiative 200 was able to prevail in spite of strong political currents moving from right to left makes it clear that many who supported it aligned themselves with liberal Democrats in other contests. This would suggest a lack of intensity to the opposition to preferences, an unwillingness on the part of many voters to withhold support from candidates simply because they disagree with them on the preference question. A similar assessment flows from the California vote, where the same electorate that adopted Proposition 209 overwhelmingly supported Bill Clinton and Al Gore Jr. over Bob Dole and Jack Kemp. Two

years later California Democrats recaptured control of the governor's mansion and both houses of the legislature.

To this extent, opposition to race preferences is atypical. Social issues are often the defining issues of political campaigns, often disrupting traditional patterns of party allegiance. The same voter who will cast one vote against race preferences and another for a candidate endorsing them probably would have been far less likely during the 1970s or 1980s to engage in similar "ticket splitting" with respect to such issues as abortion, crime control, school busing, and welfare reform. These issues created millions of "Reagan Democrats" two decades ago. Race preferences are doing nothing remotely similar today.

Indeed, further analysis of the two votes might well suggest that the presence of antipreference initiatives on the ballots brings large numbers of voters to the polls who not only support preferences but also regard the issue as a litmus test for other candidates on the ballot. If so, this would call into question the efficacy of "Prop 209" type initiatives as a political strategy. To win on the referendum but lose valuable executive or legislative offices would be a trade-off even many opponents of race preferences might be unwilling to make. The frosty reception accorded advocates of a new antipreference initiative by Republican Governor Jeb Bush of Florida underscores this sentiment.

Another sign that elected officials in much of the country feel that defying majority sentiment on race preferences carries no political price came earlier in 1998. In March, the U.S. Senate approved a 10 percent minority set-aside in federal contracts under the Interstate Transportation Emergency Act (ISTEA), in spite of a growing body of judicial precedent holding such targets unconstitutional. The Departments of Justice and Transportation blandly assured the Congress that new regulations implementing the set-asides were designed to comply with the judicial concerns expressed in earlier cases.

In May, the House weighed in, rejecting by a hefty 249–171 vote the "Riggs Amendment," which would have effectively banned race preferences in admissions to state universities. The two votes were instructive. Not only

will Congress refuse to undo racial preference programs already on the books, but it will also endorse efforts to reshape programs to skirt judicial holdings of unconstitutionality—all this in the face of polling data that show opposition to such preferences by a clear majority. To repeat: senators and representatives plainly have concluded that they can defy majority public sentiment on this issue and still keep their seats.

Consider, too, the position on the issue of Vice President Al Gore. Gore is far less circumspect in his support for race preferences than President Clinton, and far less reticent about seeking to demonize those who disagree with him. Clinton has long voiced caution about the wisdom and effects of preferences, saying early in his presidency that they produced few results and were difficult to justify. When he finally embraced the "mend it, don't end it" approach to affirmative action in 1995, preempting a primary challenge by Jesse Jackson appears to have been his chief aim. Former Clinton strategist George Stephanopoulos explained at Harvard during the Kennedy School's postmortem on the 1996 campaign that the administration felt Jackson would have entered the race had Clinton not moved on the issue as he did.

Clinton has been unerringly civil in discussing his support for affirmative action and most tolerant of those who have reached contrary positions. Gore has been substantially less so. Nowhere was the contrast between the two more evident than at a December 1997 White House meeting with a distinguished group of opponents of race preferences, including Ward Connerly, Abigail and Stephan Thernstrom, Linda Chavez, and Representative Charles Canady. Clinton again stated his philosophical difficulties with the race preferences and noted that they tend to benefit those "who are at least in a position for it to work." Moments later, he added, "A lot of the people that I care most about are totally unaffected by it one way or another."

Gore first chose to lecture the group on how inherent group antagonisms that are evident around the world justify protecting African Americans in the United States. He cited the ethnic hatred in Bosnia (where both sides are white), the "rape of Nanking" fifty years ago (committed by Asians

against Asians), and the near-genocide in Rwanda of the Tutsis by the Hutus (where blacks slaughtered blacks). "I think that people are prone to be with people like themselves, to hire people who look like themselves, to live near people who look like themselves," he said. "And yet in our society we have this increasing diversity, we have community value, a national interest in helping to overcome this inherent vulnerability to prejudice."

That formulation runs counter to repeated Supreme Court pronouncements that quotas and other preferences cannot be invoked as a remedy for general societal discrimination. It also invites the task of allocating benefits among dozens of potential ethnic and racial claimants, a task government is ill equipped to perform. Are the Hispanics who come to this country, legally and illegally, in search of economic opportunity entitled to their cut of the quota pie upon arrival? What about the children of Vietnamese boat people? Or descendants of Japanese interned during World War II? Or Chinese, treated as railroad-building coolies and denied the legitimacy of citizenship?

One month after that White House session, Gore spoke at a ceremony commemorating the birth of Martin Luther King Jr. at the Ebinezer Baptist Church in Atlanta where King once preached. No longer were opponents of racial preferences well-intentioned people with whom there was a difference of opinion. Now they were evildoers trying to deceive the nation. In the words of Mr. Gore:

> Yet now we hear voices in America arguing that Dr. King's struggle is over—that we've reached the Promised Land. . . . They use their color blind the way duck hunters use their duck blind. They hide behind the phrase and hope that we, like the ducks, won't be able to see through it. They're in favor of affirmative action if you can dunk a basketball or sink a three-point shot. But they're not in favor of it if you merely have the potential to be a leader of your community and bring people together, to teach people who are hungry for knowledge, to heal families who need medical care. So I say: we see through your color blind.
>
> Amazing Grace, also save me;
> Was color blind but now I see.

For the record, of course, no one associated with the battle against race preferences has, to the author's knowledge, ever disputed the wisdom of taking community leadership or service potential into consideration in the college admissions process. Nor do opponents of race preferences urge a sterile exclusive reliance on such static indicators of student success as SAT scores and high school grade point averages, although the combination of these two factors is a valid and unbiased predictor of college success. They do, however, urge that whatever the admissions standards, they be applied in a nondiscriminatory manner so far as race and ethnicity are concerned. Race is not a proxy for community leadership. Nor is race a proxy for the willingness "to teach people who are hungry for knowledge" or "to heal families who need medical care." On the contrary, the overwhelming evidence is that the best teaching and healing are done by those whose tests indicate a mastery of their subjects.

Other factors contributed to the resistance by legislators to tamper with race preferences. In California, implementation of Proposition 209 resulted in a sharp drop in the number of blacks and Hispanics at the state's elite public universities (and a corresponding increase at several less selective schools). An even more dramatic decline of blacks and Hispanics occurred at the University of Texas law and medical schools following federal court decisions outlawing the consideration of race or ethnicity in public university admissions.

In a painful reconsideration of positions long advocated, Nathan Glazer called for special treatment of black applicants to the nation's elite universities, suggesting that such access is the most certain path toward economic and social progress. His plea received curious support from the book *The Shape of the River* by educators William G. Bowen and Derek Bok—"curious" because the statistics assembled by Bowen and Bok can be read as lending support to the nub of the case against race preferences in admissions. Reviewing the experience at twenty-eight select colleges and universities, the book shows that both high school grade point average and SAT scores account for statistically significant differences in college performance through all four years and that black students at selective universities, most

of whom were admitted with the help of race preferences, maintain a GPA in the 23rd percentile of their schools, a full 30 percentile places lower than whites. Moreover, they achieve significantly lower graduation rates, 75 percent versus 86 percent, again emphasizing the point that their initial admissions were based upon race rather than relative academic potential. True, a high percentage attend graduate schools, which themselves maintain race preferences in admissions, but the Bowen-Bok study fails to show any point at which minorities admitted with inferior academic credentials manage to close the performance gap vis-à-vis whites or Asians. If anything, the study documents the supreme injustice practiced against those students among the unfavored races or ethnic groups who are denied admission to make room for the preferred categories.

It is difficult to determine the legal theory under which Mr. Glazer or the authors of *The Shape of the River* would effectuate the preferences they endorse. In the 1978 *Bakke* opinion written by Justice Lewis F. Powell, the "swing" vote in the case, state universities were forbidden to establish racial quotas but could—under their historic First Amendment right to determine the composition of their student bodies—make race a "plus" factor or "tie breaker." Thus the "diversity" rationale. But the vast spread embraced by many of the most selective universities for purposes of admitting the desired number of blacks and Hispanics mocks the very notion of a "plus factor" or "tie breaker." For example, the *Wall Street Journal* reported that at the Berkeley campus of the University of California in one recent pre-209 academic year, the math SAT scores were 750 for Asians, 690 for whites, 560 for Hispanics, and 510 for blacks. At that school race was not a *plus* factor in the admission of many blacks, it was *the* factor.

Of course, neither Glazer nor Bowen and Bok offer any realistic guidance for limiting the application of such preferences once they are in place. Optimistically, Glazer would extend preferences only to blacks and only at undergraduate institutions. But group entitlements quickly become a way of life. Already they extend to ethnic groups lacking even the historic claims of blacks, and to law, medical, and other graduate schools, to employment, and to local, state, and federal contracts. Even law reviews at many of the

most prestigious universities now accept black editorial board members whose competitive credentials in terms of grades and legal research ability fall short of whites turned down for the same honor. Medical schools routinely admit blacks and Hispanics whose academic credentials are significantly lower than those of whites and Asians denied admission to the same institutions. In the spring of 1998, the NAACP held a demonstration involving civil disobedience outside the Supreme Court itself because it claimed that the Justices were hiring too few black law clerks. Because these cherished positions unfailingly go on the basis of merit to the outstanding young scholars in the legal community, the NAACP move in effect demanded that the Court employ standards for its own positions that have been held unconstitutional—yet are widely practiced—elsewhere.

Perhaps the most revealing defense of race preferences was offered by Nicholas deB. Katzenbach and Burke Marshall, two Justice Department giants during the Kennedy-Johnson civil rights era. Throughout much of their article, which appeared in the February 22, 1998, *New York Times Magazine*, Katzenbach and Marshall recite pretty much the standard litany: race preferences in employment are really an effort to counter attitudinal or even subconscious discrimination; similar preferences in university admissions are grounded in the belief that "a diverse student body contributes to educational excellence and to the preparation of students to live in an integrated society." But in the end, the authors have too much intellectual integrity to maintain that an Equal Protection Clause of the Fourteenth Amendment applicable to whites could countenance the kind of race preferences they endorse. The Supreme Court has repeatedly held that under the Fourteenth Amendment racial classifications are subject to strict scrutiny. To pass muster, they must serve a compelling state interest—usually the need to remedy past discrimination against the covered individuals. And they must be narrowly tailored in terms of scope and duration to serve the compelling interest involved.

It has been by applying these standards toward the protection of whites as well as blacks that the Court in recent years has declared unconstitutional state and federal set-asides for minority government contractors and the

racial gerrymandering of congressional districts to make the election of minority candidates all but certain.

Here, in the view of Katzenbach and Marshall, is where the Supreme Court has gone wrong. Whites, they maintain, are not entitled to equal protection under the Fourteenth Amendment because the historic purpose of the Amendment and its implementing legislation was to forbid "abuse of white political superiority that prejudiced other races or ethnic minorities." They write:

> Reading the Equal Protection Clause to protect whites as well as blacks from racial classification is to focus upon a situation that does not and never has existed in our society. Unfortunately, it casts doubt upon all forms of racial classification, however benign and however focused upon promoting integration. If such a reading is finally adopted by a majority of the Court, it would put a constitutional pall over all governmental affirmative action programs and even put similar private programs in danger of being labeled "discriminatory" against whites and therefore in violation of existing civil rights legislation—perhaps the ultimate stupidity.

Thus, the ultimate political question and the ultimate legal question are one. Simply stated but not oversimplified, it is whether whites and Asians in this democracy have the same constitutional rights as blacks, Hispanics, and other favored groups. That is the core issue in arguments over whether the Equal Protection Clause of the Fourteenth Amendment forbids federal, state, or local government from preferring one group or another on the basis of race or ethnicity. And it is what is meant by the argument over whether our government and our Constitution should be "color blind." A color-blind legal order is not one that naïvely denies the existence of different races with vastly different histories any more than the pronouncement in the Declaration of Independence that "all men are created equal" suggests that we are all born with similar physical strength, mental aptitude, and family wealth. Rather, a color-blind legal order is one in which the government allocates neither rights nor burdens on the basis of race or ethnicity save as a remedy for proven specific acts of official discrimination.

Nicholas deB. Katzenbach and Burke Marshall reject the notion of a color-blind society because they do not believe that the Equal Protection Clause of the Fourteenth Amendment can apply to white people or Asian Americans and still achieve the goal of uplifting blacks. Apparently, Al Gore adheres to a similar view. In his words, "I was color blind but now I see."

Here, then, is an issue worthy of national debate as well as articulation by the courts. The legislative route to erase racial preferences has, for the time being, failed. The referendum approach has produced some stunning victories, but it has not convinced voters to underline their convictions by electing representatives who share them. But the stated attempt to write whites out of the Fourteenth Amendment could concentrate the national political mind and, appropriately framed in the right case, engage the attention of the Supreme Court.