Chapter Two

Affirmative Action Before O'Connor

Legal challenges to race preferences can target the actions of private employers (sometimes prodded by federal agencies), universities and other recipients of government aid, state governments, schools and agencies, or the federal government itself. Where private sector conduct is involved, the governing law is usually one or more provisions of the Civil Rights Act of 1964 or less sweeping later legislation. Alleged government discrimination is most often challenged under the due process or equal protection clause of the Fourteenth or Fifth Amendment. Some judges or justices will provide special deference to acts of Congress because it is the particular duty of the federal legislature to implement, by statute, the mandates of the post–Civil War amendments. By the time Justice Sandra Day O'Connor took her seat on the nation's highest tribunal to begin her long march toward primacy in the area of affirmative action jurisprudence, the Court had freshly minted opinions in the three above areas, which collectively had sanctioned a revolutionary lurch in the development of policy from the equal rights,

or "color blind," approach of the 1960s to the subsequent era of race preferences.

The landmark case *California v. Bakke*[1] famously involved the Medical School of the University of California at Davis setting aside 16 places for ethnic minorities from disadvantaged backgrounds in each entering class of 100. Alan Bakke, a practicing engineer whose academic credentials and MCAT performance dwarfed those of the admitted minorities, brought suit challenging the admission practices. The California Supreme Court held in his favor, effectively ordering him admitted and enjoining the school from considering race or ethnicity in its future admissions.[2] The U.S. Supreme Court produced four justices who urged that "benign" acts of race consciousness intended to redress the effects of centuries of past discrimination should be judged leniently,[3] thereby accepting the UC-Davis procedures, and four justices who would have affirmed the state court's decision because, as an institution accepting federal aid, the school was bound by the antidiscrimination provisions of Title VI.[4]

Justice Lewis F. Powell was thus cast in the swing role. Despite the generation of confusion that would grow from his decision, he did accomplish some useful things. First, he disposed of the notion propounded by the four liberal dissenters that a dual standard exists under the Fourteenth Amendment in cases where "benign" discrimination is at issue. "The guarantee of equal protection cannot mean one thing when applied to one individual and something else

1. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
2. *Bakke v. Regents of the University of California*, 553 P.2d 1152 (Cal. Sup. Ct. 1976).
3. *Bakke*, 438 U.S. at 272.
4. *Id.* at 409.

when applied to a person of another color," Powell wrote. "If both are not accorded the same protection, then it is not equal." It follows that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[5] Under this standard, a person asked by a state to suffer a disadvantage based on race or ethnicity "is entitled to a judgment that the burden he is asked to bear on that basis is precisely tailored to serve a compelling government interest."[6]

Powell also ruled out preferences for minorities that aim to remedy the consequences of historic discrimination or to compensate for the generalized societal discrimination that has not completely been eradicated.[7] He also rejected as unproved the UC-Davis assertion that its quota system was necessary for producing doctors willing to practice in minority neighborhoods.[8] However, he had greater sympathy for the school's claimed need for a diverse student body, saying, "This clearly is a constitutionally permissible goal for an institution of higher education."[9] Indeed, this university's right to build racial, ethnic, or geographic diversity into its program, while not enumerated in the Constitution, was no less precious than other unenumerated First Amendment rights, such as choosing a faculty, developing a curriculum, or determining how its subjects should be taught. "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats," Powell wrote. As a plus factor,

5. *Id.* at 289–290.
6. *Id.* at 299.
7. *Id.* at 310.
8. *Id.* at 307.
9. *Id.* at 312.

it might compare with demonstrated leadership or compassion, a history of overcoming disadvantage, or the ability to communicate with the poor. Indeed, the weight attributed to a particular quality may vary from year to year, depending on the mix of both the student body and the applicants for the incoming class.[10]

Justice Powell gave extraordinary weight to university descriptions of the unquantifiable benefits of their own programs. He cited a report in the *Princeton Alumni Weekly* by President William G. Bowen suggesting that much learning at college occurs informally through interaction among students: "In the nature of things, it is hard to know if this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and growth."[11]

Powell, a graduate of Harvard Law School, attached as an appendix to his opinion Harvard's description of its own admissions program, which did its best to downplay its reliance on race as simply a little balance-tipper on the scale of rather evenly matched candidates. According to the Harvard document, some candidates are so academically gifted, they demand acceptance, whereas a smaller number are turned away by the Admissions Committee as unqualified: "When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable

10. *Id.* at 317.

11. William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY, Sept. 26, 1977, at 7, 9.

of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer."[12] Thus was born what might be termed the "Big Lie" about race preferences on campus—the notion that it served mainly as a tiebreaker among applicants of otherwise equal credentials. As statistics, often drawn from downright hostile university administrations would later show, the white-black gaps in terms of SAT and GPA scores were often enormous, particularly at the most selective institutions.

Powell called for the "individualized competitive consideration of race" but gave no reliable guidance as to what specific conduct was ruled in or out. As a result, colleges and universities would deploy a dizzying array of procedures designed to admit large numbers of favored minority candidates, with most such procedures making the mandatory bow to diversity. The University of California at Berkeley, for example, would develop a matrix system that considered GPA and SAT scores along with race, California residence, and other social and academic factors, which together magically produced a nearly identical percentage of blacks and Hispanics in class after class. The University of Texas Law School maintained separate color-coded files for white and minority candidates, along with separate "presumptively admit" and "presumptively reject" scores that favored minority applicants. The University of Georgia, later joined by the University of Michigan, added twenty points to a candidate's application score based solely on race or ethnicity. Michi-

12. *Bakke*, 438 U.S. at 316.

gan's law school, after years of mandated preferences, adopted a so-called critical mass objective, which—through unabashed preferences—produced classes with 10 to 17 percent preferred minority enrollment year in and year out.[13]

The glowing accounts of admissions practices by Harvard and Princeton proved to have little basis in fact, at least with respect to most admissions programs. Rather than a tiebreaker between two otherwise evenly matched candidates from the "large middle group of applicants," race instead became a decisive attribute, vaulting blacks and Hispanics with marginal academic credentials over whites and Asian Americans with far more impressive records. Under UC-Davis's challenged quotas, Bakke had scores of 96, 94, 97, and 72 on the verbal, quantitative, science, and general information sections of his MCAT exams, while the comparable scores of the "special admitees" were 34, 30, 37, and 18, respectively.[14] Under systems purporting to follow Justice Powell's command, the results were little different. Year in and year out, for example, the average MCAT scores of admitted African American and Hispanic candidates were lower than the average scores of rejected whites and Asian Americans. In the more selective schools, the average SAT difference between whites and blacks approached or exceeded 200 points. High school GPA gaps were similarly wide. Predictably, those minorities admitted on "diversity" grounds did rather poorly in class. Their dropout rates were far higher than regularly admitted students, and they tended to congregate toward the bottom of their college classes.[15]

13. Report and Recommendations of the Admissions Committee, University of Michigan Law School (April 24, 1992).

14. *Bakke*, 438 U.S. at 277.

15. Thomas E. Wood & Malcolm J. Sherman, *Race and Higher Education* (National Association of Scholars, May 2001); Robert Lerner & Althea K. Nagai, *A*

Race-conscious admission practices in the service of "diversity" also raise some troubling issues in the context of affirmative action law. Paramount among these issues is that the practice pretends to be a device for providing better, more complete education for all students. Rather it is much more a device for compensating minorities for historic and societal discrimination. Universities have long practiced diversity admissions, but no one ever pretended that one needed 10 or 15 percent Idaho farmers or oboe players to tap adequately into the contribution they make. Nor has anyone ever pretended that any of these farmers or musicians would be at the elite school in question with SAT scores 200 points below the median. At no elite campus is there a strata of farmers, flutists, or even legatees readily identifiable, self-segregated, shunning most of the more challenging career paths, and still on the academic floor of the institution. In addition, as has become more and more clear, the program of race-conscious admissions knows no boundaries of time. Because the purported need is based on educational values rather than justice and, as mentioned, benefits students of all races, the only occurrence that would terminate the practice would be the sudden appearance of a field of minorities as qualified as the white or Asian American student populations. Just as a black child born in 1978, the year of *Bakke*, has made little progress in closing the academic gap favoring whites, so too will the minority child born today almost certainly be in a similar predicament vis-à-vis whites a generation hence.

At the time *Bakke* was decided, the lyrical tributes offered regarding the pedagogical benefits of diversity were largely

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Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger (available at www.ceousa.org).

theoretical, perhaps even theological. Instead of "informal learning through diversity," what many schools actually experienced was the division of students along racial lines segregated by housing, culture, even academic pursuit; the stigmatizing effects of their marginal academic performance on the beneficiaries of affirmative action; a developing practice of grade inflation designed in part to conceal the showing of these preferred minorities; and the evolution of a campus environment shrouded in myth and disinformation and regulated by speech code. What would happen if it were shown that the admissions procedures licensed by *Bakke* didn't work, that they disserved academic values and produced less desirable educational outcomes? Would the colleges and universities alter their course? Would they implement reverse affirmative action programs designed to reduce the number of minorities on campus? Would they at least revert to merit-based systems, which would limit admissions to those whose presence could be justified solely on academic grounds? Or would they simply switch their propaganda machines into overdrive, churning out volumes of new academic fluff designed to obscure, rather than illuminate, the truth?

In the quarter century after the *Bakke* decision, the Court decided nearly a dozen affirmative action cases, many of considerable importance. Until it revisited the *Bakke* question, however, its treatment of the issue seemed incomplete.

The Supreme Court Sanctions Preferences

During the era of official racial segregation in the South and widespread employment discrimination elsewhere, craft unions frequently excluded black workers from membership, thereby restricting access to higher-paying skilled factory jobs and limiting them mainly to unskilled production line

positions. At the Kaiser Aluminum & Chemical Corp. plant in Gramercy, Louisiana, for example, 39 percent of the workforce was black, but only 5 out of 273 craft positions—1.83 percent—were held by blacks.[16] Following creation of the Equal Employment Opportunities Commission by the Civil Rights Act of 1964, the agency began zeroing in on the Gramercy plant, demanding that Kaiser take steps to redress the gross racial imbalance. In response to this pressure, Kaiser reached accord with the United Steelworkers of America (USWA) whereby the company would cease hiring outsiders for craftsman vacancies and would instead train workers inside the plant. Blacks would participate in the program at a rate of 50 percent until the percentage of skilled black workers mirrored their percentage in the local labor force. Blacks selected for the program often had less seniority than rejected whites. Weber, one of the whites left out of the program, challenged the deal as a violation of the Civil Rights Act of 1964, which forbids job discrimination by large employers on the basis of race.

Weber's point was "not without force," conceded Justice William J. Brennan, writing for the majority. "But it overlooks the significance of the fact that the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation."[17] Moreover, to resolve questions regarding the specific language of the bill, the Court must examine the overall intent of Congress, which was to improve the economic plight of black Americans. As Senator Hubert H. Humphrey offered

16. *United Steelworkers v. Weber*, 443 U.S. 193, 198 (1979).
17. *Id.* at 201.

during the debate, "What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill?"[18]

To reach the Court's decision approving Kaiser's deal with the steelworkers union, Justice Brennan had to deal with the mildly inconvenient language of Section 703(j) of Title VII, which said that nothing contained in the title "shall be interpreted to require any employer . . . to grant preferential treatment to any group because of the race . . . of such group . . . on account of a de facto imbalance in the employer's work force." Justice Brennan concluded, however, that this section, which was added to win or maintain support from legislators in both houses of Congress "who traditionally resisted federal regulation of private business," could not be interpreted as banning voluntary private accords, even those made under federal pressure.[19]

However, the majority ignored a far more explicit provision of Title VII, Section 703(d), which provides that "[i]t shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to or employment in any program established to provide apprenticeship or other training."[20] A second section, 703(a)(2), contained similar language with respect to employer practices.

In a brutal, comprehensive dissent in which he exhaustively reviewed the legislative history of Title VII, Justice Rehnquist, joined by Chief Justice Warren E. Burger, accused

18. *Id.* at 203.
19. *Id.* at 206.
20. *Id.*

the majority of an Orwellian propensity for twisting the plain meaning of the act's provisions and the interpretations of those provisions offered during the many weeks of floor debate in both houses.[21] Rehnquist was questioning neither redress to black workers for a century of acknowledged discrimination nor what Congress should have included in the bill. Rather he questioned what Congress specifically enacted and how those authoring the legislation explained its provisions. Clearly compromises had to be made to secure passage. However, one of the compromises explicitly written into the legislation prevented compensatory relief for black victims of employment discrimination before such discrimination had been outlawed by passage of the act. Justice Rehnquist cited the words of Representative Emanuel Cellar, chair of the House Judiciary Committee and principal author of Title VII: "Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end of discrimination."[22]

On the Senate side, Senator Hubert Humphrey confirmed that "nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group."[23] There were dozens of similar statements, many by the bill's principal sponsors. Senators Joseph Clark and Clifford Casse, for example, were the two "floor captains" for the legislation. In a memorandum for the record, they offered the following: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-

21. *Id.* at 221.
22. *Id.* at 233.
23. *Id.* at 237.

white work force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed permitted—to fire whites in order to hire Negroes, or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier."[24]

In fact, until it was embraced by the Supreme Court, no contrary interpretation was offered by any legislator. Southerners and other conservative opponents worried about federal regulators and the courts, but not about voluntary actions by employers and unions. In Justice Rehnquist's words, "Not once during the 83 days of debate in the Senate did a speaker, proponent or opponent, suggest that the bill would allow employers voluntarily to prefer racial minorities over white persons."[25]

Again, the majority decision in *Weber* was more an affront to principles involving the separation of powers than those involving racial justice. Surely employment discrimination against blacks had been egregious and had produced a national calamity of unemployment, underemployment, poverty, hopelessness, and despair. What better way to bring large numbers of minorities into the economic mainstream than to accelerate their acquisition of skills through on-the-job training and apprenticeship programs. However, by twisting the meaning of the bill's clear language and by distorting the legislative history to reach the result favored by a majority of the Court, the justices contributed to the notion—already evident in *Bakke* and college admissions—that those on the side of compensatory justice for blacks were engaged in a noble, deeply moral, almost holy battle that created, and had

24. *Id.* at 240.
25. *Id.* at 244.

to be judged by, its own standards. This cause took its legitimacy not from traditional notions of truth, nor academic integrity, nor intellectual consistency, but rather from the ugliness of the original sin and its lingering effects upon the national soul. Thus, a form of super morality came into play, one that continues to invest the cause of racial justice, or perhaps to infect it.

Government Set-asides

Fullilove v. Klutznick[26] was the last of the pre-O'Connor affirmative action cases and the first to deal with the question of government set-asides. The law that would trigger decades of debate began almost by stealth, as Representative Clarence Mitchell in the House and Senator Edward Brooke in the Senate successfully introduced floor amendments into the Public Works Employment Act of 1977.[27] The amendments required the Department of Commerce to ensure that at least 10 percent of federal funds allocated for local public works projects went to companies owned and controlled by minorities, in this case blacks, Hispanics, Asians, and Native American Indians, Eskimos, and Aleuts. White contractors challenged the minority business enterprise (MBE) provision for violating the due process clause of the Fifth Amendment and Title VI of the Civil Rights Act of 1964.

Just as his judicial philosophy of self-restraint had compelled his dissent from the massive legislative rewrite job undertaken by the Court in *Weber*, so too did it dictate Chief Justice Burger's acquiescence to the legislation under challenge in *Fullilove*. Congress, he wrote, had special responsi-

26. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
27. *Public Works Employment Act*, Pub. L. 95-28, 91 *Stat.* 116 (1977).

bility for implementing the post–Civil War constitutional amendments. There was ample evidence that minorities were suffering from the present effects of past discrimination. The minorities in question accounted for 16 percent of the nation's population but only owned 3 percent of its businesses. In 1976, less than 1 percent of state and federal contracting was performed with MBEs.[28] "The presumption must be made that past discriminatory systems have resulted in present economic inequities,"[29] Justice Burger wrote. Just as race-conscious steps had been needed to redress the effects of a century of school segregation, according to Burger, "[W]e reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."[30]

Justice Burger's decision was flabby and vague. His avuncular judicial personality beamed unwarranted benevolence toward an action of facially questionable legality, particularly as it had sprung full grown from two floor amendments. What was the evidence of discrimination? Did the law really apply to groups like Aleuts, a community of hunters and fishers whose affinity for the construction business had been historically well concealed? Did Asians, with their high rates of business formation and documented zest for education and self-improvement, truly fit with the others? What about exploring race-neutral measures—mentoring programs, joint venture projects with more established firms, the waiver of default bonding requirements to mention just three—which could be of lasting benefit to minority contractors?

Justice Powell's concurring opinion, concluding "that the Enforcement Clauses of the Thirteenth and Fourteenth

28. *Fullilove*, 448 U.S. at 465.
29. *Id.*
30. *Id.* at 482.

Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of past discrimination,"[31] provided an additional voice to Burger's but not the missing steel.

In his dissent, Justice Potter Stewart invoked the words of Justice John Harlan in his historic *Plessy v. Ferguson* dissent: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[32] The country's tortured racial history contains a single paramount lesson: "The color of a person's skin and the country of his origin bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government."[33] Justice Stewart, a respected and independent voice, soon died of cancer. His fellow dissenter in *Fullilove*, Justice Rehnquist, would a bit later be elevated to Chief Justice, where he would attempt to cobble together new majorities for his views on a variety of issues, including affirmative action.

It could well have been argued at the time Justice O'Connor succeeded to the Court that the affirmative action issue was moot. *Bakke* had offered colleges and universities a safe harbor for race-conscious admissions programs so long as they were carefully developed. *Weber* had opened the door to voluntary "diversity" programs in business and industry despite the rich legislative history rejecting all forms of race or ethnic preferences. Finally, government set-asides had become the law of the land. For Sandra Day O'Connor to make her mark as a jurist, surely it would be in some other area of the law.

31. *Id.* at 510.
32. *Id.* at 522.
33. *Id.*