

"BAKKE TO WEBER AND BACK"

I wish to begin my paper with a quotation from a recent article by Eric Hoffer, although he was not directly addressing the subject I have chosen. ~~He said,~~

"I've never been a teacher or a parent, and my heart is savage by nature, and therefore unfit to tell people how to implant compassion. Still, I have the feeling that perhaps the adoption of a certain view of life might bear the fruit of compassion. We feel close to each other when we see our planet as a tiny island of life in an immensity of nothingness. We also draw together when we become aware that night must close in on all living things, that we are condemned to death at birth, and that life is a bus ride to the place of execution. All of our struggling and vying is about seats in the bus, and the ride is over before we know it."

It was not until the year 1954, only 25 years ago, that our Supreme Court decided that governmentally ~~directed~~ ^{Sanctioned} segregation denied the Negro equal protection of the laws. That, of course, was Brown against the Board of Education.

The equal protection clause has been a part of our constitution for only one-half of this Nation's two hundred years. For seventy-five years after its adoption, the Fourteenth Amendment, in the words of Justice Brennan, concurring and dissenting in



the Allan Bakke case, was "early turned against those whom it was intended to free, condemning them to a 'separate but equal' status before the law, a status always separate but seldom equal."

The first time the phrase "the Constitution is colorblind" appeared in a judicial opinion was Mr. Justice Harlan's lonely dissent in Plessy against Ferguson. That case, you will recall, concerned segregated seating facilities. He alone of nine judges saw the real meaning of the statute to be "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."

It is important to keep in mind that the protections provided by the Fourteenth Amendment are against governmental action. An ordinance, a statute, or an agency ruling. What happened in the 1960s was in some ways quite revolutionary. First, President Kennedy by an executive order provided that anyone who contracted with the Federal government could not utilize segregated facilities in his place of work nor otherwise discriminate in private employment practices solely on the basis of an individual employee's race. It is under this same executive order that so-called affirmative action plans are most often seen - a written program designed to advance the participation of blacks in jobs which had been historically denied them. Although Courts, incredibly

enough, ~~often~~ ^{always} do not ^{seem} to understand ^{there} are only a finite number of jobs in a successful enterprise. An example of what is to me incredibly naive judicial learning is supplied by the California Supreme Court in its decision on Bakke. One of their suggested solutions for the University of California was simply to increase the size of the Medical School, presumably so everyone who wanted to, could go.

Unfortunately this is not the only instance. More than one Federal court, facing the distasteful decision of giving jobs to blacks, but ~~without~~ displacing whites, has ordered the employer to increase his work force to accommodate all.

^{Nonetheless} ~~But it remains~~ - affirmative action, ^{inherently} means something must give to accommodate the action.

And so with Eric Hoffer, "all of our struggling and vying is about seats in the bus..."

With the passage of the Civil Rights Act of 1964, Congress did two things especially relevant to my paper. In Title VI they put strings of non-discrimination on Federal money going to educational institutions and in Title VII, they attempted to legislate discrimination out of the work place in the private sector.

Bakke went to a California court for relief against the State's Medical school alleging it had denied him admission because of his race - white. He invoked the protection of the Federal constitution's equal protection clause and of the State's clause which was roughly equivalent. So the

case came from the California Supreme Court, which had ruled for Bakke and ordered his admission, to the U.S. Supreme Court as an equal protection case. After initial briefing and several amicus offerings, the Court asked for additional briefing on the issue of the application of Title VI of the Civil Rights Act.

The Bakke case may be the first public instance where the Jews and the blacks found themselves on opposite sides of the fence. Among the many friends of the court, ^{submitting} arguments were Jewish organizations backing Bakke because ^{the Jews} ~~they~~ had too much of educational quotas in their history.

Most of you will recall that Bakke produced an incredibly divided Court. All nine Justices participated in the decision, with five separate opinions. Mr. Justice Powell's position was decisive on each issue, and thus he wrote the Court's opinion. Yet no other judge agreed with everything Powell had to say. The four who gave Powell a majority of five on the main issue wrote a long Concurring and Dissenting Opinion, authored by Mr. Justice Brennan. He was joined by White, Marshall and Blackman. Stevens wrote the dissent for himself, Chief Justice Berger, Justices Stewart and Rehnquist. Bakke was ordered to be admitted to Davis on the strength of Justice Powell voting for the Court, and the four dissenting justices!

I need now to recall the facts for you, the setting which produced not only broad splits among the opinions of the Justices, but many briefs from widely separated groups and, of course, much attention in the media. The best place

to begin is the syllabus provided by the Supreme Court reporter. Incidentally, it might be of interest in passing to note that Archibald Cox successfully argued for Bakke.

"The Medical School of the University of California at Davis had two admissions programs for the entering class of 100 students - the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he was rated on a scale of 1 to 100 by each of the committee members, his rating being based on the interviewers' summaries, his overall grade point average, his science courses grade point average, and his Medical College Admissions Test (~~MCAT~~) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total 'benchmark score'. The full admissions committee then made offers of admission on the basis of their review of the applicant's file and his score, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with 'special skills'. A separate committee, a majority of whom were members of minority groups, operated the special admissions program. The 1973 and 1974 application forms, respectively,

asked candidates whether they wished to be considered as 'economically and/or educationally disadvantaged' applicants and members of a 'minority group' (blacks, Chicanos, Asians, American Indians). If an applicant of a minority group was found to be 'disadvantaged' he would be rated in a manner similar to the one employed by the general admissions committee. Special candidates, however, did not have to meet the 2.5 grade point cut-off and were not ranked against candidates in the general admissions process. About one-fifth of the the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee which could reject special candidates for failure to meet course requirements or other special deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made. During a four-year period 63 minority students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied. ^{Bahke} Respondent, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973, he was rejected since no general applicants with scores less than 470

were being accepted after respondent's application, which was filed late in the year, had been processed and completed. At that time four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years special applicants were admitted with significantly lower scores than respondents."

The "Concurring and Dissenting" opinion and the Dissenting opinion in Bakke are relatively straightforward. Brennan, White, Marshall and Blackman agreed that Title VI of the Equal Rights Act - tying educational institutions to non-discriminatory practices by Federal money - went no further than the equal protection clause. On this point Powell agreed and at least one legacy of Bakke will be that equation of Title VI with the scope of the equal protection clause. It was important in the case because the four dissenters asserted that the equal protection clause should in no way be involved. They had a duty, as between statute and constitution to rule on the basis of the statute - a sound constitutional position. In their words:

"Our settled practice, ~~however,~~ is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground."

The dissenters then looked at Title VI: *- It reads:*

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

They were persuaded that the plain language of the statute required a ruling that the Davis admission program had excluded Bakke on the basis of his race.

This, of course, was the main issue (*to everyone but* ~~except for~~ Bakke himself - he wanted in).

The majority on this issue would get around the language of the statute by arguing that excluding whites carries with it no racial stigma. Some had argued that the legislation was clearly to benefit Negroes and some other designated minorities - so called "protected classes" and thus it was not intended to protect whites. That argument went down the tube when the Justices supporting affirmative action equated Title VI with the equal protection clause - for it was well established that the Fourteenth Amendment protected all citizens - black and white alike.

So what is the real holding of Bakke? The four concurring and dissenting justices who would have affirmed the Davis plan and denied Bakke admission expressed it this way:

"The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Government to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented - whether Government may use race-conscious programs to redress the continuing effects of past discrimination - and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask 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."

The last slender phrase "at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area", is absolutely crucial for it is why Powell was with these four to make a

majority on the issue of using race conscious actions. Without the qualification of past findings of discrimination, Powell was clearly gone and there would be no majority on this issue. So affirmative action barely escaped Bakke. The arguments for colorblind laws and constitutions had given way to a recitation of the failure of a colorblind constitution to correct the grave injustices of the past. They expressed it this way:

"Against this background, claims that law must be 'colorblind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot - and as we shall demonstrate, need not under our Constitution or Title VI - let color blindness 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."

As might be expected, Mr. Justice Marshall devoted much of his separate concurring opinion to ^{a review} the ~~recissitation~~ of the history of his people in this country, a history which *he insists* demanded something more than a colorblind law. His often eloquent words began:

"Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave."

and Marshall continued:

"The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools - and thereby denied the opportunity to become doctors, lawyers, engineers, and the like - is also well established.

... The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

... In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society."

~~and~~ he added: "I do not believe that the Fourteenth Amendment requires us to accept that fate."

~~And~~ He accentuates his differences with Powell in these words: "While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against the Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th Century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless

of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination.."

And a last thrust from Mr. Justice Marshall, the only person of Negro ancestry to sit on our highest Court:

"It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous and the powerful."

At the heart of Mr. Justice Powell's controlling view is the distinction he draws between the Davis plan and the Harvard plan.

Davis set aside 16 spots for minorities. Their classification of that class as "disadvantaged" was suspect because, one, no white had even been found to be disadvantaged, and two, Asians were found within the disadvantaged minorities, ~~and~~ ^{but} at the same time had done very well in open competition for the remaining spots against their advantaged white brothers. But it was the set-aside by race where whites could not qualify which bothered Powell.

Nonetheless, he approved ~~among~~ a race conscious program generally, but with a very limited scope.

Harvard's plan was much more sophisticated. They wanted diversity in their student body. All else being equal, a dash of farm boy, Southern girl, Texas cowboy and - yes - black, would benefit all. So points were made which could make the difference in being admitted. ^{Being} Black was merely one way to get a point.

This distinction satisfied Mr. Justice Powell. But it is still based on race. We have no statutes and the constitution does not protect the ^{rich} ~~rich~~ from discrimination by favoring the poor, *It does not protect the* ~~by the~~ Eastern city dweller from the Midwestern farmer's son and the Yankee-speaking Northern lass from her sister with a Georgia drawl. *But it most assuredly does protect from discrimination by virtue of race.*

I believe few people - excepting of course, Alan Bakke, were really comfortable with the resolution of this case.

The ink was not dry on the Bakke opinion when the search was on to find another vehicle to probe the reach of Bakke and of the white majority's rights under the law. Such a vehicle seemed to be provided in United Steelworkers of America v. Brian Weber.

"In 1974 United Steelworkers of America and Kaiser Aluminum entered into a master collective-bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement contained, inter alia, an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craft work forces. Black craft hiring goals were set for each Kaiser plant equal to the percentage of blacks in the respective local labor forces. To enable plants to meet these goals, on-the-job training programs were established to teach unskilled production workers - black and white - the skills necessary to become craft workers. The plan reserved for black employees 50% of the openings in these newly created, in-plant, training programs.

The case arose from the operation of the plan at Kaiser's plant in Gramercy, La. Until 1974 Kaiser hired as craft workers for that plant only persons who had had prior craft experience. Because blacks had long been excluded from craft unions, few were able to present such credentials. As a consequence, prior to 1974 only 1.83% of the skilled craft workers at the Gramercy plant were black, even though the work force in the Gramercy area was approximately 39% black. There were five blacks as against 273 whites in the skilled craft group.

Pursuant to the National agreement Kaiser altered its craft hiring practice in the Gramercy plant. Rather than hiring already trained outsiders, Kaiser established a training program to train its production workers to fill craft openings. Selection of craft trainees was made on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of black skilled craft workers in the Gramercy plant approximated the percentage of blacks in the local labor force.

During 1974, the first year of the operation of the affirmative action plan, 13 craft trainees were selected from Gramercy's production work force. Of these, 7 were black and 6 white. The most junior black selected into the program had less seniority than several white production workers whose bids for admission were rejected. Thereafter, one of those white production workers, respondent Brian Weber, instituted a class action in the United States District Court for the Eastern District of Louisiana.

The complaint alleged that the filling of craft trainee positions at the Gramercy plant pursuant to the affirmative action program had resulted in junior black employees receiving training in preference to more senior white employees,

thus discriminating against respondent and other similarly situated white employees in violation of Title VII of the Civil Rights Act of 1964. The District Court held that the plan violated Title VII, entered a judgment in favor of the plaintiff class, and granted a permanent injunction prohibiting Kaiser and the union "from denying plaintiffs, Brian F. Weber and all other members of the class, access to on-the-job training programs on the basis of race". A divided panel of the Court of Appeals for the Fifth Circuit affirmed, holding that all employment preferences based upon race, including those preferences incidental to bona fide affirmative action plans, violated Title VII's prohibition against racial discrimination in employment."

When the time came to argue the case before the Supreme Court, two
of the most significant opinion writers in Bakke were not around, ~~for Weber~~. Powell was ill and Stevens disqualified himself for some past connection with the subject matter. It was a pity, really, that Powell was not to be heard from because his seemingly narrow holding in Bakke would ^{be read against} ~~face~~ a Weber case where there had been no ~~prior~~ finding of a past history of discrimination by any authorized authority ^{prior to the adoption of the race conscious plan.} Stevens, on the strength of his dissent in Bakke, would presumably have enthusiastically joined Rehnquist in his dissent.

The opinion of the court was written by Brennan. He was joined by Stewart, White, Marshall and Blackman. Thus there were

five of the seven Justices on the majority, leaving Chief Justice Berger to join with Rehnquist's dissent. In addition to Brennan and Rehnquist, Blackman and Chief Justice Berger wrote separate opinions.

It is worthwhile noting that Weber was really ^{quite} ~~very~~ much different than Bakke. The affirmative action plan was the product of an agreement between an employer and a union. No governmental action, local, state or federal, was in any way involved. This was not a government mandated affirmation action plan. ^{No Federal money was involved.} So Weber could not look to the constitution for relief. He had to invoke Title VII of the Civil Rights Act. In particular he looked to § 703 (d), and he liked what he saw.

"It 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."

Let me read that again. The mystery in Weber is how, confronted with that language, five Supreme Court judges could find against Brian Weber's claim. It wasn't easy.

Mr. Justice Brennan and his four colleagues drew solace from a case decided by the Supreme Court in 1892, quoting, "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." ^{Something Lewis Carroll might have written.}

This same Berger Court in 1976 had decided that Title VII protects whites as well as blacks, although affirmative action was not involved in that case.

Now to find some way around the plain meaning of the words, the majority found it necessary to read Title VII against the background of legislative history and the historical context from which it arose.

Conducting such an examination the majority concluded that "an interpretation ... that forbade all race-conscious affirmative action would bring about an end completely at variance with the purpose of the statute", and thus such an interpretation "must be rejected".

As you will recall, the Civil Rights Act of 1964 was the subject of a long debate and much rhetoric. Some of the selections from the legislative history made by Mr. Justice Brennan for the majority are *incorporated into the following portions of his opinion:*

The primary concern of Congress was with "the plight of the Negro in our economy". Blacks had been largely relegated to "unskilled and semi-skilled jobs". With automation the "number of such jobs was rapidly decreasing" and the "relative position of the Negro worker (was) steadily worsening. The non-white unemployment rate in 1947 was only 64 percent higher than the white rate", but by "1962 it was 124 percent higher"

~~They~~ ^{He} quoted Senator Humphrey saying:

"What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill?"

What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education?"

Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children. If his children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities."

It was clear to Congress, the Court said, that "the crux of the problem (was) to open employment opportunities for Negroes in occupations which have been traditionally closed to them."

Perhaps most persuasively they quoted from the House Report as follows:

"No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination."

So Brennan concludes:

"It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."

The majority declined to try to detail the line of demarcation between permissible affirmative action plans and those which were not. They were content to say merely that the Kaiser/steel worker's union plan was permissible. They took comfort in the fact that the plan did not require the discharge of white workers to be replaced by new black hires, And that 50% of the whites could share the advancement. White's were not totally foreclosed. But I must inject that more than 50% of the white students could obtain admission into Davis medical school. No matter how you slice it, there are a finite number of seats on the bus and this is about who gets to sit in them.

Mr. Justice Rehnquist had worked up a real head of steam as he wrote the dissent for himself and the Chief Justice. This is, of course, not the first time that one Justice had dealt with his brothers in harsh, demeaning tones. It is, I submit, one of the more strident ones. Here is how he begins:

"In a very real sense, the Court's opinion is ahead of its time: it could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion borrows, perhaps subconsciously, at least one idea. Orwell describes in his book a governmental official of Oceania, one of the three great world powers, denouncing the current enemy, Eurasia, to an assembled crowd:

'It was almost impossible to listen to him without being first convinced and then maddened ... The speech had been proceeding for perhaps twenty minutes when a messenger hurried onto the platform and a scrap of paper was slipped into the speaker's hand. He ^{unrolled} ~~unrolled~~ and read it without pausing in his speech. Nothing altered in his voice or manner, or in the content of what he was saying, but suddenly the names were different. Without words said, a wave of understanding rippled through the crowd. Oceania was at war with Eastasia! ^(not Eurasia) The banners and posters with which the square was decorated were all wrong!... (T)he speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax."

~~G. Orwell, Nineteen Eighty Four, 182-183 (1949).~~

Today's decision represents an equally dramatic and equally unremarked switch in this Court's interpretation of Title VII."

He goes on:

"The operative sections of Title VII prohibit racial discrimination in employment simpliciter. Taken in its normal meaning, and as understood by all Members of Congress who spoke to the issue during the legislative debates, this language prohibits a covered employer from considering race when making an employment decision, whether the race be black or white."

Warming to his task, Rehnquist goes on:

"Today, the Court behaves much like the Orwellian speaker earlier described, as if it had been handed a note indicating that Title VII would lead to a result unacceptable to the Court if interpreted here as it was in our prior decisions. Accordingly, without even a break in syntax, the Court rejects 'a literal construction of § 703 (a)' in favor of newly discovered 'legislative history', which leads it to a conclusion directly contrary to that compelled by the 'uncontradicted legislative history' unearthed in McDonald and our other prior decisions. Now we are told that the legislative history of Title VII shows that employers are free to discriminate on the basis of race: an employer may, in the Court's words, 'trammel the interests of white employees' in favor of black employees in order to eliminate 'racial imbalance'. Our earlier interpretations of Title VII, like the banners and posters decorating the square in Oceania, were all wrong."

And try this one on for size my brethern:

"Thus, by a tour de force reminiscent not of jurists such as Hale, Holmes and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, 'uncontradicted' legislative history, and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions."

He argues that Congress could have specifically provided for black preference but says, quite probably correctly, that "any legislator harboring an unspoken desire for such a provision could not possibly have succeeded in enacting it into law."

Chief Justice Berger wrote a separate dissent to point out his views:

"The Court reaches a result I would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers. Under the guise of statutory 'construction', the Court effectively rewrites Title VII to achieve what it regards as a desirable result. It 'amends' the statute to do precisely what both its sponsors and its opponents agreed the statute was not intended to do."

A very disturbed Justice Blackman (whom I suggest is quietly emerging as a real star of this current court) admits he "shares some of the misgivings expressed in Mr. Justice Rehnquist's dissent concerning the extent to which the legislative history ... supports the result the Court reaches."

Nonetheless, he goes on:

"I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court today, and I, therefore, join its opinion as well as its judgment."

That is quite an admission!

My appreciation of Justice Blackman is not in any way diminished by the fact that he perceived the impossible dilemma of which we in industrial life were very much aware. In his words:

"The broad prohibition against discrimination places the employer and the union on a 'high tightrope without a net beneath them'. If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks."

And further the dissent's reading of Title VII ~~is~~
"places voluntary compliance with Title VII in profound jeopardy. The only way for the employer and the union to keep their footing on the 'tightrope' it creates

would be to eschew all forms of voluntary affirmative action. Even a whisper of emphasis on minority recruiting would be forbidden."

He adds:

"Preferential hiring along the lines of the Kaiser program is a reasonable response for the employer, whether or not a court, on these facts could order the same step as a remedy." (emphasis added)

The last phrase of Blackman seems to narrow Weber even more. We know only that an employer, voluntarily or by agreement with a union, may adopt some race conscious plans. We do not know if a court or an administrative agency can. Of course, administrative agencies, particularly the Office of Contract Compliance, do it all of the time.

Mr. Justice Blackman concludes with these words:

"The decision responds to a practical problem in the administration of Title VII not anticipated by Congress. It draws predictability from the outline of present law, and closely effectuates the purpose of the Act. Both Kaiser and the United States urge its adoption here. Because I agree that it is the soundest way to approach this case, my preference would be to resolve this litigation by applying it and holding that Kaiser's craft training program meets the requirement that voluntary affirmative action be a reasonable response to an 'arguable violation' of Title VII."

With the emphasis on the "arguable violation" theory we may have seen the last of Mr. Justice Powell's insistence on a clear finding of prior discrimination by a responsible tribunal.

So Bakke won and Weber lost. As we have seen, there are distinguishing features. But it remains that both white men sought a seat on the bus, which had been assigned to a black. One made it, one did not. Affirmative action plans designed to improve the lot of the black race were approved in one case and not in the other.

So what happens next. The Supreme Court has accepted a case on appeal from the 2nd Circuit. Its style is H. Earl Fullilove v. Juanita Kreps. Congress in the Public Works Employment Act of 1977 provided money for certain local public works projects. The Secretary of Commerce, in administering these funds was required to set aside 10 per cent of the amount of each grant for minority business enterprises. A Minority business enterprise is a business at least 50% owned by either Negroes, Spanish-speaking, Oriental, Indian, Eskimo and Aleut citizens.

The question presented in this appeal is a narrow one. It is whether Congress acted in a constitutionally permissible manner in conditioning the receipt of federal grants for local public works projects under the act upon the requirement that 10 per cent of the grants be allocated to minority business enterprises.

The 2nd Circuit noted:

"that when Congress seeks to exercise its spending powers, it is required to distribute federal funds in a manner that neither violates the equal protection rights of any group nor continues, the effects of violations that have occurred in the past, for simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

The Court of Appeals saw their role as one determining whether Congress had made adequate findings of past discrimination to meet Mr. Justice Powell's test.

Once more, however, there is a finite number of dollars. (As a concept that is true - one wonders what the limit really is.)

But whatever goes to minority groups, ^{under the set aside program} it is a class to which whites cannot be admitted. *Much like the special admissions group in Bakke*

Many on Bakke were troubled with including the Orientals, especially the Japanese who needed no help as a class in competing with their Caucasian brothers and sisters. Justice Marshall argued that the Negroes' past was sufficiently different - slavery and legally mandated segregation - that a distinction ^{in the next case - Fullilove - Congress included Indian, Eskimos and Aleuts} could be made with other minorities. ^{Some of you may be experts} on the subject of discrimination of the Aleuts in American Society. If so, please make it a subject for your next paper.

In the meantime, please stay tuned for the next episode of "seats on the bus".

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