Washington University Law Review

Volume 1979
Issue 1 *Symposium: The Quest for Equality*

January 1979

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COMMENTARY

A VIABLE COMPROMISE ON MINORITY ADMISSIONS

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Dean Griswold has given us a wise and balanced analysis of the problem raised by the *Bakke* case.[1] He has told us Justice Powell's compromise is probably the best solution at the moment to the problem posed by the fact that colorblind or group-blind admissions procedures will not now lead to the admission to law and medical schools of substantial numbers of applicants from the black and some Hispanic American groups. Dean Griswold has warned us that there are many dangers and perplexities in the Powell compromise, and that we cannot hope to avoid these, both in the case of law school and medical school admissions and in similar cases in the fields of employment or regulation. I share both his agreement with the result and his fears for the future.

In my remarks, I will take up the license suggested at the beginning and at the end of his paper where he tells us that what we deal with in the *Bakke* case are not constitutional and legal problems alone, but social and philosophical—and, I would add, political—problems. I will argue that from these points of view, the Powell compromise is one we should all embrace for a range of reasons, few of which will have much merit to constitutional lawyers, but all of which are of weight if we are to overcome the dangers of resentful minorities and intergroup conflicts that the *Bakke* issue raises.

I want to broaden the discussion beyond the narrow and complex matter of the Supreme Court's judgment, teetering as it does on a razor's edge—a judgment that may be shifted one way or another by the next case—to ask: what is best for us as a nation? How do men of good will, concerned for the joint objectives of justice for minorities and harmony among the varied racial and ethnic elements of the nation, now

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1. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

proceed? I think we have concentrated for too long on the judicial and constitutional means of deciding complicated issues. We are, it is true, in the end governed by what the Supreme Court asserts is constitutional. But in this complex area, I believe that if the varied groups and interests that have held different positions in the *Bakke* and related conflicts could agree on the general principles of a course of action, then that course of action would be the one that legislatures, regulatory bodies, and courts would on the whole accept. On this issue the courts have not been uniform or overreaching. As the *Bakke* decision shows, the Supreme Court does not think that the Constitution or the laws give unambiguous guidance. It is an incredible situation—but one we will have to live with—when four justices disagree sharply with four other justices as to the meaning of legislation passed only fourteen years ago—the Civil Rights Act[2]—at a time when most of those who passed it are still alive and many still sit in the same Congress and can be asked what they meant. Under these circumstances the Court may well be guided by dominant public opinion as to the practices that conform to a common vision of a just and harmonious society.

I have coupled these two criteria—justice and harmony—and I will explain why. In the present context of discussion of public issues, it is not necessary to explain why we want a just society, which in present understanding generally means a more equal one, but it is necessary to say a word about why multi-ethnic harmony is also an objective to be pursued. One can, of course, envisage situations in which justice calls for fierce intergroup conflict. We might agree that this was the case when the nation imposed desegregation on the South. Some of us might disagree that this was the case when federal courts imposed busing on some Northern cities. But in general, after the claims of justice are met, we want ethnic and racial groups to live together in harmony. No one wants a society in which one group or another feels alienated and does not effectively engage in its decisionmaking processes or accept the generally agreed procedures for making decisions on disputed issues. In this sense, the two objectives, which sometimes may be in conflict—justice, forcing us to forego harmony, and harmony, forcing us to give up the full measure of justice some of us may feel necessary—are jointly necessary for forging a viable policy.

The problem is that our varying conceptions of what is justice in the

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C. (1976)).

case of preferential policies have been so at odds. Justice, in my view and in the views of many people, demands that the individual alone be the test for admissions and employment. On the other hand, we know that there are many others—and they represent the great majority of the leadership of the major civil rights groups—who believe that justice, in more and more circumstances, does demand numerical objectives—call them quotas or goals (I think the difference does not amount to much)—for which our judgment of the individual must give way before the question of to which group that individual belongs. Here are two conceptions of justice in conflict. If one or the other prevails, great bodies of our citizenry will be deeply offended and angered, and will simply see this as an unjust society—one that either refuses to make up for discrimination and prejudice against the black, or one that ignores the rights of the individual and denies Marco DeFunis and Allan Bakke the objectives for which they individually struggled. It is under these circumstances that the second criterion that I would use to judge a decent policy—one that permits a substantial degree of interracial and interethnic harmony to prevail—comes into play. Is there a policy that satisfies these objectives? I think there is, and I think that Justice Powell has begun to point the way to it. In a word, it is that race and ethnicity may be *a* factor, but cannot be *the* factor in the key decision to admit to specialized and over-applied-for programs. Having long argued for a society that bases key decisions on individual rather than racial and ethnic characteristics, why would I now argue for this breach in the principle to allow some consideration of race and ethnicity, if it does not become the decisive factor?

Let me make a preliminary point. While I believe Justice Powell's compromise—some account of race, but not race as the decisive factor—is, for reasons I will develop, one that both sides might accept, I do not think his reasoning in getting to this position is very persuasive. He gets there for one reason: that diversity in student bodies, which race may in part provide, is a legitimate academic objective. Well and good. I do not think many would disagree. I can easily see those who oppose quotas and goals nevertheless tempted to take people whose background suggests that they have had different and interesting experiences, which is almost always true of blacks. Nevertheless, as we all know, we have instituted quota-like procedures in our law and medical schools for other reasons, too, and I think we would have to accept that taking race into account as one factor in making decisions could be justified on these grounds as well. Some grounds I would exclude. For

example, I would not accept as a legitimate reason for taking race into account the bowing to pressure of organized students or faculty; that is, to force. Nor would I accept as a legitimate ground for taking race into account the argument that certain races and ethnic groups must be represented in proportion to their population (or some other statistic) in important occupations and roles. But I do think other arguments that Justice Powell ruled out as a basis for taking race into account on constitutional grounds hold up on other grounds—and perhaps on constitutional grounds as well. Dean Griswold indicated a range of reasons that might justify taking race into account. For example, if a school were interested in doing more to serve a certain population, taking race into account would not be unreasonable. True, the black medical student might not serve a primarily black population, but insofar as he had black patients one might hope for a larger measure of understanding and empathy. It may well be the case that blacks do better as doctors, all things considered, than their test scores suggest. (I speak of blacks for convenience—they are by far the largest minority, and their claims to special treatment are best grounded—but it should be understood that when I say blacks I generally mean blacks and other minorities who are favored in preferential programs.)

Justice Powell, limited by the Constitution as he understood it, could accept only one narrow ground for taking race into account for admissions. I, not being an expert on the Constitution, but only considering what is a just and viable policy, can accept other reasons.

But now, why would someone who has strongly opposed quotas and goals and the whole development of a statistical standard for group justice imposed by governmental agencies accept the Powell compromise?

First, there is a narrowly pragmatic ground: Next time those of us who oppose quotas may lose completely. Four justices are willing to accept quotas without any observable restrictions, as long as these quotas are making up for past discrimination.[3] Justice Powell does not think the fourteenth amendment forbids taking some account of race.[4] The other four justices did not get to the Constitution, but spoke only of the Civil Rights Act,[5] which is already interpreted by governmental

3. Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 324 (Brennan, J., concurring in the judgment in part and dissenting in part).

4. *Id.* at 320.

5. *Id.* at 408-21 (Stevens, J., concurring in the judgment in part and dissenting in part). The Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000(d) (1976), provides: "No person in the

agencies (generally with the approval of federal courts) to require goals and quotas.[6] I think the next step in litigation—when one considers that it is President Carter who will be making the next appointments to the Supreme Court—may well fully legitimate quotas, thus establishing as constitutional those practices that make race decisive rather than one factor to be taken into account.

Second, there is a more substantive and troubling ground for accepting the "race as a factor" compromise: Most of us who defend individual rights already accept so many programs that do reach out to and make special efforts to assist members of given racial and ethnic groups. Dean Griswold has properly pointed out that many such programs now exist. There are various programs—usually operating with some federal funds or with tax-exempt foundation and college funds—that seek out blacks, Hispanic Americans, and American Indians for exclusive preparatory schools, colleges, and professional schools. These programs make no bones that they are looking for people of these groups, and will give them special assistance, tutorial or financial, to get them into and through selective educational institutions. Now that we accept these kinds of programs, where do we draw the line? We could draw the line at assistance in meeting common and universal standards, granting financial assistance and tutorial aid if they get in by meeting these common standards. But do we really believe we can properly draw the line there? Is there so much difference between a summer or two of intensive work for members of given ethnic groups to help them get into medical school, or intensive tutoring once they are in, and an admissions decision that leans over backward to make a concession in favor of members of that group? I cannot find a decisive difference. A similar issue has come up when people favoring quotas have argued, "We will let them in, but we will retain the same standards for letting them out." In the first place, I would not want to bend very far the standards for getting in. But in all honesty, few of us who sit on the admissions committees or on appointment committees have really applied a rigidly colorblind policy. We have leaned over backwards for some applicants, some potential faculty members. That makes us all lawbreakers if we were to apply strictly

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."

6. Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 341-55 (Brennan, J., concurring in the judgment in part and dissenting in part).

Title VI and the fourteenth amendment. But since we are all a little guilty, can we now raise ourselves up in full righteous wrath and insist that no account at all of race may be taken in admissions?

And a third substantial reason: We might all consider with some trepidation what the reaction of blacks, or at least black civil rights agencies and black officials in governmental agencies enforcing nondiscrimination and affirmative action in education and employment, would have been to the kind of decision that would have permitted no account of race, and would have taken us back to the understanding of nondiscrimination that was embodied in the Civil Rights Act of 1964.[7] At that time we all—black and white alike, civil rights organizations and governmental agencies—had a common view of what the law said and intended—that is, a colorblind society and colorblind action. I still think that this would be the best society for us—as I will elaborate further on—and I hope that we may yet reach that consummation for which we still devoutly wish. But I wonder how many of us would have looked with full equanimity and satisfaction on the reaction to a decision that now said, "Yes, the fourteenth amendment demands strict color blindness, and so, too, does the Civil Rights Act,[8] and no account at all may be taken of race or ethnic group by any institutions that receive federal funds or that in any way are affected with a state interest." One might have delighted in the fact that thousands of affirmative action officers in the federal government, in private business, and in colleges and universities suddenly would have found themselves at a loss for work. And yet I am afraid at how such a decision might have been interpreted. However strongly one feels about a principle, there are times when one does not want too total a victory for it because one feels that men of good will—somewhat misguided, it is true—will feel deeply offended and alienated from their fellow Americans by such a victory. I myself would be happier arguing before such a decision came down that it would not mean that the United States has turned its back on black fellow citizens and their need, hoping to convince fellow citizens, rather than arguing after it came down that it did not mean abandonment of blacks.

Let me present a parallel. The Supreme Court decisions on school prayer and abortion deeply offended and angered great numbers of Americans. Whether or not these decisions were wrong constitution-

7. *See* note 5 *supra.*

8. *See* note 2 *supra.*

ally in overriding state and local options, they were unwise because they alienated so many Americans from our processes of government and brought the Supreme Court into disrepute. A strong decision against quotas and goals would to my mind be right constitutionally. Yet I would hope we could get there in stages and with a greater degree of acquiescence from the minorities affected.

There is yet a fourth reason for the compromise: It defends the autonomy of educational institutions and private employers. I believe that they should have an independence of action to fulfill certain objectives as they see fit. And I would like to see the restrictions imposed by my understanding of our colorblind Constitution rest more lightly on them than on government. I think that it would be wrong for government to require academic institutions to take so many and so many of such-and-such a racial and ethnic category, which fortunately it yet does not, and that it is wrong to require contractors and employers to hire or promote so many of this or that racial or ethnic category, which unfortunately it does. But I would like to make a distinction between what government—our government, operating under our Constitution and our laws—should not do and what autonomous and independent institutions may do. We should make a distinction between a college and the government, or a business and the government. I could find reasons for colleges to admit preferentially the children of alumni or a few able athletes, or for business to hire people on the basis of a good impression made on a boss or without requiring the applicant to take the equivalent of a civil service examination. We expect government to be more "just," to apply universal roles, to be blind to such things as family connections or special attractiveness. One good reason we allow more discretion in the nongovernmental organizations than in the governmental is that they truly have different functions and objectives. One objective of a private college is to raise enough funds to support itself, and that may be a good enough reason to give preference to the alumni's children. One objective of business is to make a profit by means of entrepreneurial judgment, and that may be enough to justify quirky hiring.

There is another important reason why we properly should bind government to strict universalistic standards. This is a multi-ethnic country with a rich group life centered on religion, ethnicity, and race. We expect these varied groups to establish institutions that are in some substantial degree exempt from universalism in their practices, even though we bar them from practicing a crude racism. Thus, we expect a

Lutheran college to be attractive to Lutherans, and few of us would be disturbed if it tried to seek out good Lutheran students. And this is not only because we give special license to religion. Even if a college were Norwegian Lutheran and tried to ensure a body of students of Norwegian Lutheran background with an interest in that specific ethno-religious tradition, it would not bother us. We also are aware that much of the small business of this country runs on family lines and, beyond that, on ethnic lines. That an Italian restaurant prefers Italian employees would not be a cause of great concern, though our literal and narrow-minded bureaucrats often find that hard to accept. But while our ethnic and religious subgroups properly maintain themselves through associational and business ties, based in part on ethnicity and religion, we want our government, standing above all groups and standing for ideally blind justice, to be universalistic in its hiring and decisionmaking practices.

Thus, government is properly bound to stricter standards. One problem in the present situation is that the line between government and nongovernment is blurred. Government has so expanded its scope that almost everything is considered bound by the same rules by which government should be bound. Thus, every college and university is now considered a "government contractor," even though its only benefit from the federal government is that its students, like all college students, are eligible for federal grants and loans. Private schools are now being brought under strict IRS scrutiny on how they fulfill an IRS-imposed standard of affirmative action in admissions; if they do not satisfy the IRS, they may lose their tax exemption as nonprofit schools.[9] The Supreme Court looks upon the Medical School at Davis almost as if it is a branch of government itself, because Davis receives federal aid. I would like to see a looser standard for autonomous institutions of higher education, whether "public" or "private," than I would expect for government itself. I would want and expect different schools to take on somewhat different missions—some to train practitioners, others to train researchers; some to serve an area, others to serve the nation—and in taking on these missions, there should be an acceptance of a broad range of different actions in carrying them out. Of course, there are limits. None of us would like to see discrimination against specified groups. But in all honesty, I see a difference between discriminating

9. 44 Fed. Reg. 9451-55 (1979) (corrections noted at 44 Fed. Reg. 11021 (1979)) (proposed revenue procedure on private tax-exempt schools).

against Jews, which many medical schools used to do, and deciding that a few more blacks in the school would be a good idea for a number of reasons.

Because I believe in the autonomy of private associations, even when they receive a modicum of governmental aid in the form of assistance to students or tax exemption for purposes of receiving gifts, I would like to see a greater degree of freedom for them than for government. Thus, I would accept their right to make race a factor in such matters as admission to educational programs and, by extension, to employment. By the same token, I would continue to resist government when it imposes racial and ethnic quotas. That is not its job, and by doing so, it gravely undercuts its position of standing above groups and being fair to all. And being fair to all means being fair to individuals.

There is finally a fifth reason for accepting the Powell compromise: Those of us who oppose quotas and goals could not, without a certain danger of smugness, insist on absolute academic standards if that meant that blacks, who compose eleven percent of our population, were only one percent of our lawyers and doctors. I do not accept a statistical standard of justice. It is ridiculous, for example, to argue our judicial system is unfair to blacks because more blacks are arrested and sentenced. The argument must be couched in terms of whether they are treated differently for the same offenses. Nevertheless, a very substantial disproportion in the numbers of doctors and lawyers, as well as the number of prisoners, must be a cause of concern and is properly a target of some kind of action. I would argue that the right way to increase the number of black doctors and lawyers is to undertake concentrated compensatory educational programs so that a larger number of blacks will score well enough on admissions tests to enter law and medical school, and will score well enough on state bar and medical examinations to become lawyers and doctors. And yet insofar as some flexibility in admissions practices can help increase that number without substantial danger to the quality of the professionals—or to their perceived quality—then I would favor flexible discretion. But the startling and enormous differences between the scores of those regularly admitted and of those minorities admitted under the special program at the Medical School of the University of California-Davis showed that discretion can be grossly abused. One wonders whether Bakke would have won if the difference between his scores and those of the special admittees were of the order of magnitude of ten to twenty percentile points, rather than fifty to sixty. And I wonder indeed

whether under those circumstances he should have been admitted (or would have brought his case). Some flexibility, yes; quotas and gross abuse of the flexibility, no. If we want autonomy for our educational institutions, if we want them to pursue distinctive and self-chosen objectives, then we must accept this flexibility.

But how do we prevent the use of "race as a factor," now accepted by the Supreme Court for educational institutions (and very likely to be accepted, on other grounds, for employment) from simply turning covertly into quotas? And how do we prevent this if we at the same time want to respect the autonomy of educational institutions? Undoubtedly, this will be no simple matter. The problems of defining how race may be a factor without turning it into the forbidden quota will raise many difficulties. Undoubtedly, there will be more litigation. And yet I feel the principle is so well taken, for the reasons I have given above, that we should accept the difficulties of trying to find a line that most people can understand, and should observe some flexibility in admissions taking account of race without allowing it to turn into a quota or into a practice grossly unfair to others.

There can be standards that show whether a quota is operating. Thus, if the number of blacks admitted stays remarkably similar year after year, despite changes in the applicant pool and in average scores, there certainly will be grounds for suspicion, and courts may act on such evidence, and admissions committees may avoid covert quotas knowing that. If the academic differences between majority and minority applicants are as huge as they were in the Davis case, there certainly will be grounds for suspicion—just as in the reverse case in which Jewish quotas in medical schools were demonstrated by the regular denial of admission to Jewish students with very high tested abilities and the regular acceptance of non-Jewish students with much lower abilities. We want flexibility and should bend over backwards, but not so far as to throw the responsibility of admissions committees into question.

I think that, because of *Bakke* and provided that we can hold the line against quotas, we are entering into a period when black doctors and lawyers will be more respected. Black doctors and lawyers who will be graduating in 1982 and beyond, I am sure, will be looked upon as more capable than those who graduated between the early 1970's and early 1980's when crude quotas were in operation in so many schools. They may even be considered as good as the black graduates of the period before the early 1970's when, whether or not blacks still had to face

discrimination, they were undoubtedly admitted according to the same standards used to admit others.

We now read that the number of black law and medical students is beginning to decline after almost a decade of rapid growth. Blacks accounted for 6.7% of first-year medical students in 1977, compared with 7.5% in 1974. They accounted for 4.9% of first-year law school students in 1977, compared with a peak of 5.3% in 1976. Observers cite two reasons for this decline. First, more blacks are entering engineering and business. Second, the *Bakke* case has had a chilling effect. I would argue that both of these reasons are excellent ones for this modest decline. If blacks are diversifying their educational goals and moving into areas they never considered before, that is fine. If they feel engineering and business are less demanding or more rewarding than law and medicine, that is their decision, and in a free society there is no reason why we should want to interfere in it. And if the *Bakke* case has suggested to many that their mathematics and science skills must be stronger to justify their admission to medical school, there is nothing wrong with that. Only if students who strongly desire to be lawyers and doctors, and who have the ability to keep up with their classmates and to make able professionals, are being dissuaded from applying, should we be concerned. I hope that is not happening, and I have seen no evidence that it is.

There is a final safeguard to the return of quota systems; that is, to keep government from requiring or imposing quotas. We have been fortunate that government has not imposed racial and ethnic quotas on institutions of higher education, except in the special case of historically black and white colleges and universities in the South. That is all to the good. Unfortunately, government is very active in the business of imposing quotas and goals on employers. We may hope that determined litigation and corrective action in Congress to reemphasize the antidiscrimination legislation it adopted in 1964[10] may drive government from that field. But if, when government is driven from the field of imposing quotas, individual institutions of education or individual businesses want to do more than strict nondiscrimination and color blindness would require, we should respect their right to do so. Some groups, principally blacks, have suffered severely from prejudice and discrimination. Nondiscrimination will do a certain amount to change their position. Special compensatory programs should do more. But

10. *See* note 5 *supra*.

this is a country of many groups and religions, and action by members of one group to aid its own, or of many groups to aid one that has been especially victimized, is to be expected and must not be forbidden in a society in which there are generous as well as ungenerous instincts. Whether that will lead to a society in which there are five, or ten, or fifteen percent black doctors and lawyers, I do not know. For the next generation, the lower figure is the more likely one. But that should be of no concern to government so long as general fairness operates, discrimination is banned, and flexibility of decisionmaking by private and autonomous institutions is combined with a sense of responsibility to their missions.