

# Washington University Law Review

---

Volume 1979

Issue 1 *Symposium: The Quest for Equality*

---

January 1979

## Racial Preferences and Scarce Resources—Implications of the Bakke Case: Panel Discussion

Follow this and additional works at: [http://openscholarship.wustl.edu/law\\_lawreview](http://openscholarship.wustl.edu/law_lawreview)



Part of the [Civil Rights and Discrimination Commons](#), and the [Education Law Commons](#)

---

### Recommended Citation

*Racial Preferences and Scarce Resources—Implications of the Bakke Case: Panel Discussion*, 1979 WASH. U. L. Q. 107 (1979).

Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol1979/iss1/14](http://openscholarship.wustl.edu/law_lawreview/vol1979/iss1/14)

This Symposium is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

## PANEL DISCUSSION

*The discussion opened with the observation by Dean Griswold that he did not find himself in disagreement with what either Nathan Glazer or Drew Days had said. He did offer a warning against the tendency of well-meaning administrators to accomplish their civil rights goals through quota-type devices based on an ethnic or sex proportionality concept:*

I find myself quite concerned by the bureaucrats in this picture. They are able, conscientious, zealous people, many of whom work in a particular agency with little occasion to take an overall view, and there is a very considerable tendency on the part of bureaucrats, it seems to me, to press things to a dryly logical extreme, to use again a phrase of Justice Holmes. I think of that nonsense about how it is illegal to have father-son banquets in the public schools, remember that? And the further nonsense, maybe even being defended by Mr. Days' division, that you must have girls on boys baseball teams. And to me this has nothing whatever to do with discrimination, sexism, racism, or anything else of the kind. I think I even detected a little of that in Mr. Days' remarks about how fine it is that we do not have quotas, but until an organization has eleven or twelve percent black employees, there will still be discrimination, and something ought to be done about it. I think that is the only thing in his commentary that I would really disagree with. I think that before we get to that place we will have accomplished a good deal of what we need to accomplish in this area, just as I sense [that] . . . we have practically completed the job with respect to the Oriental-Americans.

*The following excerpts of the ensuing interchange among the panelists present some highlights of the discussion.*

*Drew Days:*

I am not suggesting that we go back and show in every case, or be required to show, intentional discrimination. I am just afraid that we are going through this period and have lost the sense that what we are talking about is, in many cases, intentional discrimination.

*Erwin Griswold:*

I would like to make an answer to that which may be a little legalistic . . . . I took the position in argument [arguing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), as Solicitor General] that if Judge McMillan's order was based on prior discrimination, it was valid; but that if it was, in fact, based on an effort to achieve a racial balance, it was

invalid. And the Supreme Court adopted that argument almost in exactly the words that appeared in my brief. I happen to think that was right. I think that efforts by law to achieve racial balance are invidious. They carry with them an implication that black or all black is inferior, and I do not think that should be our law . . . . I would hope that we have not come to the place where a mere variation in racial balance is in itself a basis for judicial relief on grounds of discrimination.

*Drew Days:*

We really do not disagree, Dean. When I talked about the effects test, obviously, I recognize that it is a rebuttable presumption . . . . [T]he defendant can come back and show that there is some nondiscriminatory justification for the disparity. I, of course, agree with that process and enforce those laws every day.

*Moderator:*

Do you believe in quotas?

*Drew Days:*

I believe in quotas where the courts have made a finding of past discrimination, and the courts have determined that the use of quotas represents the most effective way of remedying that past discrimination, but I do not believe in quotas—or goals, for that matter—in the abstract.

*Nathan Glazer:*

I was surprised to hear Mr. Days say that there is a statutory determination that numbers establish a presumption of discrimination and I was wondering where. That is what I understood you to say—by law of Congress, if there are great disparities in numbers, one may presume discrimination.

*Drew Days:*

The Voting Rights Act, 42 U.S.C. § 1973 (1976), is a perfect example.

*Nathan Glazer:*

I was thinking of education and employment, and while you're quite correct about the Voting Rights Act, I don't see any such statutory action in those areas on that issue.

*Drew Days:*

Well, I'm also talking about court interpretation. One situation involves non-English speaking children.

*Nathan Glazer, responding to a question concerning discriminatory practices today:*

Well, I think there are two points there, and one is what do I think is the general character of racist and discriminatory practices today, and the other relates to past effects.

In the areas I know of, and the research I know of has been quite extensive, I do not see that one can document, for current practice, in education or employment a general pattern of discrimination. In fact, I think the research documents just the opposite. This is my best judgment, which is not to say that in a big country like this there are not hundreds or thousands of individual cases of discrimination. It is to say that if one takes, for example, young blacks entering the labor force, they get, according to very good research by reputable economists, about the same kind of jobs and income that whites get, taking into account their education. And if one takes blacks exiting college, similarly, they get the kinds of jobs and incomes whites get, so that I think this is a vast change.

Now, what Mr. Days is talking about, and it is a very sober and serious point, is the obvious fact that even if practices today are on the whole nondiscriminatory, and even if in cases of discrimination there are ways to get redress, these do not deal with the fact that there has been massive and pervasive discrimination and racism for three-and-a-half centuries. What one does about that is, in all honesty, difficult. I can see the legal legitimacy of reparations, etc. But can that be worked out politically, or practically? I think not.

*Drew Days, responding to a question about proof of discriminatory intent:*

I think it is certainly open to the courts to interpret intent or define intent in ways that will permit us to make satisfying or satisfactory determinations of the scope and nature of discrimination. Whether the courts will do that is quite a different matter. For example, in the case of *Washington v. Davis* [426 U.S. 229 (1976)], regarding the extent to which statistics can be relied upon to establish intent, we still have, it seems to me, the nagging question of state action. Professor Glazer referred to that. It seems to me, however, that often there is really no logical cutoff point in terms of the extension of state action. The courts have simply said "thus far and no farther," perhaps without finding the answer in the Constitution or statute. These are matters that I think the courts are going to have to be

presented with and respond to. We may not be successful. But I am concerned with the educational process so that the people understand what is going on. Whether the courts ultimately understand it is no cause to wait.

*Nathan Glazer:*

I think that educational institutions and others have been so invaded by state requirements that to speak of some degree of autonomy is not to say absolute autonomy. I am just trying to retain an area in which they can act more independently than a state agency, as such, cannot. I think, even in the area of hiring, a degree of autonomy is reasonable. There are religious institutions; there are ethnically oriented institutions; and I imagine, as presently interpreted, they fall totally under the full reach of equal employment laws and the Equal Employment Opportunity Commission, and I think that is a problem . . . . If there were such things as, let us say, a . . . black institution that was committed to black culture and goals, I would think they might prefer, for certain purposes and for certain jobs, blacks over whites. I admit that I am going beyond the frame of this discussion to raise things that seem out of the question in our Constitution and law-ridden society. How do you deal with the problem of ethnic and racial and religious diversity and decency? In terms of my values, it is a legitimate exercise of autonomy.

*Erwin Griswold, responding to a question how discrimination should be defined:*

My temptation is to follow [Justice] Potter Stewart when he said that, "I can't define obscenity, but I know what it is." I think I would be inclined to say that a comprehensive, complete, totally accurate definition of discrimination would be very long, very complicated, and futile; but I know some of the evils of discrimination, and I am against them, and I hope we keep on making progress with them.

*Drew Days:*

We usually, in talking about violations of the equal protection clause, talk about invidious discrimination. I would urge you to look up invidious in the dictionary and maybe come back one day and tell me what that means. It tends to be basically a subjective test; apparently, invidiousness is in the eyes of the beholder.

*Nathan Glazer:*

I do not want to muddy the waters, but I had an easy definition of discrimination. I thought that it was treating people differently on grounds of race, creed, color, or national origin, but obviously, things have come a long way since that definition.

