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A Question of Equity

By Kenneth S. Tollett

Major political and social questions or problems in the United States tend to be formulated or posed as constitutional law questions. Whether under any circumstances Blacks could be considered as enjoying any of the rights, privileges or immunities under the Constitution was answered, no, before the Civil War in 1857 in the infamous *Dred Scott* decision. The effort to protect nationally the privileges and immunities of the citizens of the several states in the 14th Amendment after the Civil War was frustrated in 1873 by the sophistical interpretation of the Privileges

and Immunities Clause in the curious *Slaughter-House Cases*.

The protection of the civil rights of Blacks to public accommodation enacted in the 1875 Civil Rights Act was aborted in 1883 by the *Civil Rights Cases*. *Plessy v. Ferguson* enunciated the vicious and pernicious separate-but-equal doctrine in 1896. *Brown v. Board of Education* overturned on May 17, 1954, the separate-but-equal doctrine of the *Plessy-Ferguson* decision. All of the preceding cases were of signal importance in determining the rights, privileges and welfare of Black people in the United States. The *Bakke* case is of comparable significance to the previously enumerated cases and its implications may be even more far-reaching.

Few cases in constitutional litigation have engendered as much controversy and agitation as the *Bakke* case [which challenges special minority admissions program at the University of California's Davis Medical School]. Few people of goodwill and discernment can approach with unreserved comfort the notion that race should be taken into consideration in the admission of students to higher educational institutions. However, goodwill and discernment are not the only qualities of mind which should inform the perception of individuals looking at this case. There is the historical perspective which tells us that Blacks suffered in this country more than 200 years of slavery and nearly 100 years of officially sanctioned segregation, all of which oppressed and injured them as human beings.

The country made a positive attempt to correct the history of slavery in the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution and in the Reconstruction Civil Rights Act, but due in part to some of the Supreme Court decisions already mentioned, the attempt was unsuccessful. A decision in the *Bakke* case cannot appropriately be made without taking this history into account.

Whites have been unjustly enriched and advantaged in this society for more than 170 years at the expense, and to the

injury, of Blacks and other minorities. Principles of equity, justice and morality require that when one has been unjustly enriched at the expense—and to the injury of another—one should make restitution to the injured party. Providing restitution to those who have been injured by gross deprivations and oppression is not preferential treatment or reverse discrimination but compensatory assistance and the reversal of discrimination.

Affirmative Action

Blacks' and other minority groups' participation in higher education, particularly in graduate and professional schools, has been substantially increased or improved by special minority admissions programs. If these programs are discontinued, the admission of Blacks and other minorities into graduate and professional schools will be terribly curtailed. Blacks' access to, and distribution in a broad cross-section of institutions, will be impaired by eliminating these programs. Black and other ethnic studies programs will be brought into some question. Predominantly Black colleges and universities—particularly their graduate and professional schools—will be threatened. The entire affirmative action program will be enshrouded in doubt and uncertainty.

No matter how much one may disagree about the proper interpretation and application of the relevant abstract principles to this controversy, if the programs are not upheld and the *Bakke* case is not reversed, the forward progress of Blacks and other similarly situated minorities will be severely stymied. Indeed, the affirmation of *Bakke* would mean the reversal of affirmative action and the officially sanctioned signal to turn against civil rights in this country.

Some individuals talk about affirmative action and special minority admissions programs in terms of their being "reverse discrimination." This is an improper characterization. Discrimination, when used in relation to Blacks, has a distinct and his-

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torically determined meaning. It means: treating Blacks as slaves and subhumans for 200 years and as second-class citizens for nearly 100 more; publicly and governmentally tolerated lynchings, rapes, and castrations; the abominable sharecropper system of the South, and the poverty stricken slums of the North; the differential mortality rate of Black babies and the 40 percent unemployment rate of Black teenagers; last hired and first fired with double the unemployment rate of whites; shorter life expectancy (7.3 year difference between males) and generally much worse quality of life than whites.

Reverse discrimination connotes that Blacks are going to treat whites as they treated them in the past. That slowly and incrementally increasing Black and other minority group representation in graduate and professional schools and in employment and the professions will reverse the position of Blacks and whites in this country. Black people in the United States do not have the power to inflict that type of injury upon whites.

It may be useful here to turn to a discussion of the implications of the *Bakke* case, particularly for legal education and the bar. It is noteworthy that the deans of four publicly-supported law schools in the State of California filed an *amici curiae* brief in which they urged the United States Supreme Court to grant a writ of certiorari to the Supreme Court of California so that the issue could be authoritatively resolved upon its merits. They note that Blacks make up barely 1 percent of the legal profession, although they constitute more than 11 percent of the population. In 1964-65 Black law students constituted 1.3 percent of the entire law student enrollment that year. Ten years later, 1974-75, in part due to special minority admissions programs, the percentage had risen to nearly 5. The deans say in page 27 of their brief:

"If there is a race blind method of selection in a unitary program which will select out a meaningful number of persons from a relatively small group of minority

applicants in competition with a much larger group of whites, we do not know what it is."

This conclusion is reached after a fine-tuned analysis and comparison of the admissions credentials of minority and non-minority applicants.

Chilling Effect

The *Bakke* case has already had a chilling effect upon Black enrollment in California law schools and it is inevitable that, in time — if not reversed — this will be the effect throughout higher education. The latent and not so latent racism in the country will jump out of the cracks in the wall when it can be camouflaged or justified on the pretext that the law of the land requires it. One must remember that separate-but-equal as a principle would not have been so detestable but for the fact that it gave a patina of spurious evenhandedness to the blatant oppression and subjugation of Blacks. One may not realize it, but in answer to the claim that segregation laws were designed to oppress Blacks, Justice Henry B. Brown wrote for the majority in the *Plessy* case that laws must be "reasonable . . . enacted in good faith . . . for the promotion of the public good, and not for the annoyance or oppression of a particular class."

Opponents of affirmative action and special minority admissions programs like to refer to, and focus upon, the color-blind rhetorical dicta in Justice John M. Harlan's dissent. The key thing to focus upon in Justice Harlan's dissent is his recognition that "equal" in the separate doctrine was a thin disguise for degrading and treating Blacks as inferiors. Moreover, supposititious talk about color-blindness and merit strike as less than thinly disguised hostility to Blacks. If opposition to special minority admissions programs does not disguise hostility to Blacks, then certainly it discloses a lack of seriousness about maintaining and facilitating a significant increase in Blacks' access to graduate and professional schools.

Special minority admissions programs

will cause minimal injury to whites. Minorities, even with special admissions programs, will continue to be a small percentage of the entering graduate and professional classes across the country. More students are excluded because of other forms of preference—such as not being the children of influential individuals and alumni—than by special admissions programs. Moreover, the standing or injury problem in *Bakke* is not just a procedural technicality.

Allan Bakke is really not entitled to relief unless he can prove that he would have been admitted but for the special minority admissions program. The comparatively limited scale of most minority admissions programs should make proof of personal injury very difficult in practically all cases. Nevertheless, much discussion of affirmative action and special minority admissions programs is phrased as if hordes of Blacks and other oppressed minorities are displacing large numbers of innocent whites from jobs, graduate and professional schools. This is a blatant misstatement of the situation. Moreover, the issue is not inconveniencing and discriminating against whites but the extent to which whites should continue to deprive Blacks of equal opportunity by maintaining their historically unfair advantages.

However, neo-conservatives and other detached skeptics moan over the intractableness of social problems and acquiesce to the misery of the oppressed and maintain that government can accomplish more by doing less. With feckless resignation and splendid stoicism, crypto or Zen liberals and neoconservatives accept the historical inequities and imbalances of the social order.

The remarkable argument is made that there is something unfair about trying to correct today 300 yesteryears of oppression and dehumanization. However, some believe that if the facts are made clear, the legal and constitutional arguments clarified, then persons of goodwill and decency will recognize the propriety, equity, and justice of affirmative action. □