New Directions

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From Brown to Bakke and Beyond

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FROM BROWN TO BAKKE AND BEYOND

By Paula L. Jewell

In his opinion in *Bakke,* Associate Supreme Court Justice Thurgood Marshall stated: "I fear that we have come full circle. After the Civil War our government started several 'affirmative action' programs. This Court in the Civil Rights Cases and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken and this non-action was with the tacit approval of the courts. Then we had *Brown v. the Board of Education* and the Civil Rights Acts of Congress followed by numerous affirmative action programs. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California."

On June 28, 1978, the Supreme Court decided a landmark civil rights case, *Regents of the University of California v. Allan Bakke.* The Court affirmed the part of the California Supreme Court's decision which held that the University of California's special admissions program was unlawful, with Chief Justice Warren Burger and Associate Justices Lewis Powell, Potter Stewart, William Rehnquist and John Stevens concurring.

At the same time, Justice Lewis Powell joined with Justices William Brennan, Byron White, Thurgood Marshall and Harry Blackmun in concluding that the portion of the California Supreme Court's judgment enjoining the University of California from according any consideration to race in the admissions process must be reversed. While this decision does not mark the end of affirmative action programs, it stands as a clear reflection of the nation's eroding commitment to civil rights.

In order to fully understand the Court's narrowing definition of affirmative action, it is necessary to look at the transition from the Warren Court to the Burger Court. Chief Justice Earl Warren was appointed on October 5, 1953 by President Dwight Eisenhower who enjoyed significant support from Black voters. As a condition of that support, Eisenhower agreed to exercise a sensitivity to Black concerns in his appointments to the nation's courts.

The year 1968 saw a bitter political fight for the job of the President of the United States between candidates Hubert Humphrey and Richard Nixon. Essential to Nixon's campaign were a "Southern Strategy" and appeals to "Law and Order." Many Blacks, disillusioned by the Lyndon Johnson Administration's involvement in Vietnam, chose not to exercise their votes. As a result, Humphrey was defeated by Nixon, after a campaign which was characterized by Black apathy.

Soon after the election, Nixon began appointing to the Supreme Court individuals who reflected his own conservative judicial views. On June 5, 1969 Chief Justice Warren Burger was appointed. This appointment was followed by that of Justice Harry A. Blackmun on June 9, 1970 and the appointments of Justices Lewis Powell and William Rehnquist in January 1972. President Gerald Ford appointed Justice John Paul Stevens on December 19, 1975.

Before Bakke

The Supreme Court during the 16 years of leadership by Chief Justice Warren (1954 to 1970) was viewed by the Black community as one of the key institutions dedicated to the eradication of racism in the nation. *Brown v. the Board of Education,* the landmark decision of the Warren era, reflected a knowledge of the historical, social and economic forces affecting Black people as a class. Warren saw segregation as a national problem and fully understood the pivotal role which education could play in the development of the individual. Indeed, there may be a few people who would disagree with his view in *Brown*, that education played a key role "in awakening the child to cultural values, in preparing him for later professional training and in helping him adjust to his environment. . . . It is doubtful that any child may be expected to succeed in life if he is denied the opportunity of an education."

Today, the majority philosophy of the Court reflects the views of the most conservative of the Nixon appointees. Justice Marshall, appointed by President Johnson, and Justice Brennan, appointed by President Eisenhower—once part of a liberal majority—now more often reflect the minority philosophy of the Court.

The strict constructionist views of Chief Justice Burger and Justice Rehnquist have resulted in limiting access to the Federal courts and weakening protections for minorities against police abuses. It has become increasingly difficult to bring a class action suit, long a vehicle for claims of civil rights violations. In the *Bakke* case, the majority of the Court, while giving lip service to the doctrine of affirmative action, struck down the use of numerical quotas as reverse discrimination. One of the most disturbing aspects of the majority decision is its implication that there must be judicial, legislative or administrative findings of constitutional or statutory violations of civil rights before there can be a public interest in remedying discrimination, which for generations has been perpetuated against Black people as a class.

It is significant that the Court chose to quote Justice Oliver Holmes, in the 1918 case, *Towne v. Eisener*, in defining the concept of discrimination when it said "a word is not a crystal transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content *according to the circumstances and time in which it is used.*" Thus, even the Court recognized the influence of a national mood on the interpretation of legal terms.

At the time when the *Brown* decision was rendered, and at the time Title VI of the Civil Rights Act of 1964 was passed, Congress and the courts were concerned with discrimination against Black citizens. The framers of Title VI saw it as a means of eradicating the social and economic disparities between the races in this country.

There was a public concern for the poor and disadvantaged during the *Brown* era. For example, educational programs for the disadvantaged proliferated in both the public and private sectors and new programs were developed to bring Blacks into the economic mainstream.

Justice Powell, in writing for the majority in *Bakke*, argued that there is no principled basis for deciding which groups merit "heightened judicial solicitude and which would not. Courts would be asked to evaluate the extent of prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. . . . As these preferences began to have their desired effect and the consequences of past discrimination were undone, new judicial rankings would be necessary. This kind of variable sociological and political analysis does not lie within the judicial competence even if they otherwise were politically feasible and socially desirable."

Justice Powell's views reflect a 180 degree shift from the *Brown* court, which was deeply influenced by societal injustice and the psychological effects of discrimination on Black children. It certainly does not seem consistent with earlier decisions which looked at discrimination in terms of the effect of certain practices on employment and educational opportunities.

After Bakke

Although the Supreme Court, in the *Bakke* decision, reversed the California Supreme Court ruling that there can be no consideration of race in admissions policies, there will still be a chilling effect on college admissions officers who may not be sure how much weight they can give to race as a factor in admissions without being subject to suits based on reverse discrimination. Some admissions officers who may not be committed to equal educational opportunity will now have an excuse not to admit Blacks who they regard as marginal by traditional admissions standards.

Given the nature of the American system, it is probable that the discretionary admission of children of wealthy alumni and influential people will increase at the expense of those who are economically and socially deprived. In the absence of a strong Federal policy utilizing funding considerations, one can expect that fewer Black students will be admitted to predominantly white universities.

The *Bakke* decision may also cause graduate and professional schools at predominantly Black institutions to review their admissions policies if they feel that they will be subject to suits alleging reverse discrimination. One response to *Bakke* may be for such institutions to make a conscious attempt to increase white enrollments at exactly the same time that white institutions are decreasing Black enrollments. Predominantly Black institutions may as an alternative develop admissions criteria which differ dramatically from those of their white counterparts, developing their own testing system rather than using tests developed by the Educational Testing Service. Pressure may also be placed on the Educational Testing Service to develop more culture-free tests or increase the number of Blacks who are developing test questions.

While *Bakke* dealt specifically with institutions of higher education, the Court's reasoning in this case will undoubtedly be applied by lawyers who are advising clients on employment policies and those working for agencies designed to foster minority enterprise. The impact of *Bakke* will no doubt limit employment opportunities for members of minority groups in both the public and private sectors and seriously inhibit the development of minority business.

Government employment at both the Federal and local levels has traditionally been an avenue of work which has had tremendous appeal for Blacks. *Bakke* will make it very difficult for government agencies to design programs specifically geared to train members of minority groups for jobs in the public sector.

In the private sector, the implications of *Bakke* look even more ominous. Blacks and women have always been underrepresented in the corporate corridors. Blacks on the whole—even middle class ones—have not grown up in homes where stock options or management techniques are discussed at the dinner table. In the absence of vigorous recruitment efforts and set goals for bringing women and Blacks into the corporate world, there will be no way that they can move up the ladder and assume leadership in terms of any kind of semblance to their numerical representation.

In an effort to stimulate the development of minority business set-asides, government funds have been deposited in minority banks and some government contracts have been specifically set aside for minority consulting firms. Black bankers on the whole have not been able to rely on social contacts in the white corporate world to attract deposits. If these banks are no longer able to attract government funds, there will be an increasing shortage of capital for the development of Black businesses and homes for Black families in areas that have been traditionally redlined by lending institutions.

During recent years, minority consulting firms have grown in number and assets largely because of government policies which fostered set-asides and subcontracting arrangements for small entrepreneurs. In the absence of specific numerical targets, it is doubtful whether these firms will be able to make a profit or even stay in business.

New Strategies

Given *Bakke*, what strategies should the Black community adopt in order to protect its economic and political power? One lesson which *Bakke* should teach is the need for active political participation in both major political parties.

While a member of the Supreme Court can normally look forward to a lifetime appointment and is not subject to political pressures, the decision on the part of a President to appoint a given lawyer or judge to the Supreme Court is ultimately a political one. Blacks—through votes, political contributions, lobbying and other political leverage—need to be in a position to exercise veto power over suggested candidates for the highest court in the land.

The other lesson is the need for full participation by Black Americans in shaping the nation's educational, employment and economic development policies. Programs must be developed which will enable Black students to compete effectively with their white counterparts at all levels. Criteria for admission to educational institutions must be made more culture-free.

Blacks, through their buying power, must stimulate the development of Black businesses and make it economically attractive for companies to hire and train Black employees. The development of strong viable institutions controlled by Blacks, including those capable of doing policy analysis, must be fostered.

If the Black community elects to exercise the power of the ballot box and the pocketbook the cycle may turn back to *Brown* to *Bakke* and beyond. □

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