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BAKKE, ANTIDISCRIMINATION JURISPRUDENCE, AND THE TRAJECTORY OF AFFIRMATIVE ACTION LAW

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The U.S. Supreme Court's famously divided decision in *Regents of the University of California v. Bakke* (1978) is a landmark case in constitutional history for a number of reasons. First, it established the fundamental legal framework that has been used to justify and implement affirmative action in higher education admissions for more than 30 years. Second, it shifted the course of the Supreme Court's case law on race-conscious legal remedies and public policies from one of general endorsement to one of increasing skepticism and disapproval. Third, its multiple opinions crystallized the longstanding and deep-seated conflict that has pervaded Supreme Court decision making in the area of race—the tension between norms that address inequality through policies that employ race and norms that seek to end discrimination through measures that are race-neutral and "colorblind."[1]

The controversy over race consciousness versus race neutrality at the heart of the affirmative action debate was not laid to rest by *Bakke,* or by *Grutter v. Bollinger* (2003), the Supreme Court case upholding race-conscious admissions at the University of Michigan. Nor is the controversy likely to be resolved in the near future. Debates are widespread and cover major sectors of law addressing racial inequality in American life. Even

contemporary interpretations of *Brown v. Board of Education of the City of Topeka* (1954), hailed as the most defining court decision of the 20th century, reveal deeply contradictory perspectives on the role of race in the law, with some arguing that the integration ideal of *Brown* mandates race-conscious remedial action by government and others arguing that *Brown* requires an absolute bar on governmental considerations of race.

The *Bakke* case is central to understanding the history and trajectory of antidiscrimination law because it sits at the midpoint, both literally and figuratively, of the Supreme Court's modern jurisprudence on race, starting with *Brown* and moving forward to the present. This chapter offers a historical analysis of Supreme Court developments in affirmative action law, focusing on the central role of *Bakke* in setting the course for the Court's decisions during the last three decades. The first section of this chapter frames the debate about affirmative action in terms of competing norms in antidiscrimination jurisprudence—a contrast regarding what can be labeled *antisubordination* norms versus *anticlassification* norms. The next section examines how these norms are displayed in the multiple opinions of the *Bakke* case. The final section traces the development of post-*Bakke* affirmative action law, with special attention to the Court's decisions in its most recent higher education affirmative action cases, *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003), and the Court's dividing lines in the K–12 educational case *Parents Involved in Community Schools v. Seattle School District No. 1* (2007).

Antidiscrimination Norms

Although affirmative action debates are often portrayed in rudimentary terms as tensions between race-conscious and colorblind policies or as disputes about labels such as ''preferences'' and ''reverse discrimination,'' the issues are considerably more complex. The differences extend to disagreements about policy options and to questions of legal philosophy and jurisprudence, standards of constitutional interpretation, normative values of equality, and basic understandings of the role of race in American society (Edley, 1996). As major players in the field of affirmative action law, the courts are at the storm center of these debates, and the opinions of Supreme Court justices and judges of the lower courts inevitably reflect competing ideologies and policy preferences. Judges are not neutral arbiters when racial

policies are at stake; they, like everyone else who ponders questions of racial justice in American society, have strong beliefs and predilections.

In their role as interpreters of the Constitution—in particular the meaning of the Equal Protection Clause of the Fourteenth Amendment—the courts are charged with establishing and applying legal tests to assess the constitutionality of affirmative action policies. Inevitably, judicial standards and the ultimate outcomes in litigation are determined not simply by relevant evidence and the specific facts of cases but by a set of underlying norms—a core antidiscrimination jurisprudence—that shapes judicial decision making. Although they can be phrased in different ways, the dominant norms that have influenced judicial decision making since *Bakke* can be divided into two basic categories: *anticlassification* norms and *antisubordination* norms (Balkin & Siegel, 2003; Siegel, 2004).

Anticlassification norms can be characterized by their emphasis on protecting individual rights and using the intentional and differential treatment of individuals as the primary measure of inequality (see table 2.1). According to these norms, the Equal Protection Clause exists to ensure formal equality, and race-conscious actions by the state, if not prohibited outright, are subject to the deepest skepticism by the courts. As a consequence, policies designed to benefit members of racial minority groups should be subject to the same standards and legal tests as are policies designed to harm members of racial

TABLE 2.1
Anticlassification vs. Antisubordination Norms

Anticlassification Norms	*Antisubordination Norms*
• Primacy of Individual Rights	• Recognition of Group-Based Rights
• Normative Race-Neutrality (Colorblindness)	• Tolerance for Race-Conscious Measures
• High Sensitivity to Burdens on Nonminorities	• Low Sensitivity to Burdens on Nonminorities
• Standards of Judicial Review Consistent Across Governmental Motives	• Different Standards of Review Based on Governmental Motives (Recognition of "Benign" vs. "Invidious" Classifications)
• Little or No Institutional Deference	• Deference Based on Context
• Remediation Limited to Identified and Specific Actors	• Remediation Extends to Systemic Discrimination and Broad Range of Institutions

minority groups. The mere act of racial classification, regardless of the underlying motives of the state actors, makes a public policy presumptively unconstitutional. Justifications for race-conscious policies are, thus, rare; aside from specific remedies for fully documented discrimination by a particular public institution, very few governmental interests are sufficiently important to justify the use of race.

Antisubordination norms, on the other hand, view the Equal Protection Clause as more protective of minority rights, offering a greater tolerance for group-based remedies and the use of race to address multiple forms of racial inequality and subordination (see table 2.1). Unintentional harms by the state that result in disparate effects on racial minorities are cognizable injuries that should be redressed under the law, and motives, when considered, are subject to differential standards based on whether they benefit or burden racial minority groups. Like anticlassification norms, antisubordination norms propose that policies that subjugate and exclude minorities should be presumptively unconstitutional, but inclusive policies designed to promote greater opportunities for minorities should be subject to reduced judicial scrutiny. Deference to important institutions becomes acceptable when considering the constitutionality of policies designed to promote inclusion, and a range of state interests beyond remediation by a single institution can justify race-conscious policies. And, although the burdens that may fall on nonminorities because of race-conscious policies are not irrelevant in constitutional inquiries, the benefits and costs weighed in the legal calculus tilt more strongly in favor of protecting minority rights.

There are, of course, both strong and weak versions of these norms, with strong forms of anticlassification leading to an almost automatic disapproval of race-conscious policies (the exceptions being court-ordered remedies for clear violations of constitutional or statutory rights), and strong versions of antisubordination showing tolerance for policies such as minority set-aside programs. Weaker versions of each norm may lead to convergence and agreement on a particular set of facts—for instance, both a modest anticlassification norm and a modest antisubordination norm might lead judges to agree that limited uses of race in a competitive selection process designed to promote diversity would be constitutionally acceptable.

The multiple opinions in *Bakke* are classic illustrations of the tension between anticlassification and antisubordination norms, and the *Bakke* ruling itself set the basic trajectory of the Supreme Court's three decades of

affirmative action jurisprudence—a jurisprudence that continues to dominate judicial decisions in the area of racial justice.

The *Bakke* Opinions

The *Bakke* case is renowned for its fragmented decision and its multiple opinions.[2] Justice Lewis Powell was joined by Justices William Brennan, Byron White, Thurgood Marshall, and Harry Blackmun to uphold the prospective use of race in higher education admissions, but was joined by Chief Justice Warren Burger and Justices John Paul Stevens, Potter Stewart, and William Rehnquist to strike down the particular minority set-aside program at the medical school of the University of California, Davis—a program that limited competition for 16 out of 100 seats in the entering class to disadvantaged minority students. Although a "plus-factor" admissions program such as those debated in the University of Michigan cases was not before the Court, Justice Powell's controlling opinion proposed that an admissions program that employed race as a plus-factor among several factors in choosing an educationally diverse—and not merely racially diverse—student body would satisfy strict judicial scrutiny.

The importance of Justice Powell's opinion in articulating the diversity rationale for race-conscious admissions cannot be gainsaid. The Powell opinion set the basic framework for selective university admissions programs throughout the country through the 1990s, and the Supreme Court's 2003 decision in *Grutter* reaffirmed the Powell opinion as constitutional canon. But the division among the justices in *Bakke* is just as important as the Powell opinion in understanding how competing norms have affected Supreme Court case law and the justices' votes in affirmative action cases since *Bakke.*

Antisubordination and the Brennan Opinion

The Brennan bloc would have upheld the UC Davis medical school admissions policy under the Equal Protection Clause. Justice Brennan's constitutional analysis proceeded in two steps, both of which illuminate his reliance on antisubordination rather than anticlassification norms. First, he concluded that the standard of review applicable to race-conscious affirmative action programs, although careful and searching, did not have to be strict scrutiny—the standard that had been applied to governmental policies that

employed race to exclude minorities from participation in public life. Second, he concluded under this more relaxed standard that the Davis policy was justified by a sufficiently important interest in addressing the effects of past discrimination in society; moreover, the policy did not stigmatize or overburden any particular group.

Standard of Review: Intermediate Scrutiny

In articulating the standard of review to assess the Davis program, Justice Brennan navigated a course between strict scrutiny and rationality review, the far more deferential standard of review employed when assessing most economic and social legislation. Justice Brennan concluded that rationality review, which requires only that a policy bear some rational relationship to a legitimate interest, was inapplicable because "The mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme" (*Bakke,* 1978, p. 358–359). But strict scrutiny was equally inapplicable because of the lack of stigma associated with the program; Whites as a class had not been saddled with the same disabilities associated with discrimination against minorities, nor had they been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" (p. 357).

Instead, Justice Brennan articulated an intermediate standard of review, borrowing from the Court's equal protection case law in the areas of gender discrimination and discrimination against illegitimate children. Race, like the other categories, had been "inexcusably utilized to stereotype and stigmatize politically powerless segments of society" and affirmative action programs could present a risk of stigma because "they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own." In addition, race is "an immutable characteristic which its possessors are powerless to escape or set aside" (*Bakke,* 1978, p. 360).

The appropriate test for Justice Brennan was, therefore, one that required an interest to be important—but not "compelling," as required under strict scrutiny—and one that avoided the harms of stereotyping and stigma:

> Because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those

> created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. (*Bakke,* 1978, p. 361)

Justice Brennan thus concluded that programs that had been designed to promote inclusion rather than subordination—including the subordination of Whites—could pass constitutional muster under a more lenient equal protection test.

Satisfying Intermediate Scrutiny

Employing intermediate scrutiny, Justice Brennan concluded that the Davis program did indeed advance an important interest and did not stigmatize any individual or group. Justice Brennan relied on school desegregation and employment discrimination case law, as well as empirical data on the underrepresentation of minorities in medicine, and fully accepted the university's interest in remedying societal discrimination:

> Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School. (*Bakke,* 1978, p. 362)

Moreover, neither Allan Bakke, the plaintiff, as an individual nor Whites as a group had suffered any stigma because of the program:

> Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. This distinction does not mean that the exclusion of a white resulting from the preferential use of race is not sufficiently serious to require justification; but it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of

> government actions, none of which has ever been thought impermissible for that reason alone. (*Bakke,* 1978, p. 375)

The Davis program was reasonable in light of its objectives, did not equate minority status with disadvantage, and did not necessarily violate the Constitution because it set aside a predetermined number of seats for disadvantaged minority students. A set-aside program was not distinct in a constitutional sense from a plus-factor program, Justice Brennan argued, because both programs afforded special consideration to minority applicants that could result in the exclusion of a White student.

Antisubordination and the Marshall and Blackmun Opinions

Justice Marshall concurred with Justice Brennan, but wrote separately to express his fear that the Court had come "full circle" (*Bakke,* 1978, p. 402) since the passage of the Fourteenth Amendment, the judicial curtailing of Reconstruction-era rights, the Jim Crow decades of segregation, the Court's desegregation decision in *Brown,* and the era of affirmative action to erect new constitutional barriers to equality for minorities. Drawing on both the social and legal history of African Americans in the United States, Justice Marshall's opinion stated,

> For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier. (*Bakke,* 1978, p. 387)

Reflecting a strong antisubordination stance, Justice Marshall went on to state,

> It is more than a little ironic that, after several hundred years of class-based discrimination against 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. (p. 400)

Justice Blackmun's opinion reflects similarly strong antisubordination currents in his treatment of equal protection jurisprudence. Reacting to Justice Powell's view that the Fourteenth Amendment had expanded beyond its original concept of guaranteeing equal citizenship to African Americans to include broader principles that might ban affirmative action, Justice Blackmun wrote,

> This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. (p. 405)

Justice Blackmun then went on to state the need to address past discrimination:

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy. (p. 407)

Anticlassification and the Stevens Opinion

Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, agreed with Justice Powell that the medical school admissions policy at the University of California, Davis was illegal, but relied solely on a federal statute—Title VI of the Civil Rights of 1964—to invalidate the program and did not reach the question of what standard of review should be used in assessing the program under the Equal Protection Clause. His analysis, while limited to statutory interpretation, reflects anticlassification norms of formal equality, individualized rights to equal treatment under the law, and colorblindness.

Title VI states in part, "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" (42 U.S.C. § 2000d). While Justice Stevens declined to rule on the doctrinal question of whether

Title VI and the Fourteenth Amendment were coextensive—that their prohibitions were identical—he argued that "the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government" (*Bakke,* 1978, p. 416).

Legislative history, according to Justice Stevens, revealed that Congress' "answer to the problem of federal funding of segregated facilities stands as a broad prohibition against the exclusion of any individual from a federally funded program 'on the ground of race' " (p. 413). Quoting from the legislative record, Justice Stevens wrote,

> The word "discrimination" has been used in many a court case. What it really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin. . . .
>
> The answer to this question [what was meant by "discrimination"] is that if race is not a factor, we do not have to worry about discrimination because of race. . . . The Internal Revenue Code does not provide that colored people do not have to pay taxes, or that they can pay their taxes 6 months later than everyone else.
>
> If we started to treat Americans as Americans, not as fat ones, thin ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans. If we did that we would not need to worry about discrimination. (p. 415)

Thus, for Justice Stevens, colorblindness and proscriptions on individual differential treatment emerged as primary values under Title VI—and by inference the Equal Protection Clause. Taking a literal approach to Title VI's prohibitions, the Stevens bloc voted to strike down the Davis admissions program: "The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. . . . The plain language of the statute therefore requires affirmance of the judgment below" (p. 412). Although Bakke had not been prohibited from applying and being admitted to the medical school—the other 84 seats in the class remained available to him—exclusion from the 16 minority-reserved slots was sufficient to cause a Title VI violation.

Justice Stevens' analysis of Title VI commanded only four votes, and both Justice Brennan and Justice Powell argued that Title VI was indeed coextensive with the Equal Protection Clause—although Justices Brennan

and Powell disagreed about what would be permissible under the Equal Protection Clause. The Stevens opinion is considerably briefer than the Powell and Brennan opinions, but its analysis of a major federal antidiscrimination statute is revealing nonetheless: colorblindness and formal equality emerge as dominant standards in antidiscrimination law, and the burdens of racial classification are magnified through a focus on individuals rather than groups or institutions.

Anticlassification and the Powell Opinion

Justice Powell's opinion in *Bakke* has been enshrined in constitutional law and educational policy making—as well as in popular culture—as a Solomonic middle ground between the Brennan and Stevens blocs. Over time, the diversity rationale has become undeniably important, embraced not only in higher education but in the public and private employment sectors as well; without question, the gains in minority participation achieved through diversity programs have been widespread and meaningful. But Justice Powell's opinion, despite its endorsement of diversity and race as a plus-factor, is strongly animated by anticlassification values. Strict scrutiny is Justice Powell's standard for analyzing racial classifications, and notions of minority inclusion and social justice are watered down by his reliance on *educational* diversity, not racial diversity, to justify race-conscious admissions. Only the special context of higher education and its attendant academic freedoms lead him in *Bakke* to create an exception to a general prohibition on racial classifications.

Individual Rights and the Standard of Review

Both the legal analysis and rhetoric of Justice Powell's opinion are illuminating. In addressing the nature of rights under the Equal Protection Clause, Justice Powell states,

> It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal. (*Bakke,* 1978, p. 289)

Stating, "The clock of our liberties . . . cannot be turned back to 1868" (p. 295) and to the original intent of the Fourteenth Amendment, Justice Powell

goes on to conclude there is no fundamental difference between "invidious" and "benign" racial classifications:

> *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. (p. 295)

Addressing the question of what standard of review should apply to race-conscious affirmative action programs, Justice Powell's opinion states, "Once the artificial line of a 'two-class theory' of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived 'preferred' status of a particular racial or ethnic minority are intractable" (p. 295). Racial preferences, according to Justice Powell, are not always clearly benign, may reinforce stereotypes that certain groups are unable to achieve success without special protection, and can force innocent persons to bear the burdens of redressing grievances that were not of their making. Therefore, strict scrutiny necessarily applies to race-conscious affirmative action programs as well.

Strict Scrutiny and Admissions Programs

Applying strict scrutiny by requiring a highly substantial interest and a necessary means to advance that interest, Justice Powell recognized four goals of the program—(1) reducing the historic deficit of minorities in medical schools and the medical profession, (2) countering the effects of societal discrimination, (3) increasing the number of doctors who will serve in underserved communities, and (4) obtaining the educational benefits of a racially and ethnically diverse student body. He then rejected the first three, while accepting, with an important modification, the diversity rationale as sufficiently important.

Under Justice Powell's reasoning, reducing the deficit of minority physicians is a facially invalid goal because it establishes a specified percentage of minority students simply for its own sake. Societal discrimination, unlike identified discrimination against a particular actor, is "an amorphous concept of injury that may be ageless in its reach into the past" (p. 306), and "To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the

Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination'' (p. 310). And Justice Powell found virtually no evidence in the record that could justify the university's use of its special admissions program to promote better health care among underserved citizens.

Educational Diversity

Although the university's diversity rationale focused on racial and ethnic diversity, Justice Powell made clear that ''ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body'' (p. 314). Thus, the rationale that he found to be constitutionally permissible is a broader diversity that encompasses factors such as race, ethnicity, geography, and cultural advantage or disadvantage, and is tied to ''The freedom of a university to make its own judgments as to education [and] the selection of its student body'' (*Bakke,* 1978, p. 312). Supported by the First Amendment interest in academic freedom, a university must be ''accorded the right to select those students who will contribute the most to the 'robust exchange of ideas' '' (p. 313).

However, in assessing whether the Davis program was necessary to advance its interest in diversity, Justice Powell rejected the program, which he concluded ''focused *solely* on ethnic diversity,'' and ''would hinder rather than further attainment of genuine diversity'' (p. 315). Turning to an example of a permissible policy—the Harvard College admissions policy that had been detailed in an *amicus curiae* brief before the Court—Justice Powell concluded that race or ethnicity could be used as a plus factor, along with other factors such as geography, personal talents, experience, leadership potential, or a history of overcoming disadvantage. Such a policy would treat applicants as individuals and not insulate them from comparison with other applicants.

Summarizing his position and relying heavily on anticlassification norms, Justice Powell concluded,

> The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. . . . Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. (p. 320)

The Powell opinion thus laid the groundwork for major shifts in the law of racial discrimination and affirmative action. Diversity in higher education became an acceptable state interest and opened the door in theory to forward-looking interests designed to promote important social goals, rather than simply redressing past injuries. But affirmative action was dealt a serious blow in *Bakke,* one from which it has never recovered. Societal discrimination, despite its powerful effects on opportunities for minority advancement, was rejected by Justice Powell as a compelling interest, and a watered-down version of diversity was enshrined as a talisman for affirmative action policy making.

The Supreme Court and Post-*Bakke* Affirmative Action Law

Although the Supreme Court has struggled with affirmative action law in the decades since *Bakke*—with inconsistent case law emerging during the 1980s and early 1990s because of shifting alignments among the justices—anticlassification jurisprudence now dominates Supreme Court decision making. Recent cases have confirmed that strict scrutiny applies to all race-conscious affirmative action programs, regardless of the level of government or the underlying motives of state institutions. Antisubordination norms still emerge in leading decisions, but the recent composition of the Court has led to the adoption of a strong anticlassification jurisprudence and the relegation of antisubordination norms largely to dissenting opinions. The latest Supreme Court opinion involving voluntary school desegregation policies shows that a near-majority of the Court now endorses a virtual zero-tolerance approach to race-conscious policies, and sees Justice Powell's *Bakke* opinion (and its reaffirmation in *Grutter*), as a unique exception to a general prohibition on race-conscious policies.

Case Law in the 1980s and 1990s

A comprehensive review of the Supreme Court's affirmative action case law is beyond the scope of this chapter, but even a cursory survey of the leading equal protection cases demonstrates the tension between the two antidiscrimination norms and the increasing entrenchment of anticlassification jurisprudence. For example, in *Wygant v. Jackson Board of Education* (1986), the Court ruled by a 5–4 vote that a race-conscious policy in a public school

teachers' collective bargaining agreement designed to protect minority teachers from layoffs—and to preserve the integrity of an earlier affirmative action plan—violated the Equal Protection Clause. Writing for a plurality that included Chief Justice Burger and Justices Rehnquist and Sandra Day O'Connor (Justice White concurred in the judgment but did not join any other opinion), Justice Powell concluded, ''The level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination'' (*Wygant,* 1986, p. 273) and applied strict scrutiny to strike down the policy. In doing so, he rejected both the interest in addressing societal discrimination and the interest in providing teacher role models for students; he further concluded that the policy was not narrowly tailored because it imposed too heavy a burden—layoff from work—on nonminority teachers.

Writing in dissent, Justice Marshall, joined by Justices Brennan and Blackmun, concluded that the challenged plan would satisfy any level of scrutiny, including strict scrutiny, because the state interest in ''preserving the integrity of a valid hiring policy—which in turn sought to achieve diversity and stability for the benefit of *all* students—was sufficient, in this case, to satisfy the demands of the Constitution'' (p. 306). Moreover, no alternative would have attained the stated goal in a narrower or more equitable fashion. Justice Stevens, also dissenting, stated, ''Race is not always irrelevant to sound governmental decisionmaking,'' (p. 314) and

> In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white faculty. (p. 315)

He added,

> There is . . . a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason. . . . The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. (p. 316)

Yet, the outcome of affirmative action cases during the 1980s and early 1990s was far from predictable. In two cases, *Fullilove v. Klutznick* (1980) and

Metro Broadcasting, Inc. v. Federal Communications Commission (1990), the Court upheld affirmative action programs where federal powers were traceable directly or indirectly to Congress. In *Fullilove,* the Court by a 6–3 vote rejected a constitutional challenge to a congressional set-aside program designed to benefit minority contractors. Chief Justice Burger, joined by Justices White and Powell, concluded that the program satisfied either intermediate or strict scrutiny because it was rooted in Congress' special powers; Justice Marshall, joined by Justice Brennan and Blackmun, urged an intermediate standard of review but also concluded that the program would readily satisfy strict scrutiny. Dissenting Justices Stewart, Rehnquist, and Stevens argued, however, that colorblindness was the overarching norm of the Equal Protection Clause, and that "the government may never act to the detriment of a person solely because of that person's race" (*Fullilove,* 1980, p. 525).

In *Metro Broadcasting,* the Court by a 5–4 vote upheld two FCC plans designed to increase opportunities for minorities in the awarding of radio and television broadcast licenses. Writing for the majority, Justice Brennan held that the plans were mandated by Congress and that deference should be granted because of congressional powers; accordingly, an intermediate standard of review was appropriate. Justice Brennan concluded that the plans were substantially related to the important interest in promoting the diversity of broadcast viewpoints. Justice O'Connor, joined by Justices Rehnquist, Antonin Scalia, and Anthony Kennedy, dissented and argued that both congressional and state racial classifications should be subject to strict scrutiny; the FCC plans failed strict scrutiny because broadcast diversity was "simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications" (*Metro Broadcasting,* 1990, p. 612).

The Supreme Court also upheld affirmative action policies in the 1980s where the lower courts were exercising their powers to remedy severe racial discrimination. In *Local 28, Sheet Metal Workers International Association v. Equal Employment Opportunity Commission* (1986), the Court by a 5–4 vote upheld a lower court's efforts to require an intransigent union that had engaged in long-standing discrimination to remedy its discrimination through hiring goals and other measures. And in *United States v. Paradise* (1987), the Court by a 5–4 vote upheld a court-ordered plan that included hiring and promotions quotas designed to remedy extensive discrimination in the Alabama Department of Public Safety. In both *Local 28* and *Paradise,* the Court

could not settle on a standard of review, but the plurality opinions in each would have upheld the programs under even strict scrutiny.

In 1989, the Court in *City of Richmond v. J.A. Croson Company* settled the basic question of what standard of review should apply to state and local affirmative action policies. In a 6–3 decision, the Court struck down a minority set-aside program in municipal contracting, with five justices agreeing that strict scrutiny was the appropriate standard of review. The *Croson* Court ruled that the City of Richmond had made inadequate findings of its own past discrimination to justify a remedial plan, and the set-aside program was not narrowly tailored to an interest in remedying the City's past discrimination. Although Justice O'Connor's opinion made clear that a municipality could have compelling interest in remedying the effects of its past discrimination, a ''strong basis in evidence'' would be necessary, and the City of Richmond had failed to satisfy that standard.

Writing in dissent, Justice Marshall, joined by Justices Brennan and Blackmun, proposed that the Court's decision marked ''a deliberate and giant step backward in this Court's affirmative-action jurisprudence'' (*Croson,* 1989, p. 529) and criticized the adoption of the strict scrutiny standard in no uncertain terms:

> In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past. (p. 553)

Instead, intermediate scrutiny was the appropriate standard of review and the City of Richmond had easily satisfied it.

Six years later, in *Adarand Constructors, Inc. v. Peña* (1995), the Court by a 5–4 vote extended strict scrutiny to *all* racial classifications, including ones by Congress, and effectively overruled *Metro Broadcasting.* In *Adarand,* Justice O'Connor announced three fundamental propositions to govern racial classifications: (1) *skepticism*: meaning that racial classifications are inherently suspect and must be subject to strict scrutiny; (2) *consistency*: meaning that equal protection principles applied to all classifications regardless of motive—invidious or benign—and regardless of the group affected; and (3) *congruence*: meaning that strict scrutiny applied to all levels of government, whether to state and local government through the Fourteenth Amendment

or to the federal government via the due process clause of the Fifth Amendment.

The anticlassification norms of the majority opinion were further reinforced by concurring opinions in *Adarand.* Justice Scalia, for instance, offered a quintessential statement of colorblindness: ''In the eyes of government, we are just one race here. It is American'' (*Adarand,* 1995, p. 239). Similarly, Justice Clarence Thomas in his concurring opinion wrote, ''In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple'' (p. 241).

The *Adarand* dissenters, on the other hand, employed antisubordination reasoning to support arguments for a lower standard of review. For example, Justice Stevens, joined by Justice Ruth Bader Ginsburg, stated,

> The Court's concept of ''consistency'' assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. (*Adarand,* 1995, p. 243)

He added, ''The consistency that the Court espouses would disregard the difference between a 'No Trespassing Sign' and a welcome mat. . . . An interest in 'consistency' does not justify treating differences as though they were similarities'' (p. 245).

Although the Court's major affirmative action cases during the 1980s and 1990s did not address higher education admissions, the Court made clear by the time of its *Adarand* ruling that strict scrutiny would have to be applied to all racial classifications, even those involving key governmental institutions such as Congress and even when goals and policies implicated other constitutional interests, such as academic freedom under the First Amendment. Because of the intervening case law between *Bakke* and *Adarand,* the courts were increasingly skeptical of affirmative action policies, but the Supreme Court's revisiting of the diversity rationale in its most recent affirmative action cases has shown that affirmative action is surviving, although it

may have a life that ultimately survives in only particular environments and with certain preconditions.

Recent Cases

The Supreme Court's most recent higher education affirmative action decisions in *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003), as well as its voluntary school desegregation ruling in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), further demonstrate the tension between anticlassification and antisubordination norms and the ascendancy of anticlassification jurisprudence.

Grutter *and* Gratz

Because post-*Bakke* case law had cast increasing doubt on the legality of affirmative action policies, the Supreme Court revisited the question of whether diversity-based admissions policies in higher education were constitutional.[3] The Court, by a 5–4 vote in *Grutter,* upheld a race-conscious admissions policy at the University of Michigan's law school that paralleled the Harvard undergraduate admissions policy cited by Justice Powell in *Bakke.* In doing so, Justice O'Connor's majority opinion reaffirmed the basic conclusions of Justice Powell that academic freedom provided a special basis for colleges and universities to advance an interest in obtaining diverse student bodies. However, in *Gratz,* decided by a 6–3 vote, the Court struck down a University of Michigan undergraduate admissions policy that employed a numerical point system and granted automatic points to members of underrepresented minority groups; such a system, the Court ruled, was overly mechanical and lacked the flexibility to be narrowly tailored to the interest in diversity.

The Court employed strict scrutiny in both cases, but Justice O'Connor's opinion in *Grutter* emphasized the importance of context, so that her version of strict scrutiny was considerably more deferential than the strict scrutiny employed in earlier cases such as *Croson.* Justice O'Connor underscored that the university's interests in academic freedom required a more relaxed evaluation of its diversity interest, and she deferred in *Grutter* to the law school's good faith actions in satisfying the narrow tailoring requirements of strict scrutiny. As a consequence, anticlassificationist norms were especially strong in the dissenting opinions in *Grutter.* Justice Rehnquist, writing for himself and Justices Scalia, Kennedy, and Thomas, stated, "The

Court, in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School's program despite its obvious flaws'' (*Grutter,* 2003, p. 387). Justice Thomas added in his dissent,

> The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. (p. 353)

And Justice Scalia's dissent concluded, ''The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception'' (p. 349).

In contrast, antisubordination norms were advanced in dissenting opinions of the *Gratz* case. For instance, Justice Ginsburg wrote,

> Our jurisprudence ranks race a ''suspect'' category, ''not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.'' . . . But where race is considered ''for the purpose of achieving equality,'' . . . no automatic proscription is in order. (*Gratz,* 2003, p. 301)

Justice Stephen Breyer, although concurring in the *Gratz* judgment, added,

> In implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion, . . . for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally. (p. 282)

Parents Involved in Community Schools

The *Parents Involved* case did not address an affirmative action plan, but the Court relied on affirmative action case law to address the constitutionality of voluntary desegregation plans, which were designed to promote racial diversity and to avoid racial isolation and resegregation, in Seattle, Washington, and Jefferson County, Kentucky.[4] All of the justices agreed that *Grutter* was still good law, but the Court limited *Grutter*'s applicability to K–12 education by stressing the uniqueness of higher education and the absence of academic freedom interests in elementary and secondary education.

Applying strict scrutiny, the Court by a 5–4 vote struck down the voluntary plans on narrow tailoring grounds. The Court concluded that the racial classifications employed in each of the school districts were not necessary to advance their asserted interests, and that the districts had not adequately considered race-neutral alternative policies. A plurality composed of Chief Justice John Roberts and Justices Scalia, Thomas, and Samuel Alito also rejected the school districts' compelling interest arguments, proposing that they were simply interests in "racial balancing"—seeking racial proportionality for its own sake. But Justice Kennedy, who cast the fifth vote to strike down the plans, disagreed fundamentally with this argument and found the interests in avoiding racial isolation and promoting educational diversity (paralleling the higher education diversity interest) to be compelling.

Although the *Parents Involved* case imposes serious limits on the ability of school districts to advance desegregation goals voluntarily, the case is perhaps most remarkable for the extraordinary contrasts in antidiscrimination jurisprudence advanced by Chief Justice Roberts' plurality bloc and the remaining justices. Indeed, their differences run to the very core of the Equal Protection Clause and the legacy of *Brown,* revealing contrasting visions of racial integration that reflect individual rights and colorblindness on one hand and group-based rights and race-conscious remediation on the other.

In his plurality opinion, Chief Justice Roberts proposed an especially strong anticlassification interpretation of *Brown,* arguing, "It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954" (*Parents Involved,* 2007, p. 2767). In determining which side is "more faithful to the heritage of *Brown*" (p. 2767), Chief Justice Roberts's opinion went on to quote the *Brown* plaintiffs' brief, which stated in part that the Fourteenth Amendment prohibits differential treatment on the basis of children's color or race, and to quote from the oral argument of Robert L. Carter, who argued for the *Brown* plaintiffs, to suggest that "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens" (pp. 2767–2768).

Equating *Brown* with the Seattle and Jefferson County litigation, the Chief Justice's opinion continued,

> Before *Brown,* children were told where they could and could not go to school based on the color of their skin. The school districts in these cases

> have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. (p. 2768)

Chief Justice Roberts then concluded his opinion with a cogent anticlassification statement: "The way to stop discrimination on the basis of race is stop discriminating on the basis of race" (p. 2768).

The remarkable language in the Roberts opinion led the other justices to distance themselves from the plurality's analysis. Justice Kennedy stated, "Parts of the opinion by The Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account" and "To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken" (p. 2791). Passages in the *Parents Involved* dissenting opinions are even more critical, with Justice Stevens stating, "There is a cruel irony in The Chief Justice's reliance on our decision in *Brown v. Board of Education*" (p. 2797), and "The Chief rewrites the history of one of this Court's most important decisions" (p. 2798). Justice Breyer's opinion, joined by Justices Stevens, David Souter, and Ginsburg, contains more excoriating language:

> It is a cruel distortion of history to compare Topeka, Kansas, in the 1950's [*sic*] to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). (p. 2836)

The incidental cost of using a race-conscious label in the Seattle and Louisville cases, Justice Breyer added, "does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation" (p. 2836).

As an alternative, Justice Breyer proposed a more deferential standard of review based on governmental motives: "The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races" (pp. 2835–2836). Justice Breyer offered a strong antisubordination justification for the school districts' plans:

> The compelling interest at issue here, then, includes an effort to eradicate the remnants, not of general "societal discrimination," . . . but of primary and secondary school segregation . . . ; it includes an effort to create school environments that provide better educational opportunities for all children; it includes an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees. If an educational interest that combines these three elements is not "compelling," what is? (p. 2823)

Because Justice Breyer and the other dissenting justices agreed with Justice Kennedy that the interests in avoiding racial isolation and promoting diversity could be compelling, the Court's ruling in *Parent Involved* was effectively tempered, and five members of the Court provided a basis for school districts to employ other types of race-conscious policies that could advance compelling interests in avoiding racial isolation and in promoting diversity. Justice Kennedy's opinion also offered school districts specific, albeit limited, options for creating constitutionally compliant policies, such as plus-factor student assignment policies that parallel higher education admissions policies, as well as race-neutral policies such as creating magnet schools and drawing attendance zones that are mindful of racial demographics.

Mediating Antidiscrimination Norms: The Court's Center

Justice O'Connor's opinion in *Grutter* and Justice Kennedy's opinion in *Parents Involved,* while adhering to the strict scrutiny standards endorsed by anticlassification jurisprudence, represent moderating and centrist perspectives on an increasingly polarized Court. The O'Connor and Kennedy opinions blunted the more extreme views espoused by blocs such as the Roberts plurality in *Parents Involved,* and they suggest a constitutional analysis of race that, in at least some instances, is more receptive to elements of antisubordination jurisprudence characterized by the Brennan bloc in *Bakke* and the dissenters in more recent affirmative action decisions.

Justice O'Connor employed a version of strict scrutiny that was deferential to institutions of higher education and approached, as a practical matter, the intermediate level of scrutiny for racial classification espoused by adherents of antisubordination jurisprudence. In doing so, she also employed powerful rhetoric reminiscent of earlier antisubordination-focused opinions:

> "Ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." . . . And, "Nowhere is the importance of such openness more acute than in the context of higher education." . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized. (*Grutter,* 2003, pp. 331–332)

Similarly, Justice Kennedy in *Parents Involved* stated, "This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children" (*Parents Involved,* 2007, p. 2797).

Nevertheless, the "centrism" exhibited by Justices O'Connor and Kennedy may be limited to special settings such as public education and must be placed in the context of a Court that has become increasingly disapproving of racial classifications since *Bakke* and continues to employ strict scrutiny to assess affirmative action policies. In 2006, Justice O'Connor was replaced by Justice Alito, a member of the Roberts bloc in *Parents Involved,* and a majority of the current Court views racial classifications with a high degree of skepticism, if not outright condemnation. Justice Kennedy, while employing broad rhetoric to endorse school districts' interests in addressing racial isolation and promoting diversity, still voted to strike down the voluntary desegregation policies on narrow tailoring grounds, and his *Parents Involved* opinion offers schools districts only a small space for developing constitutionally compliant policies. One can expect that the future decisions of the Court, as in earlier cases, will feature close votes and divided opinions, and that the tensions between anticlassification and antisubordination norms will stay as strong as ever.

Conclusion

In the three decades since the Supreme Court's ruling in *Bakke,* affirmative action case law has gone through a variety of stages, with early inconsistencies and ultimate clarifications in the standards of review and the likely outcomes of cases. Yet, the fundamental tensions inherent in the multiple *Bakke* opinions remain, not only in the courts but in public debates and public policies that attempt to address contemporary racial inequality. The broad goals of social justice that accompanied early affirmative action policies have

clearly been diluted since *Bakke,* largely because the diversity rationale has replaced social and institutional remediation as the most legally and politically viable justification for affirmative action. Justice Powell's *Bakke* opinion recast race-conscious affirmative action as a public policy to which the highest standards of judicial review must be applied, and in doing so, established the diversity rationale as a rare exception under which racial considerations might be tolerated; institutions both inside and outside of higher education, averse to the risks of future litigation and political outcry, have simply followed suit. *Bakke*'s role in shifting the terms of the affirmative debate is unquestionable, and the limited space that the Court has provided for affirmative action in recent years clearly pivots around the diversity rationale espoused by Justice Powell. And the ascendancy of anticlassification jurisprudence, reflected in the Powell opinion and later Court majorities, has been cemented in the Court's current membership. In the future, the Court may move in different directions, but much will depend on its composition and the norms espoused by the sitting justices. Neither anticlassification norms nor antisubordination norms are likely to disappear altogether, and the dynamic between the two schools of antidiscrimination jurisprudence will continue to animate debates for years to come.

Notes

1. The terms *race-conscious* and *race-neutral* do not have a fixed meaning in the law, but the terms offer a useful dichotomy to describe public policies that employ race explicitly as a factor in the design and implementation of a policy—race-consciousness—versus those that do not employ race explicitly—race-neutrality. When placed under the lens of constitutional analysis, race-conscious policies trigger close scrutiny by the courts, and race-neutral policies will be presumptively constitutional. Even though governmental actors may be aware of relevant information such as the racial composition of a population in race-neutral policy making, their policies would still be assessed under a lower standard of review.

2. Six separate opinions were filed in the *Bakke* case. Justice Powell announced the judgment of the Court striking down the special admissions policy at the medical school of the University of California, Davis, but upholding the use of race in higher education admissions. Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, voted to strike down the admissions policy under Title VI of the Civil Rights Act of 1964. Justice Brennan, joined by Justices White, Marshall, and Blackmun, voted to uphold the use of race in admissions and would have upheld the Davis policy as constitutional under the Equal Protection Clause. Justices White, Marshall, and Blackmun each wrote separate opinions.

3. In *Hopwood v. Texas* (1996), a lower federal appeals court struck down a race-conscious law school admissions policy at the University of Texas and concluded that affirmative action case law since *Bakke* had effectively overruled the case. The Supreme Court chose not to hear an appeal of *Hopwood* and did not address the constitutionality of higher education admissions policies until the University of Michigan cases in 2003.

4. The Supreme Court issued a single opinion in the Seattle and Jefferson County decisions, although the litigation involved two separate cases: *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) and *Meredith v. Jefferson County Board of Education* (2007).

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