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COMMENTARY

THE DISEASE AS CURE: "In order to get beyond racism, we must first take account of race."*

ANTONIN SCALIA**

As you know, every panel needs an anti-hero, and I fill that role on this one. I have grave doubts about the wisdom of where we are going in affirmative action, and in equal protection generally. I frankly find this area an embarrassment to teach. Here, as in some other fields of constitutional law, it is increasingly difficult to pretend to one's students that the decisions of the Supreme Court are tied together by threads of logic and analysis—as opposed to what seems to be the fact that the decisions of each of the Justices on the Court are tied together by threads of social preference and predisposition. Frankly, I don't have it in me to play the game of distinguishing and reconciling the cases in this utterly confused field.

The chaos in which we find ourselves is well-enough exemplified by *Bakke*[1] itself. Four of the Justices tell us that both the Constitution and Title VI permit racial preference; four of the Justices tell us that whatever the Constitution may permit, Title VI forbids it. And the law of the land, pronounced by the one remaining Justice, apparently is that Title VI is no different from the Constitution; governmental racial distinctions of any sort are "odious to a free people" and their validity "inherently suspect"; they must pass "the most exacting judicial examination," and can only be justified by a "compelling" state interest. We later learn that the "compelling" interest at issue in *Bakke* is the enormously important goal of assuring that in medical school—where we are dealing with students in an age range of twenty-two to twenty-eight, or in Bakke's case, thirty-three to thirty-nine—we will expose these impressionable youngsters to a great diversity of people. We want them

* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (Blackmun, J., concurring in the judgment in part and dissenting in part).

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

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to work and play with pianists, maybe flute players. We want people from the country, from the city. We want bespectacled chess champions and football players. And, oh yes, we may want some racial minorities, too. If that is all it takes to overcome the presumption against discrimination by race, we have witnessed an historic trivialization of the Constitution. Justice Powell's opinion, which we must work with as the law of the land, strikes me as an excellent compromise between two committees of the American Bar Association on some insignificant legislative proposal. But it is thoroughly unconvincing as an honest, hard-minded, reasoned analysis of an important provision of the Constitution.

There is, of course, a lot of pretense or self-delusion (you can take your choice) in all that pertains to affirmative action. Does anyone really think, for example, that the situation has changed at Davis? So instead of reserving sixteen class places for minority students, the school will open all one hundred slots to all applicants, but in choosing among them, will take into account the need for diversity—piano players, football players, people from the country, minority students, etc. When it comes to choosing among these manifold diversities in God's creation, will being a piano player, do you suppose, be regarded as more important than having yellow skin? Or will coming from Oshkosh, Wisconsin, be regarded as more important than having a Spanish surname? It will be very difficult to tell, won't it?

Only two results of the *Bakke* decision are certain. First, the judgments that the Davis medical school makes in filling these one hundred slots will be effectively unappealable to the courts. (There's no way to establish, for example, that the diversity value of New York City oboists has not been accorded its proper weight.) Second, when all is said and done, it is a safe bet that though there may not be a piano player in the class, there are going to be close to sixteen minority students. And I suspect that Justice Powell's delightful compromise was drafted precisely to achieve these results—just as, it has been charged, the Harvard College "diversity admissions" program, which Mr. Justice Powell's opinion so generously praises, was designed to reduce as inconspicuously as possible the disproportionate number of New York Jewish students that a merit admissions system had produced.

Examples abound to support my suggestion that this area is full of pretense or self-delusion. Affirmative action requirements under Title VI and VII are said repeatedly "not to require the hiring of any un-

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qualified individuals." That gives one a great feeling of equal justice until it is analyzed. Unfortunately, the world of employment applicants does not divide itself merely into "qualified" and "unqualified" individuals. There is a whole range of ability—from unqualified, through minimally qualified, qualified, well-qualified, to outstanding. If I can't get Leontyne Price to sing a concert I have scheduled, I may have to settle for Erma Glatt. La Glatt has a pretty good voice, but not as good as Price. Is she unqualified? Not really—she has sung other concerts with modest success. But she is just not as good as Price. Any system that coerces me to hire her in preference to Price, because of her race, degrades the quality of my product and discriminates on racial grounds against Price. And it is no answer to either of these charges that Glatt is "qualified." To seek to assuage either the employer's demand for quality or the disfavored applicant's demand for equal treatment by saying there is no need to hire any unqualified individuals is a sort of intellectual shell game, which diverts attention from the major issue by firmly responding to a minor one.

But, of course, even the disclaimer of compulsion to hire unqualified individuals loses something when it is translated into practice by the advocates of affirmative action. Consider, for example, the following statement by Professor Edwards: "This is not to say that blacks or women must be thrust into positions for which they are not qualified; however, when the choice is between white males and other qualified or qualifiable individuals, we should open the available positions to those who formerly could not occupy them."[2] Note that what begins with the ritualistic denial of any intent to foster hiring of the unqualified imperceptibly shifts to a call for hiring of the "qualifiable," which surely must be a subcategory of the unqualified. It is typical of the confused level of debate that characterizes this field.

Another example of pretense or self-delusion: The Department of Labor regulations concerning goals for hiring to overcome "underutilization" read as follows: "The purpose of a contractor's establishment and use of goals is to insure that he meets his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin."[3] This is, quite literally, incredible. Once there is

2. Edwards, *Race Discrimination in Employment: What Price Equality?* 1976 U. ILL. L.F. 572, 594.

3. 41 C.F.R. § 60-2.30 (1978).

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established a numerical figure, the failure to meet it will have material, adverse consequences; namely, the substantial risk of cutoff of government contracts and the substantial certainty of disruptive and expensive government investigations. All that we know about human nature and human motivations indicates quite clearly that discrimination often will be produced in an effort to meet or exceed the magic number. I am a businessman who has, let us say, six more jobs to fill, and I am three short of my minority "goal." Reaching the goal will render my government contracts secure and will save thousands of dollars in the expenses necessary to comply with the demands of an equal employment investigation. If I consult my self-interest, which people tend to do, I will hire three minority applicants, even if they are somewhat less qualified than others. When the results that are inevitable are compared with the results that are said to be "intended," one must conclude that the drafter of the regulation is either fooling us or fooling himself. I appreciate, of course, that any antidiscrimination law with teeth in it will generate *some* pressures to favor minority groups. But that is worlds away from the "we-need-three-more-nonwhites" attitude that is the utterly predictable result of so-called "goals."

Judge Wisdom, dissenting in the *Weber* case,[4] makes the following statement: "The Union's duty to bargain in good faith for all its members [an obligation imposed by law] does not prevent it from fairly advancing the national policy against discrimination, even if that requires assisting some of its members more than others."[5] One has to be reminded of the line from *Animal Farm*, to the effect that all animals are created equal but some are more equal than others. And one cannot help but think that a paraphrase of Judge Wisdom's statement would fit very nicely in the mouth of a good old-fashioned racist employer: "We favor all applicants, but we favor white applicants more than others." It is very difficult to take Judge Wisdom's argument as a serious attempt to identify and grapple with the real issue rather than as an elaborate intellectual word game.

Another pretense or self-delusion—perhaps the grandest of all—is the notion that what was involved in the *Weber* case is voluntary private discrimination against whites. As Judge Wisdom put it: "While the government might not be able to require that restorative justice be

4. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977), *cert. granted*, 99 S. Ct. 720 (No. 78-435).

5. *Id.* at 233 n.15 (Wisdom, J., dissenting).

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done, neither should it prevent it."[6] Fancy that! To think that the real issue in *Weber*, and presumably all those "reverse discrimination" cases, is damnable federal regulation: whether the federal government should be able to *prevent* the discrimination against better qualified employees, which Kaiser and thousands of other businesses throughout the country are chomping at the bit to engage in! That is, of course, chimerical. Nobody really believes that Kaiser would have established the challenged program, or the union permitted it, without the "incentive" of federal administrative regulations, which in effect makes the application of what Judge Wisdom calls "restorative justice" a condition for the award of government contracts and for the avoidance of expensive litigation in and out of the courts. To discuss the issue in the fictitious context of voluntarism not only makes any intelligently reasoned decision impossible in the particular case, but poisons the well of legal discourse.

That last quotation concerning "restorative justice" may explain why I feel a bit differently about these issues than, for example, Judge Wisdom or Justice Powell or Justice White. When John Minor Wisdom speaks of "restorative justice," I am reminded of the story about the Lone Ranger and his "faithful Indian companion" Tonto. If you recall the famous radio serial, you know that Tonto never said much, but what he did say was (disguised beneath a Hollywood-Indian dialect) wisdom of an absolutely Solomonic caliber. On one occasion, it seems that the Lone Ranger was galloping along with Tonto, heading eastward, when they saw coming towards them a large band of Mohawk Indians in full war dress. The Lone Ranger reigns in his horse, turns to Tonto, and asks, "Tonto, what should we do?" Tonto says, "Ugh, ride-um west." So, they wheel around and gallop off to the west until suddenly they encounter a large band of Sioux heading straight toward them. The Lone Ranger asks, "Tonto, what should we do?" Tonto says, "Ugh, ride-um north." So, they turn around and ride north, and, sure enough, there's a whole tribe of Iroquois headed straight towards them. The Ranger asks, "Tonto, what should we do?" And Tonto says, "Ugh, ride-um south," which they do until they see a warparty of Apaches coming right for them. The Lone Ranger asks, "Tonto, what should we do?" And Tonto says, "Ugh, what you mean, 'we,' white man?"

6. *Id.* at 235.

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I have somewhat the same feeling when John Minor Wisdom talks of the evils that "we" whites have done to blacks and that "we" must now make restoration for. My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man. There are, of course, many white ethnic groups that came to this country in great numbers relatively late in its history—Italians, Jews, Irish, Poles—who not only took no part in, and derived no profit from, the major historic suppression of the currently acknowledged minority groups, but were, in fact, themselves the object of discrimination by the dominant Anglo-Saxon majority. If I can recall in my lifetime the obnoxious "White Trade Only" signs in shops in Washington, D.C., others can recall "Irish Need Not Apply" signs in Boston, three or four decades earlier. To be sure, in relatively recent years some or all of these groups have been the beneficiaries of discrimination against blacks, or have themselves practiced discrimination. But to compare their racial debt—I must use that term, since the concept of "restorative justice" implies it; there is no creditor without a debtor—with that of those who plied the slave trade, and who maintained a formal caste system for many years thereafter, is to confuse a mountain with a molehill. Yet curiously enough, we find that in the system of restorative justice established by the Wisdoms and the Powells and the Whites, it is precisely *these* groups that do most of the restoring. It is they who, to a disproportionate degree, are the competitors with the urban blacks and Hispanics for jobs, housing, education—all those things that enable one to scramble to the top of the social heap where one can speak eloquently (and quite safely) of restorative justice.

To remedy this inequity, I have developed a modest proposal, which I call RJHS—the Restorative Justice Handicapping System. I only have applied it thus far to restorative justice for the Negro, since obviously he has been the victim of the most widespread and systematic exploitation in this country; but a similar system could be devised for other creditor-races, creditor-sexes or minority groups. Under my system each individual in society would be assigned at birth Restorative Justice Handicapping Points, determined on the basis of his or her ancestry. Obviously, the highest number of points must go to what we may loosely call the Aryans—the Powells, the Whites, the Stewarts, the Burgers, and, in fact (curiously enough), the entire composition of the present Supreme Court, with the exception of Justice Marshall. This

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grouping of North European races obviously played the greatest role in the suppression of the American black. But unfortunately, what was good enough for Nazi Germany is not good enough for our purposes. We must further divide the Aryans into subgroups. As I have suggested, the Irish (having arrived later) probably owe less of a racial debt than the Germans, who in turn surely owe less of a racial debt than the English. It will, to be sure, be difficult drawing precise lines and establishing the correct number of handicapping points, but having reviewed the Supreme Court's jurisprudence on abortion, I am convinced that our Justices would not shrink from the task.

Of course, the mere identification of the various degrees of debtor-races is only part of the job. One must in addition account for the dilution of bloodlines by establishing, for example, a half-Italian, half-Irish handicapping score. There are those who will scoff at this as a refinement impossible of achievement, but I am confident it can be done, and can even be extended to take account of dilution of blood in creditor-races as well. Indeed, I am informed (though I have not had the stomach to check) that a system to achieve the latter objective is already in place in federal agencies—specifying, for example, how much dilution of blood deprives one of his racial-creditor status as a "Hispanic" under affirmative action programs. Moreover, it should not be forgotton that we have a rich body of statutory and case law from the Old South to which we can turn for guidance in this exacting task.

But I think it unnecessary to describe the Restorative Justice Handicapping System any further. I trust you find it thoroughly offensive, as I do. It, and the racist concept of restorative justice of which it is merely the concrete expression, is fundamentally contrary to the principles that govern, and should govern, our society. I owe no man anything, nor he me, because of the blood that flows in our veins. To go down that road (or I should say to return down that road), even behind a banner as gleaming as restorative justice, is to make a frightening mistake. This is not to say that I have no obligation to my fellow citizens who are black. I assuredly do—not because of their race or because of any special debt that my bloodline owes to theirs, but because they have (many of them) special needs, and they are (all of them) my countrymen and (as I believe) my brothers. This means that I am entirely in favor of according the poor inner-city child, who happens to be black, advantages and preferences not given to my own children because they don't need them. But I am not willing to prefer the son of a

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prosperous and well-educated black doctor or lawyer—solely because of his race—to the son of a recent refugee from Eastern Europe who is working as a manual laborer to get his family ahead. The affirmative action system now in place will produce the latter result because it is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need; that is to say, because it is racist.

But I not only question the principle upon which racial affirmative action is based; I even question its effectiveness in achieving the desired goal of advancing a particular race. Professor Edwards, for example, states in one of his pieces that: "The continued existence of long-standing myths about the inherent inability of blacks to perform certain work has also contributed to their exclusion from significant jobs in the employment market . . . ."[7] That strikes me as true, but one may well wonder whether the prescribed solution of affirmative action based on race will eliminate the myths rather than assure their perpetuation. When one reads the *Bakke* case, the most striking factual data is the enormous divergence in the average college grades and average test scores of the regular admittees and the special (minority) admittees of the Davis Medical School for the years Bakke was rejected. In 1973 they looked like this:[8]

	Grade Point Average		Medical College Admission Test			
	Science	Overall	Verbal	Quantitative	Science	Gen'l Info.
Regular	3.51	3.49	81	76	83	69
Minority	2.62	2.88	46	24	35	33

Do you suppose the "image" of minority groups has been improved by this? I suggest that, to the contrary, the very ability of minority group members to distinguish themselves and their race has been dreadfully impaired. To put the issue to you in its starkest form: If you must select your brain surgeon from among recent graduates of Davis Medical School and have nothing to go on but their names and pictures, would you not be well advised—playing the odds—to eliminate all minority group members? It is well known to the public that the outstanding institutions of higher education graduate the best and the

7. Edwards, *supra* note 2.

8. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 277 n.7 (1978).

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brightest principally through the simple device of admitting only the best and the brightest. And it is obvious to the public that (to the extent these schools flunk *anyone* out) the same factor that produced special admissions will also tend to produce special retention and, ultimately, special graduation. Thus, insofar as "public image" is concerned, the immediate and predictable effect of affirmative action is to establish a second-class, "minority" degree, which is a less certain certificate of quality. In other words, we have established within our institutions of higher education (and wherever else racial affirmative action is applied) a regime reminiscent of major league baseball in the years before Jackie Robinson: a separate "league" for minority students, which makes it difficult for the true excellence of the minority star to receive his or her deserved acknowledgment. To be sure, the students' teachers, and those of us who have the opportunity of examining the students' transcripts, can tell who is or is not outstanding. But those members of the public about whom Professor Edwards is concerned—those who judge by generalities, or by "image," if you will—are they likely to think better or worse of minority graduates? The person who was so ignorant as to say "a Negro simply cannot become a truly outstanding doctor" can now plausibly add "—and the fact that he obtained a degree from one of the best medical schools in the country doesn't prove a thing."

In response to this, the advocates of racial affirmative action might say the following: "Even if, as you say, our system cannot give an increased number of minority students a first-class Davis degree—and indeed, even if it may, as you say, make it impossible for *any* minority student to obtain a first-class Davis degree—at least it gives more minority students the concrete benefits of a first-class Davis education." But that is questionable pedagogy. In grammar school, at least, where the politics of race do not yet seem to have permeated pupil assignment within schools, we do not "help" a disadvantaged student by admitting him into a faster group. Why should college and graduate school be different? During the guns-on-campus disturbances at Cornell, one-half of that school's black students were on academic probation. Why? They were neither stupid nor lazy. As a whole their test scores were in the *upper* twenty-five percent of all students admitted to college. But the Cornell student body as a whole was in the upper one percent. Was it really "helping" these young men and women, either from the standpoint of their personal intellectual development or from the standpoint

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of their "image" as minority graduates in later life, to place them in an environment where it was quite probable (as probable as such things can ever be) that they did not belong? It solved the political problems of the school administrators, no doubt. And it may have given the administrators, faculty, and alumni the warm feeling that they were doing their part (at no expense, by and large, to their own children) for "restorative justice." But did it really help these young men and women? With few exceptions, I suspect not.

I could mention other harmful, practical effects of racial affirmative action. It has been suggested, for example, that one consequence is to encourage the location of industries in areas where affirmative action problems are likely to be reduced; that is, away from the inner cities where the game of racial percentages produces significantly higher quotas (or, if you prefer, goals). In any case, it is a fact that statistics show an increase in the economic status of blacks in the years immediately preceding affirmative action and a decline thereafter.[9] Whatever else the program may be, it is not demonstrably effective.

I am, in short, opposed to racial affirmative action for reasons of both principle and practicality. Sex-based affirmative action presents somewhat different constitutional issues, but it seems to me an equally poor idea, for many of the reasons suggested above. I do not, on the other hand, oppose—indeed, I strongly favor—what might be called (but for the coloration that the term has acquired in the context of its past use) "affirmative action programs" of many types of help for the poor and disadvantaged. It may well be that many, or even most, of those benefited by such programs would be members of minority races that the existing programs exclusively favor. I would not care if *all* of them were. The unacceptable vice is simply selecting or rejecting them *on the basis of their race.*

A person espousing the views I have expressed, of course, exposes himself to charges of, at best, insensitivity or, at worst, bigotry. That is one reason these views are not expressed more often, particularly in academia. Beyond an anticipatory denial, I must content myself with the observation that it must be a queer sort of bigotry indeed, since it is shared by many intelligent members of the alleged target group. Some of the most vocal opposition to racial affirmative action comes from minority group members who have seen the value of their accomplish-

9. See Sowell, *Are Quotas Good for Blacks?*, COMMENTARY, June 1978, at 40.

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ments debased by the suspicion—no, to be frank, the reality—of a lower standard for their group in the universities and the professions. This new racial presumption, imposed upon those who have lifted themselves above the effects of old racial presumptions, is the most evil fruit of a fundamentally bad seed. From racist principles flow racist results.

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