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Henry J. Abraham

SOME POST-*BAKKE*-AND-*WEBER* REFLECTIONS ON "REVERSE DISCRIMINATION"

*Henry J. Abraham**

So much has been said, written, and emoted concerning the subject of "reverse discrimination" that it represents a veritably frustrating experience to endeavor to come to grips with it in a non-redundant, non-banal, non-breast-beating manner. The difficulty is compounded by the all-too pervasive substitution of passion for reason on the wrenching issue—one that, admittedly, invites passion. Indeed, passion informed not an insignificant number of the record filings of the 120 briefs *amicii curiae* in the first central "reverse discrimination" case of *Regents of the University of California v. Bakke*,[1] in which oral argument was presented to the Supreme Court of the United States in mid-October 1977. It took place in a sardine-like packed Court chamber, with more than 200 putative spectators waiting in line all night in the hope of perhaps hearing one three-minute segment of that potential bellweather decision—toward which the Court, in an unusual action, called for the filing of supplementary briefs by all parties concerned two weeks later in order to argue specifically the *statutory* question(s) involved in the application of Title VI of the Civil Rights Act of 1964. Passion similarly governed the denouement of the second major "reverse discrimination" case, *United Steel Workers and Kaiser Aluminum & Chemical Corporation v. Weber*,[2] which the Court decided in June 1979, almost exactly one year after the *Bakke* holding. And passion, however comprehensible emotionally, has clouded the arguments and contentions of even the most cerebral professional as well as lay observers of the "reverse discrimination" issue, the resolution of which may well constitute a watershed in this particularly crucial aspect of the race syndrome, of what Gunnar Myrdal more than three decades ago so pointedly titled "The American Dilemma."[3]

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1. 438 U.S. 265 (1978).
2. 99 S. Ct. 2721 (1979).
3. G. MYRDAL, AN AMERICAN DILEMMA (1944).

In the hope of avoiding an abject surrender to the aforementioned passion(s), I shall do my best to discuss the matter in a rational manner while pledging to strive to eschew what Headmaster Stanley Bosworth of St. Ann's Episcopal School in Brooklyn so tellingly, if perhaps a mite expansively, identified as the "[p]iety, puritanism and guilt [that have] combine[d] to stir the worst semantic confusion" conceivable[4] in this emotion-charged policy spectrum. It would thus be helpful to try to identify at the outset what we are, or *should be,* talking about in any attempted analysis of the constellation of "reverse discrimination," and what we *should not be* talking about. To do that it is necessary to find what the concept *means.* "I only want to know what the words mean," once commented Mr. Justice Oliver Wendell Holmes, Jr., the judicial philosopher of our age, but he freely admitted, with E. M. Forster, that there is "wine in words."[5] A lot of wine and other rather less consumable liquids have been poured into the notion, into the alleged meaning, of "reverse discrimination."

II.

Stipulating the audience of these ruminations to be educated, intelligent human beings, who read, see and/or hear the news that informs our *vie quotidienne,* I am comfortable in assuming a basic familiarity with the issues involved. I also am aware that, and I daresay without exception, any reader will have strong feelings on the matter. So do I. We would not be human if we did not; while they operate on a host of levels and are triggered at vastly diverse moments, we all have consciences. Stipulating these facts, I should first endeavor to make clear what "reverse discrimination" is *not:* (1) It is *not* action, be it in the governmental or private sector, designed to remedy the absence of proper and needed educational preparation or training by special, albeit costly, primary and/or secondary school level preparatory programs or occupational skill development, such as "Head Start," "Upward Bound," etc., always provided that access to these programs is not bottomed on race but on educational, and/or economic need, be it cerebral or manual. (2)

4. The New York Times, Oct. 29, 1977, at 22, col. 3 (Letters).

5. Interview with Francis Biddle (one-time clerk to Mr. Justice Holmes), Wynnewood, Pa., March 10, 1962.

It is *not* the utilization of special classes or supplemental tutoring or training, regardless of the costs involved (assuming, of course, that these have been properly authorized and appropriated) on any level of the educational or training process, from the very pre-nursery school bottom to the very top of the professional training ladder. (3) It is of course *not* the scrupulous exhortation and enforcement of absolute standards of non-discrimination on the basis of race, sex, religion, nationality, and also now, to a limited extent, age. (4) It is *not* the above-the-table special recruiting and utilization efforts which, *pace* poo-pooing by leaders of some of the recipient groups involved, are not only pressed vigorously, but have been and are being pushed and pressed on a scale that would make a Bear Bryant and Knute Rockne smile a knowing smile. (5) It is *not* even an admission or personnel officer's judgment that, along with sundry other criteria, he or she may take into account an individual applicant's racial, religious, gender, or other characteristics as a "plus"—to use Mr. Justice Powell's *Bakke* term—but only if that applicant can demonstrate the presence of demonstrable explicit or implicit merit in terms of ability and/or genuine promise. For I shall again and again insist that *the* overriding criterion, *the* central consideration, must in the final analysis be present or arguably potential *merit.* It must thus be merit and ability, not necessarily based exclusively upon past performance, but upon a mature, experienced judgment that merit and ability are in effect in the total picture either by their presence or by their fairly confident predictability. These five "nots," which are all aspects of the concept of "affirmative action"—are naturally not an exhaustive enumeration. Yet they are illustrative of common practices that, in my view, do *not* constitute "reverse discrimination"—always provided that they remain appropriately canalized within proper legal and constitutional bounds—for they give life to the basic American right of equality of *opportunity.* One of the major problems, alas, is that militant pro-"reverse discrimination" advocates insist on substituting a requirement of equality of *result* for the requirement of equality of *opportunity*—a requirement based on the dangerous notion of statistical group parity, in which the focal point becomes the group rather than the individual.

This brings me to the necessary look at a quintet of what "reverse discrimination" *is:* (1) It *is,* above all, what in the final analysis, the

Bakke and *Weber* cases fundamentally were all about, namely the setting aside of quotas—be they rigid or quasi-rigid—i.e., the adoption of a *numerus clausus,* on behalf of the admission or recruitment or training or employment or promotion of groups identified and classified by racial, sexual, religious, age, or nationality characteristics. For these are characteristics that are, or should be, proscribed on both legal and constitutional grounds, because they are *non-sequiturs* on the fronts of individual merit and ability and are, or certainly should be, regarded as being an insult to the dignity and intelligence of the quota recipients. "Our Constitution is color-blind," thundered Mr. Justice John Marshall Harlan in lonely dissent in the famous, or infamous, case of *Plessy v. Ferguson* in 1896, "and neither knows nor tolerates classes among citizens."[6] His dissent, which became the guiding star of the Court's unanimous holding in the monumental and seminal 1954 ruling in *Brown v. Board of Education of Topeka,*[7] now prompts us to ask the question whether, as the proponents of "reverse discrimination" urge, the Constitution must be color-conscious in order to be color-blind.[8] But to continue what "reverse discrimination" is, it is (2) the slanting of what should be neutral, pertinent, and appropriate threshold and other qualification examinations and/or requirements; double-standards in grading and rating; double-standards in attendance and disciplinary requirements. It *is* (3) the dishonest semanticism of what are called *goals* or *guidelines,* that the bureaucracy has simply pronounced legal and/or constitutional on the alleged grounds that they differ from rigid *quotas,* which admittedly would be presumably illegal and/or unconstitutional. Fully supported by Mr. Justice Powell's dismissal of them in the *Bakke* decision as a "semantic distinction" which is "beside the point,"[9] I submit that this distinction is as unworkable as it is dishonest—in the absence of, to use a favorite Department of Health, Education and Welfare, Department of Labor, and O.E.E.O. term, "good faith" vis-a-vis the far-reaching efforts of affected educational institutions and employers to function under the concept of "goals" or "guidelines." But

6. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

7. 347 U.S. 483 (1954).

8. *See* Mr. Chief Justice Hale's dissenting opinion in De Funis v. Odegaard, 82 Wash.2d 11, 507 P.2d 1169, 1189 (1973).

9. 438 U.S. at 289.

while going to enormous length to deny any equation of "goals" or "guidelines" with "quotas," the largely unchecked enforcement personnel of the three aforementioned powerful and well-funded agencies of the federal government—personnel that, certainly in the realm of the administration of higher education, often lacks the one-would-think essential experience and background—in effect *require* quotas while talking "goals" or "guidelines." Indeed, within hours, if not minutes, of the *Bakke* decision, for example, Eleanor Holmes Norton, the aggressive head of the O.E.E.O., announced that the Supreme Court holding would make no difference, whatever, to "the work we have been doing."[10] Thus, there is extant an eager presumption of a lack of a good faith effort against the background-imposition of rigid compliance quotas, based upon frequently irrelevant group statistics, statistics that are demonstrably declared to be *ultra vires* by Title VII, Sec. 703(j) of the Civil Rights Act of 1964.[11] (4) Reverse discrimination *is* such a statutory provision—one recently challenged and declared unconstitutional by U.S. District Court Judge A. Andrew Hauk,[12] but also upheld by U.S. District Court Judge Daniel J. Snyder, Jr.,[13] who was affirmed by the United States Court of Appeals for the Third Circuit[14]—as that mandated under the Public Works Employment Act of 1977.[15] Under that Act, Congress enacted a rigid requirement that 10 per cent of all public works contracts designed to stimulate employment go to minority business enterprises. How does this law identify such enterprises? They are, according to its terms, private businesses that are at least half-owned by members of a minority group or publicly held businesses in which minority group members control a majority of the stock.[16] And who are these statutorily recognized minorities? They are, says the Act, blacks, Orientals, Indians, Eskimos, Aleuts, and what is termed the "Spanish-speaking."[17] At issue, in what has quickly come to be known as the "1977 Ten Per Cent Set-Aside Quota Law," are thousands of construction jobs

10. *Newsweek*, July 10, 1978, p. 29.
11. 42 U.S.C. § 2000e-2(j) (1976).
12. Associated Gen'l Contractors of Cal. v. Secretary of Commerce of the United States Dept. of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977).
13. Constructors Ass'n. of W. Pa. v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977).
14. Constructors Ass'n. of W. Pa. v. Kreps, 573 F.2d 811 (3d Cir. 1978).
15. 42 U.S.C.A. § 6705(f)(2) (Supp. 1979).
16. *Id.*
17. *Id.*

and billions of dollars worth of Government contracts. But when the U.S. Supreme Court initially had the case before it a few days after the *Bakke* decision came down, it ducked the problem on the ground that the award involved had already been consummated and the money expended, the issue thus being moot.[18] However, the Court has since agreed to reexamine it with its docketing of the potentially seminal case of *Fullilove v. Kreps*,[19] for which oral argument was heard on November 27, 1979. And reverse discrimination *is* (5) the widely advanced notion, a favorite of officials at the very highest levels of all branches of our contemporary Administration that, somehow, two wrongs make a right; that the children must pay for the sins of their fathers by self-destructive actions; that, in the words of Mr. Chief Justice Burger's dissenting opinion in the pro-reverse discrimination *Franks* decision in 1976, of "robbing Peter to pay Paul."[20]

III.

It is, of course, the latter issue—one I have suggested as my fifth illustration of what "reverse discrimination" *is*—that lies at the heart of the matter. To put it simply, but not oversimplifiedly, it is the desire, the perceived duty, the moral imperative, of compensating for the grievous and shameful history of racial and collateral discrimination in America's past. Discrimination is a fact of history which no fair person can deny, and whose reappearance no decent or fair person would sanction, let alone welcome. America's record since the end of World War II, and especially since the *Brown* decision, is a living testament to the far-reaching, indeed exhilarating, ameliorations that have taken place, and are continuing to take place, on the civil rights front. This is a fact of life amply documented and progressively demonstrated, and I need not do so here.[21] Anyone who denies the very real progress *cum* atonement that has

18. Kreps v. Associated Gen'l Contractors of Cal., 438 U.S. 909 (1978).

19. Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2403 (1979).

20. Franks v. Bowman Transp. Co., 424 U.S. 747, 781 (1976) (Burger, C.J., dissenting).

21. I have tried to document this record in my book H. ABRAHAM, FREEDOM AND THE COURT (3d ed. 1977), now in its third edition, which—ironically in view of my stance on "reverse discrimination"—encountered difficulties in certain parts of the country as recently as a decade or so ago because of its allegedly excessive liberality on the race issue. I presume it all depends, to utilize Al Smith's felicitous phrase, "whose ox is being gored"—and at which moment in history.

taken place, and is continuing to take place, in both the public and the private sector, is either a fool, dishonest, or does so for political purposes—and the largest numbers fall into that latter category. American society today is absolutely committed to the fullest measure of egalitarianism under our Constitution, mandated in our basic document by the "due process" clause of amendments five and fourteen and the latter's "equal protection of the laws" clause as well as in a plethora of legislation. But that Constitution, in the very same amendments, safeguards liberty as well as equality—a somber reminder that rights and privileges are not one-dimensional.

It is on the frontiers of that line between equality and liberty that so much of the "reverse discrimination" controversy, both in its public and private manifestations, has become embattled. It is here that the insistent, often strident, calls for compensatory, preferential, "reverse discrimination" action are issued—and, more often than not, they issue from a frighteningly profound guilt complex, a guilt complex that has become so pervasive as to brush aside as irrelevant on the altar of atonement even constitutional, let alone legal, barriers—witness, for example, the opinions by Justices Brennan and Blackmun in both the *Bakke*[22] and *Weber*[23] rulings. To cite just one or two cases in point: One argument that veritably laces the pro-"reverse discrimination" positions of the briefs[24] in *Bakke* and *Weber,* especially those by the American Civil Liberties Union, the Association of American University Professors, Harvard University, Stanford University, the University of Pennsylvania, Columbia University, and the NAACP, among others, is that the injustices of the past justify, indeed demand, a "temporary use of affirmative action including class-based hiring preferences and admission goals" in favor of racial minorities.[25] In other words, the record of the past creates the catalyst *cum* mandate for the imposition of *quotas* like the 16 places out of 100 admittedly set aside by the

22. 438 U.S. at 402 (separate opinion of Blackmun, J.).

23. 99 S. Ct. at 2721 (Brennan, J. delivered the opinion of the Court); 99 S. Ct. at 2730 (Blackmun, J., concurring).

24. *See, e.g.,* Amicus Curiae brief for The American Association of University Professors, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

25. Amicus Curiae brief of Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, June 7, 1977, p.X, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

Medical School of the University of California at Davis for the "special" admission of members of certain minority groups.[26] What the school did is entirely straightforward and clear: it *did* establish a quota; it *did* practice discrimination; it *did* deny admission to a fully qualified white applicant, Allan Bakke, on racial grounds—which, as Mr. Justice Steven's stern opinion for himself and his colleagues Burger, Stewart, and Rehnquist, makes clear, is clearly forbidden by the plain language of Title VI of the Civil Rights Act of 1964.[27] The University had justified its action on the grounds of redress for past racial discrimination (the University, incidentally, had *never* practiced discrimination—and had never been accused of such until it denied Allan Bakke's admission);[28] on the need for compensatory action; and a commitment to "genuine equal opportunity."[29] In the responsive, apposite words of a widely-distributed statement by the Committee on Academic Nondiscrimination and Integrity:

> Just as no one truly dedicated to civil liberties would contemplate a "temporary" suspension of, say, the right to counsel or the right to a fair trial as a means of dealing with a crime wave, so no one truly dedicated to equality of opportunity should contemplate a "temporary" suspension of equal rights of individuals in order to achieve the goal of greater representation. The temporary all too often becomes the permanent. It is not the ultimate ends we proclaim but the temporary means we use which determine the actual future.[30]

In *Weber,* the central issue was a similar type of quota arrangement, although it governed employment rather than education: the Steelworkers and the Kaiser Corporation, under pressure by government agencies to engage in "affirmative action," had devised a plan that "reserves for black employees 50% of the openings in an in-plant craft training program until the percentage of black craft workers in the plant is commensurate with the percentage of blacks

26. 438 U.S. at 275.
27. 438 U.S. at 408 (Stevens, J., concurring in the judgment in part and dissenting in part).
28. 438 U.S. at 305.
29. Brief for Petitioner at 32, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
30. 45 *Measure* 1 (December 1977).

in the local labor force."[31] Both the U.S. District Court[32] and the U.S. Court of Appeals[33] had ruled that the plan clearly violated Title VII, Sec. 703, of the Civil Rights Act of 1964, which *specifically* outlaws racial discrimination in employment because of "race, color, religion, sex, or national origin."[34] But while admitting the presence of the plain statutory proscription, Mr. Justice Brennan in effect sanctioned its violation on the basis of the *spirit* of the law rather than its letter.[35]

A related, although somewhat different justification advanced on the altar of redressing past wrongs by temporarily—or perhaps not so temporarily?—winking at legal and constitutional barriers, one I prefer to call the "I am not really pregnant, just a little bit," approach to the problem, is illustrated by Ronald Dworkin, Professor of Jurisprudence at Oxford University, in his following 1977 defense of the use of racial criteria in connection with the well-known 1974 Washington Law School "reverse discrimination" case of *De Funis v. Odegaard*:[36]

> Racial criteria are not necessarily the right standards for deciding which applicants should be accepted by law schools for example. But neither are intellectual criteria, nor indeed, any other set of criteria. The fairness—and constitutionality—of any admissions program must be tested in the same way. It is justified if it serves a proper policy that respects the right of all members of the community to be treated as equals, but not otherwise. . . . We must take care not to use the Equal Protection of the Laws Clause of the Fourteenth Amendment to cheat ourselves of equality.[37]

Which, of course, is exactly what he in effect counsels here—in addition to the inequality of "reverse discrimination." In other words, the desired end justifies the means—no matter what the Constitution may command. We have here another patent illustra-

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31. 99 S. Ct. at 2724.
32. 415 F. Supp. 761 (E. D. La. 1976).
33. 563 F.2d 216 (5th Cir. 1977).
34. 42 U.S.C. §§ 2000e-2(a), 2000e-2(d), and 2000e-2(j) (1976).
35. 99 S. Ct. at 2726-27.
36. 416 U.S. 312 (1974).
37. Dworkin, *Defunis v. Sweatt*, in EQUALITY AND PREFERENTIAL TREATMENT (M. Cohen, T. Nagel, and T. Scanlon eds. 1977).

tion of the guilt complex syndrome which, not content with equal justice under law and equality of opportunity, insists upon, in Harvard Law Professor Raoul Berger's characterization, the attainment of "justice cost what it may."[38] Yet it represents the gravamen of the concurring opinions in *Bakke* by Justices Brennan, Marshall, and Blackmun; the controlling holding in the *Weber* case via the pen of Mr. Justice Brennan; and that of the concurring opinion therein by his colleague Blackmun.

Along with a good many others who consider themselves *bona fide* civil libertarians and are certifiable champions of civil rights, who decades ago fought the good fight for equal justice and nondiscrimination—when fighting it was far more fraught with professional and personal risks than it is now—I confess, however, that I do not have a guilt complex on that issue. Myself a sometime victim of discrimination, of prejudice, and of the *numerus clausus, i.e.,* of quotas, I know that two wrongs do not one right make; that any so-called "temporary suspension" of constitutional rights is a cancer upon constitutionalism; that there is no such thing as being a little bit pregnant. Because of our religious persuasion my parental family and I were exiled from, and a number of members of our family were exterminated by, a land where our ancestors had lived for 500 years. As relatively recently as 1952, I was told by an administrator at a major northern university—one of the first proudly to carry the *anti*-Allan Bakke banner twenty-five years later—that I could not be promoted then because "we have already promoted one Jew this year." To which he added, and he was wholly sincere, "no personal offense meant." Happily, those times are gone—and I, for one, will not support their return on the altar of siren-like calls for atonement for past wrongs, etched in socio-constitutional rationalizations and manifestations of preferential treatment, compensatory standards, and quotas that are based on criteria and considerations other than those of fundamental merit, of ability, of equality of opportunity, and of equality before the law.

IV.

There is one other matter *cum* issue that must be addressed as a

38. "The Imperial Court," *The New York Times Magazine,* October 9, 1977, p.115.

complement to my exhortation of the legal process, the necessity of playing the proverbial judicio-governmental societal game according to its rules. That, of course, is the role of the judiciary in interpreting the Constitution and the laws passed (and executive actions taken) under its constellation. The line between judicial "judging" and "lawmaking" is of course an extremely delicate and vexatious one: what represents "judicial activism" to some represents "judicial restraint" to others, and vice versa. All too often an observer's judgments correspond to the answer to the question "whose ox is gored?" Jurists are human, as we all are, yet they, unlike laymen, are presumed to be professionally qualified to render objective judgment on the meaning, range, and extent of constitutionally and statutorily sanctioned or interdicted governmental authority and exercise of power. To be sure, in Mr. Justice Cardozo's memorable phrase from his seminal *The Nature of the Judicial Process,* "it is not easy to stand aloof" when one deals with so controversial a policy matter as the resort to discrimination as a cure for discrimination, for, as that great jurist and sensitive human being put it so poignantly, "[t]he great tides and currents which engulf the rest of men, do not . . . pass [even] the judges idly by."[39] And they assuredly have not done so—notwithstanding what would appear to be some crystal clear statutory, and some relatively clear constitutional, commands. *Au contraire,* these commands have served jurists as well as legislators and mere citizens as justifications and/or rationalizations along the pathways of coming to grips with the issue in settling fashion in either political, or socio-economic, or philosophical, or statutory, or, in the final analysis, judicially constructed terms.

But there are demonstrable limits to subjectivity and result orientation, even when these are viewed against the notion of an obligation to heed, as Mr. Justice Holmes put it, "the felt necessities of the time."[40] One of these limits is the ascertainable intent of lawmakers in enacting legislation. *De minimis,* courts have an absolute basic obligation to examine *statutory* language and *legislative intent* as evidenced by the printed record—and the "reverse discrimination" field is no exception. Admittedly, the *constitutional*

39. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS at 168 (1921).
40. O. HOLMES, THE COMMON LAW at 1 (1881).

ground is considerably less clear: for the very verbiage and concept of "equal protection" (and, for that matter, "due process of law") defy finite or categorical definition—regrettably all-too-often depending upon the eye of the beholder or the subject and object of the aforementioned ox-goring. Yet even on constitutional *qua* constitutional grounds it is difficult to deny the verity of Mr. Justice Powell's point in his majority opinion in the 1978 *Bakke* case when he noted that: "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."[41]

Be that as it may, one who attempts to be a dispassionate commentator need not reach, as in effect the Court customarily tried very hard not to reach, the constitutional issue (here the fourteenth amendment's equal protection of the laws clause). For if words mean anything, the basic statute involved, namely the 1964 Civil Rights Act's Title VII,[42] would indeed seem to be crystal clear in *proscribing* the kind of racial quotas that the United States District Court[43] and the United States Circuit Court[44] found to have violated Brian Weber's rights, for example, but which, on appeal, the highest court of the land *upheld* in its 5 to 2 decision.[45] The controlling opinion, written by Mr. Justice Brennan, acknowledged the statutory, the linguistic command, but he and his four supporters found approbative warrant in the law's "spirit" rather than in its letter.[46] For the law's section 703(a) makes it unlawful for an employer to classify his employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[47] And, perhaps even more tellingly, section 703(j) provides that the Act's language is not to be interpreted "to require any employer . . . to grant preferential treatment to any individual or to any group because of

41. 438 U.S. at 289-90.
42. 42 U.S.C. § 2000e *et. seq.* (1976).
43. 415 F. Supp. 761.
44. 563 F.2d 216.
45. 99 S. Ct. 2721.
46. *Id.* at 2726-27.
47. 42 U.S.C. § 2000e-2(a)(2) (1976).

the race . . . of such individual or group" to correct a racial imbalance in the employer's work force.[48] Further to buttress historical and factual documentation on statutory grounds that the authors of the Civil Rights Act were demonstrably opposed to racial quotas, one need only take a glance at the voluminous, indeed repeated, documentation to that extent in the *Congressional Record* during the debates that led to the passage of the 1964 Civil Rights Act. Thus, the latter's successful Senate floor leader, Senator Hubert Humphrey (D.-Minn.), in responding to concerns voiced by doubting colleagues, vigorously and consistently gave assurance that no racial quotas or racial work force statistics would be employable under the law. In one exchange with his colleague Willis Robertson (D.-Va.), he made the following offer: "If the Senator can find in Title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color . . . I will start eating the pages one after another, because it is not in there."[49]

It is difficult, indeed, it is in fact impossible, to argue with the facts of the statute's language or with congressional intent. Mr. Justice Brennan's opinion attempted to vitiate those facts by (1) seizing upon the allegation that the joint Steelworkers-Kaiser Corporation agreement to hire one black for every white trainee was not *required* but was *voluntary;*[50] and (2) that, in any event, the program would expire upon reaching statistical workforce-by-race availability-in-the-community parity.[51] One need not embrace the angry and sarcastic language of Mr. Justice Rehnquist's dissenting opinion to support his documented contentions that, as to (1) anyone with any knowledge of the course of affirmative action programs knows that they are patently Government-*required;*[52] and that, as to (2), subsection (j) of Section 703—quoted above—(a) forbids such a program and (b) the notion that it would prove to be "temporary" is either naive or "Houdini-like."[53] Whatever one's personal views on the underlying issue, whatever one's sympathies, the Rehnquist

48. 42 U.S.C. § 2000e-2(j) (1976).
49. 110 CONG. REC. 7420 (1964).
50. 99 S. Ct. at 2726.
51. *Id.* at 2730.
52. 99 S. Ct. at 2736 (Rehnquist, J., dissenting).
53. *Id.* at 2749.

dissent, as Professor Philip B. Kurland of the University of Chicago School of Law put it, is simply unanswerable in terms of statutory construction and congressional intent.[54]

To a very considerable degree it was not the Rehnquist dissent, but that by Mr. Chief Justice Burger, which comes to the heart of the matter if one wishes to abide by the imperatives of the governmental framework under which we live. For he points to the salient fact that:

> The Court reaches a result I would be inclined to vote for were I a member of Congress considering a proposed amendment of Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers. Under the guise of statutory "construction," the Court effectively rewrites Title VII to achieve what it regards as a desirable result. It "amends" the statute to do precisely what both its sponsors and its opponents agreed the statute was *not* intended to do.[55]

There *is no* response to the Chief Justice's admonition—for it assesses accurately the obligations accruing under our system's separation of powers and the attendant roles of the three branches. In brief, and calling a spade a spade, the Court *legislated*—a function in this instance demonstrably reserved to the legislature (Congress). The elusive line between "judging" and "legislating" is, to repeat, of course a monumentally difficult one to draw in a great many instances, and it represents *the* basic issue of controversy in the exercise of judicial power. But there is *no* controversy in the present instance: Congress spoke and wrote with uncharacteristic clarity! Nonetheless, a majority of five Supreme Court Justices, given the nature of the public policy issue at hand, would neither listen nor read accurately.

V.

A concluding word on the desirability of "reverse discrimination" *per se*. I hope I have demonstrated what I regard as its tenets; what

54. Letter to author, July 7, 1979.

55. 99 S. Ct. at 2734 (Burger, C.J., dissenting) (emphasis in original).

it *is,* and what it is *not.* Whether or not one agrees with that position, and regardless of how one perceives or reads the inherent statutory and constitutional issues, what of the merits of the proposition of racial, or sexual, or religious, or nationality quotas, or by whatever other noun they may be perfumed? It is not easy to do for me—as my students and colleagues would testify—but I will endeavor to be brief: I shall call as my star witness upon someone whose credentials on the libertarian front are indisputably impeccable, Mr. Justice William O. Douglas. In his dissenting opinion in *De Funis v. Odegaard,* after finding that Marco De Funis had been rejected by the University of Washington School of Law "solely on account of his race,"[56] the justice lectured at length on that classification, styling it at the outset as introducing "a capricious and irrelevant factor working an invidious discrimination,"[57] and insisting that the Constitution and the laws of our land demand that each application for admission must be considered in a "racially neutral way,"[58] a phrase he italicized and one, incidentally, quoted with approval by Mr. Justice Powell in *Bakke.*[59] "Minorities in our midst who are to serve actively in our public affairs," he went on, "should be chosen on talent and character alone, not on cultural orientation or leanings."[60] Warmly he cautioned that

> [t]here is no constitutional right for any race to be preferred . . . . A De Funis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.[61]
>
> . . . So far as race is concerned, any state sponsored preference of one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.[62]

Mr. Justice Douglas concluded on a note that, for me, hits the

56. 416 U.S. at 333 (Douglas, J., dissenting).
57. *Id.*
58. *Id.* at 334.
59. 438 U.S. at 298.
60. 416 U.S. at 334.
61. *Id.* at 336-37.
62. *Id.* at 343-44.

essence of the entire issue: "The Equal Protection Clause," he insisted,

> commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for the Irish. It should be to produce good lawyers for Americans. . . .[63]

That, I submit in all humility, is the *sine qua non* of the matter. It is my fervent hope, though far from a confident expectation—especially given the unsatisfactory, multi-faceted, evasion-inviting response given by the Court in *Bakke*—that we will still, at this late hour, resolve to heed the now retired Justice's admonition and substitute for "lawyers" whatever educational, occupational, or professional noun may be appropriate in given circumstances in the justly egalitarian strivings of all Americans, regardless of race, sex, creed, age, nationality, or religion, for a dignified, happy, prosperous, and free life, blessed by a resolute commitment to, and acquiescence in, equal justice under law—which is as the cement of society.

63. *Id.* at 342.

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