

Can Affirmative Action Survive the Struggle?

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For the moment, there is a lull in the debate over the Department of Education's recent announcement that federally funded colleges are barred from awarding scholarships on the basis of race. Amid much confusion, the Bush administration decided that the prohibition- a change in interpretation of Title VI of the Civil Rights Act of 1964- will be implemented after a four-year transition period. The only exception to the new rule is that colleges will be permitted to award race-specific scholarships from private funds donated specifically for that purpose.

The four-year grace period means that the real decision-making on this highly controversial issue has simply been deferred.

Regardless of what the politicians finally decide to do, the Department of Education's action has drawn attention to the substantial possibilities of Title VI as a vehicle for whites to challenge race-conscious affirmative action. Title VI prohibits racial and ethnic discrimination by any entity that receives a federal grant.

There may well be a majority on the Supreme Court that would like to hold that Title VI bars all racial preferences by federally funded organizations. This was the view expressed by four justices in *University of California Regents v.*

Bakke, 438 U.S. 265 (1978). Yet a majority of the *Bakke* Court found that Title VI's restrictions on racial discrimination are coextensive with the restrictions imposed by the 14th Amendment- and that those restrictions are not absolute.

If Title VI ultimately plays a significant role in striking down preferential programs for blacks in colleges and universities, the irony will be that under the Court's 1984 ruling in *Grove City College v. Bell*, 104 U.S. 1211, Title VI could only have had limited impact in this area. *Grove City* held that the prohibition, under a different statute, of sex discrimination in a federally financed educational "program or activity" applied only to programs or activities that were themselves receiving federal funds- a ruling that presumably would apply to a similar passage in Title VI.

But Congress overruled *Grove City* in the Civil Rights Restoration Act of 1987, and now Title VI applies to *all* programs and activities of federally funded school. In consequence, efforts to use Title VI to limit affirmative action could have far-reaching consequences.

This would not be the only case where Congress' desire to remedy the Court's narrow interpretation of a civil-rights statute might lead to unintended

restrictions on affirmative action. The vetoed Civil Rights Act of 1990 (which has already been reintroduced, in relevant part, in the House of Representatives) is a more potent example of the phenomenon- and one with implications that could render debate about Title VI largely academic.

Much attention was paid last year to claims that the new Civil Rights Act, also known as the Kennedy/Hawkins bill, would cause the widespread use of employment quotas. But there was probably just as much reason to believe that the law would have led to the *prohibition* of racial quotas, in education as well as in employment and other contractual relationships.

In a piece that appeared here on Nov. 20, 1989 ("Time Running Out on Minority Preferences in Private Workplace," Page 21), I argued that there was a good chance (even before the retirement of Justice William Brennan Jr.) that, given the opportunity, the Supreme Court would hold that §1 of the Civil Rights Act of 1866 (42 U.S.C. §1981) prohibits all race-conscious affirmative action in contractual relationships.

The argument ran like this. In its 1976 decision in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, the Supreme Court held that both Title VII of the 1964 Civil Rights Act (which bars racial discrimination in the making of contracts) and §1981 (which bars racial discrimination in the making of contracts) prohibit discrimination against white persons. In 1979, the Court qualified that holding as to Title VII in *United Steelworkers v. Weber*, 443 U.S. 193, ruling that Title VII does not prohibit racial preferences in the context of a reasonable affirmative-action program. The Court reaffirmed that

holding as recently as 1987 in *Johnson v. Transportation Agency, Santa Clara County* 480 U.S. 616. But the Court has never decided whether §1981, as opposed to Title VII, prohibits race-conscious affirmative action.

Even if a majority of the Court might like to hold that Title VII prohibits affirmative action in employment, the *Weber* and *Johnson* precedents may deter such a ruling in the near future. No similar precedent impedes a decision that §1981 bars affirmative action in employment (as well as in education and other relationships covered by that statute). And numerous suits challenging affirmative action programs, including four against various government entities in San Francisco, raise claims under §1981.

Backfiring on Liberals

Congress had the opportunity in Kennedy/Hawkins to address whether §1981 prohibits affirmative action. But affirmative action is a controversial enough subject that, if either its proponents or opponents recognized §1981's bearing on the matter, no one was willing to address that question directly.

The legislation Congress attempted to enact did, however, contain provisions that, in two ways, would significantly have increased the likelihood that the Supreme Court would hold §1981 to bar all racial preferences.

First, in the 1989 ruling in *Patterson v. McLean Credit Union*, 109 S. Cr. 2363, which held that §1981 does not prohibit racial harassment in employment, the Court also called into question whether §1981 covers any discrimination occurring after a person is hired- including discrimination in

promotions. Section 12 of Kennedy/Hawkins, by specifically applying §1981 to promotions and other post-hire areas of discrimination, would have greatly increased the frequency of reverse-discrimination suits brought under §1981, since such suits far more often involve promotions than they involve hiring decisions.

The second way in which Kennedy/Hawkins would have increased the likelihood of the Court's holding that §1981 bars race-conscious affirmative action is more complicated. One reason for expecting the Court to hold that §1981 prohibits affirmative action in contractual relationships- even though Title VII does not prohibit it in employment- is that the Court traditionally has interpreted the two statutes quite independently.

For example, in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), the Court rejected arguments that it should construe §1981 limitations periods to avoid interfering with Title VII's preference for voluntary resolution of employment discrimination claims. In contrast, in *Patterson's* holding that §1981 does not cover racial harassment, the Court relied in part on the argument that a broader interpretation of §1981 might cause that law to interfere with Title VII's preference for voluntary resolution of claims- precisely the argument it had rejected in *Johnson*.

The *Patterson* reasoning might be criticized because it would seem to deny a §1981 remedy for racial harassment in *education* on the ground that Title VII provides a remedy for racial harassment in *employment*. But by departing from the earlier line of authority interpreting the two statutes independently, *Patterson* could prove useful to proponents of affirmative action when

the Court considers whether §1981 bars racial preferences, even in the context of an affirmative-action program that would be permissible under Title VII.

Another Blunder?

Kennedy/Hawkins, however, also responded to the *Patterson* Court's reliance on Title VII to limit the scope of §1981. Section 11 of the final version of the bill contained a subsection styled "Non-limitation," which provided that one civil-rights law shall not be construed "to repeal or amend by implication" another civil-rights law. The Senate committee report made clear that this provision was intended to prevent one civil-rights statute from being used to narrow the scope of another civil-rights statute.

Were this section to become law, when the Court reached the issue of whether §1981 prohibits race-conscious affirmative action in contractual relationships, it would have little difficulty overcoming arguments that it should reconcile §1981 with Title VII just as it did in *Patterson*. The Court would simply state that Congress had mandated that Title VII not be read to limit the protections of §1981 and that those protections apply to whites as well as racial minorities.

If the 102nd Congress wants to avoid virtually assuring that the Court reads §1981 to bar race-conscious affirmative action, it should eliminate this language from the civil-rights bill it will attempt to enact this term. Doing so will diminish- but not eliminate- the chances of such an outcome. Absent more definitive action on the part of Congress, a substantial likelihood will remain that the Court will read §1981 in the same manner a majority of the justices would

like to read Title VII and Title VI-
though with far greater consequences.

There is some chance that the Court will touch on the matter before Congress is able to do anything. The Court is now considering a petition for certiorari in *Hicks v. Brown Group*, 902 F. 2d 630 (8th Cir. 1990). In *Hicks*, a case brought under §1981 by a white man claiming that he was fired because of his race, the appeals court held that, despite *Patterson*, racially discriminatory terminations are covered by §1981.

On Dec. 10, 1990, the Supreme Court requested the views of the Department of Justice on §1981's application to terminations. The case does not appear to contain an affirmative-action defense for the employer, but the Court has been ready enough lately to offer ominous dicta in controversial civil-rights cases. The justices just might use this opportunity to start to answer the question about §1981 and affirmative action that they have left open for 15 years.