

Striking Down Set-Aside System, Court Tackles a Complex Issue

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The U.S. Supreme Court, in a Jan. 23, 1989, decision- *City of Richmond v. Croson*- struck down Richmond, Va.'s minority set-aside program as violative of the Equal Protection Clause of the 14th Amendment.¹

Early predictions of the ultimate impact of the decision on similar programs around the nation have varied.

But, whatever the impact, the decision is likely to stand as a landmark, if solely because it represents the court's first effort to confront one of the most complex and sensitive affirmative action issues- the legality of racial preferences when minorities have become majorities.

To place the matter in perspective, it is necessary to look back to the court's 1978 ruling in the *Bakke*² case. For many years prior, racial classifications had been uniformly reviewed by the courts under the "strict scrutiny" standard, which almost invariably resulted in a finding that the classification was unconstitutional.

In one of the several opinions in the *Bakke* case, however, four justices expressed the view that "benign" or "remedial" preferences should be subjected to a slightly more relaxed level

of scrutiny than measures designed to disadvantage racial minorities.³

The justices relied on a line of cases that found the origin of the strict scrutiny standard in a concern that the presumption of the legitimacy of legislative processes might not be justified in cases in which legislation was directed against "discrete and insular minorities."⁴ The justices believed that concern would not apply in cases in which the legislation was enacted for the benefit of a minority.

The "modified strict scrutiny" standard urged by these justices never commanded a majority of the court. But the sentiments expressed by its adherents undoubtedly influenced those other justices who, while nominally applying more stringent standards, helped to form the majorities upholding racial preferences in employment and government contracting.

And even ardent opponents of such measures probably would acknowledge that when a majority enacts legislation to benefit an historically disadvantaged minority, it is not exactly the same thing

¹ 57 U.S.L.W. 4132.

² *Regents of the University of California v. Bakke*, 438 U.S. 265.

³ 438 U.S. 355-379 (Brennan, White, Marshall, and White, JJ., concurring in the judgment in part dissenting in part).

⁴ The phrase is from *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

as when a majority enacts legislation directed against that minority.

But as the courts labored to develop a coherent jurisprudence of remedial racial preference, a troubling question lay dormant: Should it make a difference that the preference for an historically disadvantaged group is imposed by a jurisdiction where that group is actually a majority of the population? It was a question of growing importance.

By 1980, 25 cities with populations over 200,000 had non-Anglo majorities, including 5 of the nation's 10 largest cities, suggesting that much of the impact of locally-imposed affirmative action in this country occurs in jurisdictions where whites no longer control the political processes. Yet, in treating the legality of an affirmative action program adopted by such a jurisdiction, the courts would not directly address the significance of the fact that the benefited group was the majority in the jurisdiction.

Indeed, in upholding voluntary affirmative action programs for the Detroit Police Department, for example, the 6th Circuit specifically relied on the modified strict-scrutiny standard articulated by the four justices in *Bakke*.⁵ The court did not even suggest that the fact that the city was predominantly black might raise a question as to the applicability of that standard.

The issue could not be ignored forever. The *Croson* case considered the constitutionality of a minority set-aside program that had been imposed by a city where in 1980 slightly more than 50 percent of the population was black.

⁵ *Detroit Police Officers Association v. Young*, 608 F.2d 671, 194 (1979), cert. denied, 452 U.S. 938 (1981); *Bratton v. City of Detroit*, 704 F.2d 878, 885 (1983), cert. denied, 464 U.S. 1040 (1984).

The program, which required that contractors on city construction projects subcontract 30 percent of the dollar amount of the work to minority-owned businesses, was enacted in 1983 by a city council on which blacks held a 5-4 majority. The vote approving the programs was 6-2-1, with all five blacks voting in favor and three of four whites either opposing the program or abstaining.

Although noting the existence of a black majority in Richmond, the 4th Circuit opinion striking down the program had not specifically relied on that fact.⁶ In the Supreme Court, the contractor challenging the set-aside program did not make an issue of Richmond's black majority. In oral argument last October counsel for the contractor acknowledged that the decision not to raise that issue had been reached after some deliberation.

Certain members of the court proved nevertheless to be acutely interested in the matter. Chief Justice William H. Rehnquist was questioning the contractor's counsel whether the fact that the set-aside was imposed by a city would distinguish the case from the 1980 decision in *Fullilove v. Klutznick* (in which the court upheld the constitutionality of set-asides imposed by Congress).⁷ Justice Antonin Scalia interrupted to ask if the more significant question was not whether the fact that a black majority had imposed the measure should make a difference. The chief justice later returned to the issue when questioning Richmond's counsel.

Although eight of the justices acknowledged that in certain cases, cities and states could impose race-conscious

⁶ *Croson v. City of Richmond*, 822 F.2d 1355, 1359 (1987).

⁷ 448 U.S. 448.

measures to remedy past discrimination, the court struck down Richmond's set-aside program for failure to satisfy the strict scrutiny standard that a majority of the court agreed should apply to racial preferences in any context.

In announcing the decision, Justice Sandra Day O'Connor devoted two paragraphs in Sec. III-A of her opinion to explaining why arguments for a diminished level of scrutiny for "benign" racial classifications would, in any event, not apply in light of Richmond's black majority.⁸ In Sec. V- in an evident departure from her previous views on the need for findings of past discrimination⁹- she stressed that unless the body enacting a racial preference makes proper findings both as to the scope of past discrimination and the extent of the necessary remedy, the measure may merely be a product of "racial politics."¹⁰ The chief justice and Justices Byron R. White and Anthony M. Kennedy joined these portions of her opinion.

In Sec. II- distinguishing the case from *Fullilove*- Justice O'Connor reasoned that the same deference accorded by the judiciary to race-conscious enactments by Congress was not warranted in the case of such enactments at the state or local level, because the 14th Amendment had been enacted as a check on race-based legislation by such entities.¹¹ Though the justice did not reference Richmond's black majority in this context, the possibility of such majorities seems an implicit element of her reasoning. The

chief justice and Justice White joined this part of her opinion, while Justice Kennedy specifically disagreed with it.¹²

Separate concurrences of Justices John Paul Stevens¹³ and Scalia¹⁴ reflected similar concerns about preferences enacted for the benefit of a racial group that is also the dominant political group.

Thus, the existence of a black majority in Richmond appears to have had an important influence on the approaches taken in *Croson*. But the court's several opinions offered little guidance respecting what- if any- significance the lower courts should accord the fact that a racial preference benefits the majority in evaluating the legality of such a preference in a particular factual setting. There is no obvious answer.

In evaluating the legality of race-conscious remedies, courts could give that factor such weight that few measures favoring local racial majorities would survive. Ironically, this might result in blacks and other national minorities being worse off in some jurisdictions in consequence of finally acquiring political power.

But, in order to give weight to the majority status of the benefited group, it is necessary first to establish standards for identifying the majority status that would invoke that standard of review.

This seems hideously complex, if not impossible. What of cases in which blacks of Hispanics comprise majorities of the populations but have little political power, or cases in which they are minorities in the population but are able to control the political process? What if there is a black mayor but a

⁸ 57 U.S.L.W. 4139

⁹ See *Wygant v. Jackson Board of Education*, 476 U.S. 267, 289-93 (O'Connor, J., concurring (1986)).

¹⁰ 57 U.S.L.W. at 4143.

¹¹ Id. at 4137-4138.

¹² Id. at 4145.

¹³ Id. at 4145n.9.

¹⁴ Id. at 4147.

predominantly white city council, or vice versa? What of cities where the majority is made up of blacks and Hispanics, or blacks, Hispanics and Asians, with each group having rather different interests? And, of course, electoral majorities as well as majorities on governing bodies may shift from year to year.

These difficulties, as well as an understandable reluctance to have courts constantly making an issue of the racial motivations of groups who continue to, themselves, suffer from centuries of prejudice, could lead courts toward a prohibitively restrictive approach to all locally imposed preferential measures. “Modified strict scrutiny,” in effect, would be supplanted by “enhanced strict scrutiny.” Thus, because blacks have become politically dominant in some jurisdictions, they might find themselves worse off not only in those jurisdictions but in other jurisdictions as well.

So long as the court accepts the permissibility of locally imposed, race-conscious measures to correct past discrimination, however, there would seem to be a more sensible approach to dealing with the varied problems raised by the existence of minority-majorities. Courts could invariably—that is, regardless of whether a majority or minority is benefited—carry out their own detailed inquiries into the appropriateness of challenged measures.

The prevailing articulated standard requires that a jurisdiction imposing a racial preference make findings that “define both the scope of [past discrimination] and the extent of the remedy necessary to cure its effect,”¹⁵ and that there be “a strong basis in evidence”¹⁶ for such findings.

¹⁵ Id. at 4143.

¹⁶ Id., quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986).

Although this standard was intended to impose substantial obligations on governmental bodies enacting remedial preferences, it seems nevertheless to permit courts to accord a degree of deference to the judgment of the bodies imposing the measures, as long as they have built a sound record plausibly supporting the remedial nature of the measure.

There is reason to question whether such deference can be justified in this context. The process of identifying past discrimination and devising an appropriate remedy is one of enormous subjectivity. Consider, for example, the difficulty of determining whether minorities have been discriminatorily excluded from government contracting, an area in which there is little case law to serve as a guide.

Even Justice O’Connor’s suggestion, that a reasonable approach would be to compare the minority representation among qualified contractors with the proportion of contracts received by minorities,¹⁷ fails to consider the manifold differences in capitalization that would render such an inquiry largely meaningless.

Although the legal framework for identifying employment discrimination is seemingly better developed, even in fully litigated cases, the determination of whether discrimination occurred is frequently but a matter of opinion. Determining whether there has been some past discrimination in recent decades or where it is not obvious that effects of that discrimination exist today.

But whether the discrimination has been severe enough in recent times to warrant preferential measures to correct its effects is a far more complex issue. Its answers are more likely to be dictated

¹⁷ 57 U.S.L.W. at 4141, 4143.

by philosophical predilections than anything remotely quantifiable.

An even more difficult issue- and one ultimately amenable only to immensely subjective resolution- concerns the appropriate scope of the remedy. The preferential measures that have been seen in the courts quite generally have not been intended merely to ensure present non-discrimination; they have also sought, in some way, to remedy past discrimination as well.

For example, assume past discriminatory hiring caused blacks to make up only 10 percent of a police force although they were 30 percent of the relevant labor market. A black hiring rate substantially above 30 percent- say, 50 percent or 60 percent- might be established in order to quicken the pace at which blacks will come to make up 30 percent of the police force. Yet, there are no recognized criteria for determining what might be a reasonable remedy in a particular setting.

These considerations suggest that, if preferential remedies imposed at the local level are to continue, the court's role in reviewing those measures must involve more than deferring to facially sound judgments of fact-finding bodies. In fact, that review must approach a de novo determination of whether the remedy was appropriate in the circumstances.

This is not to say that courts have typically shown themselves to be more adept at making these judgments than local administrative bodies. Rather, the point is that, when subjectivity is involved, the impartiality of the governmental body exercising it is critical. Unless we distinguish between local governmental authorities that are and are not impartial- and probably we neither can nor want to- it is better that

the subjectivity be exercised by the courts.

Whether this is feasible remains to be seen. Much remains to be seen as courts explore the impact of the *Croson* ruling on the hundreds of affirmative action measures voluntarily imposed by cities and states throughout the country.

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