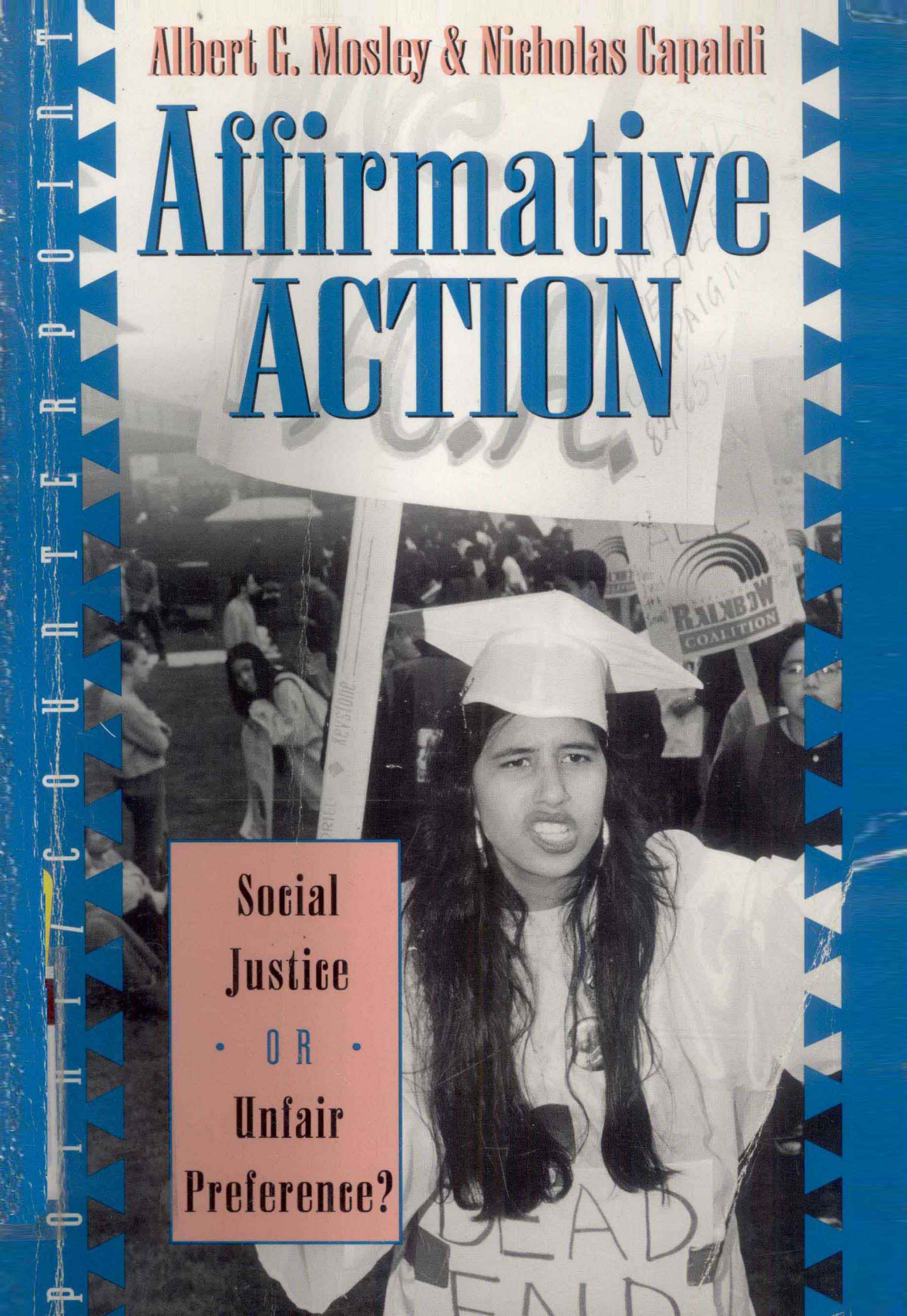
Albert G. Mosley & Nicholas Capaldi

Affirmative ACTION



Social Justice • OR • Unfair Preference?

POLITY CORPORATE

AFFIRMATIVE ACTION

Social Justice or Unfair Preference?

Albert G. Mosley
and
Nicholas Capaldi

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Preface

Affirmative action has been a controversial policy, especially within the academic world, since its inception about three decades ago. Recently it has become a central issue in the presidential campaign and in various states as well as numerous court cases. Our joint aim has been to convey some sense of the history and meaning of this controversy. The issues we discuss lie at the heart of any conception of what the American experience has meant and can continue to mean. We believe that students, teachers, those connected with the law and public policy, and the intelligent lay public will all benefit from this discussion.

As befits the nature of the Point/Counterpoint series, we have tried to illuminate the issues by taking opposing sides and accentuating our differences. At the same time our approach is philosophical in attempting to identify and articulate the fundamental presuppositions of the debate and the arguments that can be offered in support of and opposition to those presuppositions. We begin with independently written essays and follow this with rebuttals of each other's position. We did not negotiate over what was or was not a fair and reasonable interpretation of our work, nor did we attempt to alter one another's response. We pulled no punches, for it is our firm joint conviction that the truth will best emerge in the mind of the reader who is presented with tough work through the arguments. The commitment on the part of both authors is pedagogical not antagonistic, that is we hope to illuminate the issues not win the argument.

We jointly thank James Sterba and Rosemarie Tong, the editors of the series, for inviting us to participate and for aiding us in the exchange of views. We also thank Jennifer Ruark, Acquisitions Editor for Rowman & Littlefield, for her orchestration of the final product. Professor Capaldi

adds additional thanks to his wife Nadia for her patience in illuminating the law, to William Allen for calling attention to the wider public policy dimensions of the debate, to Steven Chesser his research assistant, and to the staff of the Intercollegiate Studies Institute for calling attention to material that might otherwise have been missed. Professor Mosley would also like to thank his wife Kathleen for her support and many references, his research assistant Samuel Hunter, Jr. for exceptional service and discussions, the Ohio University Research Council for research funding, my colleagues James Petrik, Richard Manning, Bob Trevis, Peter Kousaleos, and Bill Smith for reading and commenting on earlier drafts, and a very special thanks to my department chair Donald Borchert for his efforts and support.

The strengths of these essays owe much to these people; the weaknesses, no doubt, to our reluctance always to follow their advice. The authors accept full responsibility for the views expressed.

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Albert G. Mosley

Legislative and Judicial Background

In 1941, Franklin Roosevelt issued Executive Order 8802 banning discrimination in employment by the federal government and defense contractors. Subsequently, many bills were introduced in Congress mandating equal employment opportunity but none were passed until the Civil Rights Act of 1964. The penalty for discrimination in Executive Order 8802 and the bills subsequently proposed was that the specific victim of discrimination be "made whole," that is, put in the position he or she would have held were it not for the discriminatory act, including damages for lost pay and legal expenses.

The contemporary debate concerning affirmative action can be traced to the landmark decision of *Brown v. Board of Education* (1954), whereby local, state, and federal ordinances enforcing segregation by race were ruled unconstitutional. In subsequent opinions, the Court ruled that state-mandated segregation in libraries, swimming pools, and other publicly funded facilities was also unconstitutional. In *Swann v. Charlotte-Mecklenburg* (1971), the Court declared that "in order to prepare students to live in a pluralistic society" school authorities might implement their desegregation order by deciding that "each school should have a prescribed ratio of Negro to White students reflecting the proportion for the district as a whole."[1] The ratio was not to be an inflexible one, but should reflect local variations in the ratio of Whites to Blacks. But any predominantly one-race school in a district with a mixed population and

a history of segregation was subject to "close scrutiny." This requirement was attacked by conservatives as imposing a "racial quota," a charge that reverberates in the contemporary debate concerning affirmative action.

With the Montgomery bus boycotts of the mid-1950s, Blacks initiated an era of nonviolent direct action to publicly protest unjust laws and practices that supported racial discrimination. The graphic portrayals of repression and violence produced by the civil rights movement precipitated a national revulsion against the unequal treatment of African Americans. Blacks demanded their constitutional right to participate in the political process and share equal access to public accommodations, government-supported programs, and employment opportunities. But as John F. Kennedy stated in an address to Congress: "There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job."[2]

Kennedy stressed that the issue was not merely eliminating discrimination, but eliminating as well the oppressive economic and social burdens imposed on Blacks by racial discrimination.[3] To this end, he advocated a weak form of affirmative action, involving eliminating discrimination and expanding educational and employment opportunities (including apprenticeships and on-the-job training). The liberal vision was that, given such opportunities, Blacks would move up the economic ladder to a degree relative to their own merit. Thus, a principal aim of the Civil Rights Act of 1964 was to effect a redistribution of social, political, and economic benefits and to provide legal remedies for the denial of individual rights.

The Civil Rights Act of 1964

The first use of the phrase "affirmative action" is found in Executive Order 10952, issued by President John F. Kennedy in 1961. This order established the Equal Employment Opportunity Commission (EEOC) and directed that contractors on projects funded, in whole or in part, with federal funds "take affirmative action to ensure that applicants are employed, and employees are treated during their employment, without regard to the race, creed, color, or national origin."

As a result of continuing public outrage at the level of violence and animosity shown toward Blacks, a stronger version of the Civil Rights

Bill was presented to the Congress than Kennedy had originally recommended. Advocates pointed out that Blacks suffered an unemployment rate that was twice that of Whites and that Black employment was concentrated in semiskilled and unskilled jobs. They emphasized that national prosperity would be improved by eliminating discrimination and integrating Black talent into its skilled and professional workforce.[4]

Fewer Blacks were employed in professional positions than had the requisite skills, and those Blacks who did occupy positions commensurate with their skill level had half the lifetime earnings of Whites. Such facts were introduced during legislative hearings to show the need to more fully utilize and reward qualified Blacks throughout the labor force, and not merely in the unskilled and semiskilled sectors.

While the bill was being debated, there was intense pressure from civil rights supporters that a stronger version of the bill be passed, which would have empowered the Department of Justice to pursue systemic as well as individual cases of discrimination. Advocates of a stronger bill stressed the grossly unequal distribution of economic benefits (double unemployment among Blacks, average lifetime income of Black college graduates less than that of eighth-grade White dropouts), but they did not advocate proportional representation or racial balance. Rather, Senator Hubert Humphrey argued that "the goal was to see to it that people were employed on the basis of merit rather than on false standards such as color or race."[5]

In opposition, southern senators such as Senators Sam Ervin (D-S.C.) and John Sparkman (D-Ala.) argued that the bill extended the power of the federal government by denying Americans their basic economic, personal, and property rights, for the sole benefit of the Black segment of the population.[6] A minority report in the House of Representatives by representatives from Louisiana, Georgia, Virginia, South Carolina, North Carolina, and Missisippi argued that the rights of employers to hire and fire, the rights of unions to choose members, the rights of postsecondary and professional schools to choose students, and seniority rights in employment would be egregiously impaired by the proposed Civil Rights Act.[7] Senator Ervin's amendment to delete Title VII from the Civil Rights Bill was defeated. But the question of whether emphasis should be on prosecuting individual cases of discrimination or eliminating broad discriminatory practices remained unresolved. Nonetheless, the clear intent of Title VI and Title VII of the bill was to eliminate discrimination

and redistribute opportunities so that Blacks were not limited to the lower end of the educational and employment spectrum.

In 1965 President Lyndon Johnson issued Executive Order 11246, which gave the Department of Labor primary responsibility for enforcing affirmative action. To this end, the Labor Department established the Office of Federal Contract Compliance and took the proactive stance that contractors to the federal government must show that, prior to the award of government contracts, they had proactive plans to ensure the inclusion of minorities in their workforce. Labor union leadership gave lip service to antidiscrimination efforts, but local unions (especially of the AFL) were rigidly segregated and rabidly opposed to the inclusionary role of affirmative action.

1972 Amendments to the Civil Rights Act

The U.S. Commission on Civil Rights was empowered to monitor the efforts of enforcement agencies, and in 1971 the commission provided comprehensive evidence that meaningful results were not being produced. Subsequently, Congress passed the Equal Employment Opportunity Act of 1972 extending the Equal Employment Opportunity Commission's (EEOC) oversight to employers and unions with over fifteen members and to all state, local, and federal government employees. A council was established to coordinate the activities of the various agencies involved in enforcement of Title VII, and the EEOC was granted enforcement powers and jurisdiction over cases involving institutional patterns of exclusion.

A primary justification of the 1972 bill was the realization that the enforcement machinery necessary to ensure the redistributive goals of the Civil Rights Act was woefully inadequate. The 1972 bill also gave greater recognition to systemic discrimination rather than the traditional focus on individual cases. Allowing class action suits recognized that some cases of discrimination extended further than the particular individuals instituting the suit and, hence, that each individual entitled to relief need not be named in the claim for relief.[8]

In 1970, under President Nixon and then secretary of labor George Shultz, the federal government instituted the Philadelphia Plan, requiring that the highly segregated construction contractors and labor unions of Philadelphia employ more minority workers. The plan was extended in Order no.4, issued by the Labor Department, according to which employ-

ers with at least fifty employees and $50,000 in government business were to develop "specific goals and timetables" to correct for the underutilization of minority workers. A firm, informed of its noncompliance with the affirmative action guidelines, had 120 days in which to present the Office of Federal Contract Compliance Programs (OFCCP) with a plan to correct its underutilization, or face the loss of government business.

In 1971, the Labor Department issued Revised Order No.4, which had been extended to include women as well as minority workers. Major corporations (Bethlehem Steel, AT&T) and universities (Columbia University) were forced to end discriminatory practices and initiate affirmative action plans to employ and promote more women and minorities. In the same year, the Supreme Court interpreted Title VII to proscribe "not only overt discrimination but also processes that are fair in form but discriminatory in operation."[9]

The Department of Health, Education, and Welfare also issued guidelines to implement Title VI of the Civil Rights Act, which prohibited discrimination on the basis of race, color, or national origin in the distribution of benefits in any federally assisted programs. Recipients of federal funds were required to "take affirmative action to overcome the effects of prior discrimination" and "even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation of a particular race, color, or national origin." To illustrate, "where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service."[10]

Constitutional challenges to affirmative action have been based primarily on the Equal Protection Clause of the Fourteenth Amendment, which prohibits state and local governments from denying a person within their jurisdictions the equal protection of the law. Moreover, the Supreme Court has held that classifications that involve fundamental rights (e.g., political activity, freedom of movement, right to privacy) or minorities (race, national origins) are subject to *strict scrutiny.* This means that such classifications must be used in the service of a compelling government interest, be narrowly tailored to that interest, and be necessary for the achievement of that interest. These requirements are designed to discourage the use of suspect classifications, and few policies survive such review.

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Intermediate scrutiny, on the other hand, requires only that the use of a classification serve important (rather than compelling) governmental interests and that it be rationally related to (rather than necessary for) the achievement of those interests.

Using race as a means of increasing the access of Blacks to political, educational, and economic opportunities would be a benign classification given the history of racism in America. On the other hand, using race as a means of excluding Blacks or Whites from such opportunities would be invidious. However, whether the Fourteenth Amendment to the Constitution and the Civil rights Act of 1964 forbids both invidious and benign uses of race in the design of public policies has been a point of contention. In some cases, the courts have held that the government (e.g., in *Fullilove v. Klutznich*, *Metro Broadcasting Inc. v. F.C.C.*) and private agencies (e.g., in *United Steelworkers v. Weber*) may use race in crafting policies to remedy past discrimination and increase diversity. In more recent decisions, however, the Court has held even benign uses to the more stringent criteria of strict scrutiny (*City of Richmond v. Croson*, *Adarand Constructors v. Pena*).

Title VII explicitly prohibits the use of race, color, religion, sex, or national origin by employers (of at least fifteen people), employment agencies, and labor organizations to exclude individuals from the full benefits offered by those agencies unless such use serves a bona fide occupational qualification. It also prohibits employment practices that perpetuate the effects of past discrimination, except where such is the result of a bona fide seniority or merit system. Moreover, section 703j explicitly denies that Title VII requires preferential treatment or a racial balance.

Title VII did not specify the definition of discrimination, and the courts have distinguished three forms it may take: (1) *disparate treatment*, classifying people as different who are similar in the relevant respects or classifying people as similar who are different in the relevant respects; (2) *adverse impact*, when a seemingly neutral procedure such as testing, interviewing, or educational requirements disproportionately eliminates a particular group from certain opportunities without those procedures being relevant to fulfilling the requirements of that opportunity; and (3) *perpetuating the effects of past discrimination into the present*, as when an agreement between management and union effectively excludes a particular group from training, promotion, and retention benefits.

Adverse impact might indicate discrimination even though the discriminatory effect was produced by "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" but which were not necessary for the proper performance of the position in question.[11] Adverse impact occurs when a practice produces an underrepresentation of a race, sex, or ethnic group in a given workforce. According to the 1978 Uniform Guidelines on Employee Selection Procedures (for compliance with Revised Order No. 4 of the Carter administration), a practice has an adverse impact on a group if it resulted in a selection rate from that group that was less than four-fifths the selection rate of the group with the highest selection rate.[12] Where there is a pattern of exclusion, the remedy seeks to correct the resulting underrepresentation through special recruitment efforts, goals, and timetables, and, in the most egregious cases, strict numerical quotas until a certain level of representation is reached.[13]

Thus, as in *Griggs v. Duke Power Co.* (1971), requiring a high school diploma or passing score on an intelligence test for jobs that could be performed without need of such would disproportinately affect Blacks and other groups who historically had been denied equal educational benefits. Such "color-blind" qualifications would also exclude many Whites from jobs for which they would otherwise qualify. By outlawing irrelevant requirements and recruitment based on personal networks, affirmative action has made it possible for more people in general to have opportunities that otherwise would have been reserved for a privileged few.[14] This has led Derrick Bell to argue that, contrary to popular opinion, marginalized Whites (women and less well-connected males) have benefited more from affirmative action than Blacks.[15]

Illegal discrimination would also be indicated in practices that perpetuate the effects of past discrimination into the present. Title VII explicitly excluded bona fide seniority systems from this category. On the other hand, the Court held that other practices (e.g., collective bargaining agreements that locked Blacks into lower paying job categories) were not excluded.[16] Agreements requiring union apprenticeships for certain jobs, where Blacks had been denied union membership, reinforced and perpetuated the effects of past discrimination, even if the agreements were not instituted with the intent of adversely affecting Blacks.

Remedies required by a finding of discrimination included hiring, reinstatement, backpay, retroactive seniority, and promotion. Such reme-

dies were meant to correct a finding of discrimination by placing specific victims in the position they would have been in were it not for the discriminatory action of the defendant. And where a policy of discrimination deterred members of an underrepresented minority from even applying for opportunities, relief was to be granted if specific individuals could show that they would have applied but for their knowledge of the operation of the discriminatory policy.[17]

Bakke and *Fullilove* were the first major cases involving relief provided to individuals who were not the direct victims of specifiable acts of discrimination by the granting institution. Both cases have been controversial because in neither case was the relief provided for specific acts of discrimination officially attributed to the granting agency.

Regents of the University of California v. Bakke (1978)

The medical school at the University of California, Davis, opened in 1968 and the faculty devised a special program to insure the representation of minority students. This program reserved sixteen (out a total of one hundred slots for disadvantaged and minority students who were then evaluated in a separate admissions system. Alan Bakke was a White male who had been denied admission to the UC-Davis Medical School for two consecutive years. After his second refusal, he brought suit claiming his rights had been violated under the Fourteenth Amendment, the California constitution, and Title VI of the 1964 Civil Rights Act. In a split decision, five justices agreed, but they differed over whether it was unlawful for the school to take race into account in its admission process. Four justices argued that the university's decision violated Title VI, and Justice Powell argued further that it violated the Fourteenth Amendment, which he interpreted to proscribe not only invidious (meant to exclude) but benign (meant to include) racial classifications as well. Benign racial classifications were allowable, but only after a finding of discrimination by a judicial, legislative, or administrative body. "After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated."[18] Justice Powell held that the university was not a body capable of making a finding of discrimination, and its goals could have been achieved by means other than classification based on the suspect category of race. Justices Brennan, White, Marshall, and

Blackmun dissented on this issue, arguing that the intent of the Fourteenth Amendment was to protect the class of former slaves and did not prohibit the use of racial classifications to remedy past discrimination. Benign uses of racial classifications should be held to an intermediate level of scrutiny such that they need not be necessary for (but only rationally related to) achieving an important governmental interest. Justice Brennan wrote:

> Congress can and has outlawed actions which have a disproportionately adverse and unjustified impact upon racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination.[19]

Moreover, argued Justice Marshall, because of the complicity of the government in discrimination against Blacks, it had a compelling interest in initiating and supporting programs designed to bring Blacks into the mainstream of American life.[20] Also dissenting, Judge Blackmun maintained that it was proper for the university to make a finding of discrimination and that the remedial function of affirmative action was not possible without race-conscious measures: "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 perpetrate racial supremacy."[21]

The Court was split on the many issues involved, and only Justice Powell argued that all racial classifications were legally subject to a strict rather than intermediate level of scrutiny. Nonetheless, Powell argued that race could be considered necessary in promoting the goal of diversity in the student body (although he did not insist that diversity be established as a compelling interest of the university). Despite many differences between the justices, the Court has remained consistent in allowing preferential treatment as a remedy for official findings of past discrimination. While Powell defended the view that such remedies should be limited to individuals, Brennan, Marshall, Blackmun, and White argued that remedies should be able to target groups as a whole.[22]

Fullilove v. Klutznick (1980)

The Public Works Employment Act of 1977 established a 10 percent set-aside of $4 billion in public-works funding for minority business enterprises (MBE). In the *Fullilove v. Klutznick* challenge to this set-aside, the Supreme Court acknowledged the right of Congress to use racial classifications in remedying past discrimination and held that an an adverse affect on a nonminority business amounted to a "sharing of the burden" by innocent parties. The Court denied that the set-aside was unduly *underinclusive* (failing to provide remedies to individuals who had been harmed by past discrimination) or *overinclusive* (providing benefits to members of the group who had not been harmed by past discriminatory action), and hence affirmed that it was narrowly tailored to meet the goal of ameliorating the present effects of past discrimination in government procurement programs. Moreover, the measure was temporary, ending with the final disbursement of funds allocated under the Public Works Act. Justice Stevens dissented, arguing that the MBE provision was overinclusive—providing benefits to members of the minority class who had not been harmed by past discriminatory action—and hence not narrowly tailored.

While early cases fit the classical model of compensation to specific individuals, *Bakke* and *Fullilove* directly addressed the issue of compensation to groups rather than individuals. In *Fullilove*, Powell, in a switch of positions, allowed that a remedy need not be directed to individuals who were the victims of specific instances of discrimination, but that Congress had the power to effect broad redistributive remedies. However, Justices Stewart, Rehnquist, and Stevens argued that remedies should be limited to specific individuals.

United Steelworkers v. Weber (1979)

In 1978, a union (the United Steelworkers of America) and a corporation (Kaiser Aluminum and Chemical Corporation) tacitly acknowledging that each had engaged in years of racial discrimination against Black workers, entered into a "voluntary" agreement to correct the discrepancy between the percentage of Blacks in skilled craft positions (0 percent) and the percentage of Blacks in the local labor force (39 percent) by reserving 50 percent of the openings in a training program sponsored by the

corporation until the discrepancy was eliminated. Workers in skilled positions were paid substantially higher wages and, traditionally, admittance to such training programs was based on union membership and seniority. However, in accordance with the agreement, several Black workers were admitted over Brian Weber and other White workers with greater seniority. Weber brought suit, claiming that his rights (and those of others similarly situated) under Title VII were being violated.

Section 703j of Title VII stated that employers and unions could not be required to correct racial imbalances without a finding of discrimination, but Title VII encouraged voluntary agreements to correct such imbalances.[23] Without an official finding of past discrimination, specific percentages in hirings and promotions could not be viewed as remedial. Nonetheless, it was argued that the imbalance in the proportion of Blacks in skilled positions relative to their proportion in the local workforce was sufficient indication of past discrimination, and that Title VII was intended to redress such by redistributing resources and opportunities from Whites as a group to Blacks as a group. This was made clear in the Kaiser brief, which interpreted the intent of Title VII to be

> not only to compensate or make whole individuals, but also to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . White employees over other employees. . . . This "prophylactic" objective . . . reaches beyond the person to the class. Compensation of an individual for harm he suffered does not assure persons of his race equal access to employment opportunities. Disadvantages to the group linger long after the injury to the individual has been enjoined and paid for.

Continuing with this point, the brief contended that "overcoming conditions that operate to the disadvantage of an identifiable group or class frequently requires the presence of that group in the workforce in significant numbers. Until that situation exists others may be deterred from applying or even seriously considering the possibility of doing so."[24]

On the other hand, the brief for Weber contended that the intent of the 50 percent quota was not to redress identifiable instances of discrimination against identifiable individuals, for none of those chosen for the training program were chosen because they were victims of past discrimination by the employer and union. Rather, the intent of the quota was to achieve a racially balanced workforce, and this was being done by

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