A Comment on the Nondiscrimination Principle in a "Nation of Minorities"

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The last time I was asked to comment on changes in race law since *Brown*[1] was in 1983 at the Legal Defense Fund's annual celebration of the *Brown* decision. There, in response to Assistant Attorney General William Bradford Reynold's invocation of the nondiscrimination principle—the principle of colorblindness—as the basis for the Civil Rights Division's current opposition to many remedial programs, I said in part:

> I think that we would have no debate over whether or not a policy of nondiscrimination or colorblindness is an ideal for an ideal society. The problem is that ours is not an ideal society. Ours is a society that is still permeated by racial discrimination and even more so by the traces of racial oppression that was permitted legally as well as socially and economically up until a little less than thirty years ago. And in that context it does not seem to me that it is possible to take the position really that the remedy for discrimination can be on a basis that does not take race into account. There is a very clear reason for this. [It is that] discrimination is not, contrary to the premise of the nondiscrimination principle, against individuals. It is discrimination against a people. And the remedy, therefore, has to correct and cure and compensate for the discrimination against the people and not just the discrimination against the identifiable persons. That seems to me to be at the heart of the debate and the heart of the presentations and I think it is by no means an unprincipled debate. But, I must say that I come out much differently than Mr. Reynolds on it.

What I want to do in this comment is to amend and expand on those remarks. What I have to say has to do only with the constitutional principles that underlie the debate. It should be noted, however, that there are also questions of statutory interpretation that are simply beyond the scope of my comment,[2] and issues of executive policy that are fundamentally

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1. Brown v. Board of Educ., 347 U.S. 483 (1954).

2. It should be noted that the current Civil Rights Division's interpretation of the Civil Rights Act of 1964—especially Title VI, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252-53 (1964) (codified at 42 U.S.C. §§ 2000d-6 (1976 & Supp. V 1981)), and Title VII, *Id.* §§ 701-716, 78 Stat. 241, 253-

political and neither compelled nor prohibited by rules of law. One source of confusion is that current policy is always said to be justified or required by the commands of law for which someone else is responsible.

I have two points to make with respect to the constitutional basis for the current policies of the Civil Rights Division. The first is that the policy of limiting remedies to individually identified victims of racial discrimination is neither compelled nor justified by constitutional considerations. The equal protection clause is not primarily concerned with the protection of individuals against invidious discrimination. On the contrary, it cannot sensibly be interpreted in any other way than—as argued principally by Owen Fiss[3]—in terms of its protection of groups, and of individuals only by reason of their membership in groups.[4]

The second point is that the nondiscrimination principle is an inexact and too sweeping characterization of the command of the equal protection clause with respect to racial and other ethnic classifications in a society that has come to be preoccupied in a large measure with the assimilation of minority groups into its political, economic, educational, and cultural life. In my view, the clause should not be construed to mean that all uses of racial classifications are suspect; disadvantages to white males (as the most obvious dominant group) deriving from such classifications need not be tested by the same grudging judicial standards as racial discrimination against blacks. If this is so, the current Civil Rights Division's emphasis on protecting white males against disadvantages to them from racial classifications is not justified, and certainly not required, by constitutional considerations in cases of voluntary affirmative action any more than it would be justified in cases of judicially mandated remedies.

As far as the first of these points is concerned, the analysis starts with the *Brown* case itself.[5] The decisions in *Brown* were, as more than a generation of law teachers and students have pointed out to each other, ambiguous about the basis for the constitutional command, and even more so about the remedy. Nevertheless, it seems clear from the thrust of the opinions as a whole—and certainly from the follow-up decisions through

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66 (1964) (codified as amended at 42 U.S.C. §§ 2000e-17 (1976 & Supp. V 1981))—is at odds with that of the Division prior to 1981, and with my own convictions concerning the command of that statute with respect to the application of the nondiscrimination principle to remedial programs.

3. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

4. I realize that this statement is inconsistent with some statements in the opinions of some members of the Supreme Court. For one example, see Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289, 299, 320 (1978) (Powell, J.). Justice Powell noted: "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently," *id.* at 299, as if that distinction were the key to an understanding of the case. To me, this statement is simply incoherent, in the sense that it means nothing.

5. Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*).

Swann[6]—that the right of Linda Brown was to attend a unitary school system, not just the right not be excluded, because of her race, from a particular school that she would otherwise be eligible to attend. This characterization of her right is the only one that fits the constitutional violations by the state that the Court found in *Brown*. The state did not merely disregard a constitutional command protecting individuals against racial discrimination when it discriminated against Ms. Brown; it violated the equal protection clause by running a segregated (or dual) school system that was a primary, but by no means a unique, component of a state-imposed caste system.

Once this is recognized explicitly, it is plain that how the state must act has nothing to do with Ms. Brown personally, as an individual. She just happened to be the member of a group subjected to the racial classification who asserted her standing to bring the matter to court; sending her to a particular school does not cure the violation. The state's duty to stop the violation simply cannot be conceived of in terms of relief to individual victims—the policy which is now the starting point of the Civil Rights Division. The constitutional benefits of changing from a dual to a unitary school system, in short, are conferred not on identifiable persons only, but on everyone in the system, white and black, and particularly on future generations. The costs, on the other hand, are borne by the institutions of the state, not by the individual wrong-doers, and by its citizens generally, especially the children. Neither benefits nor costs, in other words, are consistent with an image of a Constitution concerned solely with personal rights.

So far, I believe, there cannot be real debate about the constitutional principles involved. The dispute arises when a racial classification affects limited resources. The familiar prototypes are jobs and places in graduate schools, which lead to good jobs. In these cases, it is easier to identify the individual victims of a racial classification. This fact has a double effect on the current policy debate. The first has to do with the members of the group discriminated against in the past. Individual members of that group can be identified as victims either because they applied for the contested spots, or because they can prove that their awareness of the discrimination specifically deterred them from doing so. Under the current Justice Department's policy, the benefits of any remedy must be limited to these identified victims. The second effect has to do with everyone else applying for the contested spots, who would (or at least might) have been given them in open competition. Mr. Bakke is an example; his rejection by the Davis Medical School happened to isolate him from the rest of the world

6. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

as a specific "victim" of an affirmative action remedy.[7] That kind of identifying process is essential to implementation of the new Departmental policy; it generates the rhetorical force behind both the limitation of the benefits of remedial programs to identified victims of past discrimination and the extension of the protection of the nondiscrimination principle to those personally disadvantaged by the remedy. The question is whether this ability to identify individual victims should carry constitutional weight, for it clearly does affect perceptions of justice, and therefore the politics of the matter.

It does not seem to me that constitutional consequences should flow from the fact that individual victims and beneficiaries are identifiable in these cases, as opposed to school cases and voting-rights violations,[8] where the whole population is more clearly affected. The victims are random in either case; they just happen to be in the way. It is in the nature of racial discrimination that it ignores individuals' other traits, and treats their race as the overriding quality of all members of the racial group. The fact that *X* happened to be a particular job applicant turned down, or provably in the class deterred by official discrimination from applying at all, does not affect the scope of the state's unconstitutional conduct, even if it gives *X* an especially clear right to relief. It is, in other words, inherent in the situation that *Y* would have been treated in the same way as *X* for the same reason, had *Y* been in the way instead of *X*, and had *Y* been of *X*'s race.

This being so, it seems to me that, in constitutional terms, *X* in the employment case is like Linda Brown in the school case. Each is merely the catalyst—the person with standing who chooses to assert it—who brings the state's violation into court, either through private action or in a Justice Department suit. The job of the court is not just to help her, but to require the state to run a constitutional employment system, as it required a constitutional school system. This simply cannot be done if the fundamental constitutional principle involved is defined as the protection of individuals against disadvantage based on their race. The underlying thrust of the current Justice Department's policy—to limit relief to the compensation of individual victims for individual wrongs done them—is therefore totally without constitutional justification.

Once it is recognized that the court's duty must extend to an entire employment system, the nondiscrimination principle so frequently invoked

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

8. The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, created the Civil Rights Division and authorized the Attorney General to bring suits to enjoin racially based abridgements of the right to vote. The law enforcement program under the statute was virtually paralyzed in its early years by the Justice Department's commitment to the Senate to investigate possible deprivations of the right to vote only on the basis of individuals' complaints, rather than going forward on statistical evidence. That commitment dwindled in practice in 1960 and was specifically abrogated in 1961.

by the government is revealed as constitutionally unjustified. The current Department has cited this principle to support its policy of protecting individual white males against the consequences of state efforts (including judicially generated efforts) to restore the composition of work forces or student bodies to what they would have been absent racial discrimination. According to this principle of colorblindness, compensatory relief must be limited to blacks already identified as victims of past discrimination; the extension of advantages to *other* blacks is thus viewed as unjustified racial discrimination against white applicants. Plainly, the application of the individual nondiscrimination principle here is at odds with the fundamental command to the state that is at the heart of the school cases. It is my argument that this command does not vary in other institutional contexts, where the affected population is not so confined, so clearly defined, and so much a product of state compulsion as in the school cases. The validity of this argument is at the center of the controversy in the Birmingham Fire and Police Department case, where the Department has intervened on behalf of white male applicants claiming to have been discriminated against, because of their race, by reason of preferences given black applicants.[9]

The accepted resolution of the tension between the nondiscrimination principle and state efforts to enable members of identified minority groups to enter into job or limited educational programs is to determine whether the state is furthering a compelling (or "important") state interest through the least restrictive means. This was essentially the approach used by all members of the Court who discussed the constitutional problem in the *Bakke* case.[10] It permits remedies for judicially established violations quite easily, and—to most of the Court, though in varying degrees—permits carefully circumscribed race-conscious legislative and executive policies. I believe, however, that it is time to abandon the notion that, regardless of purpose, race is a suspect classification that calls into play something like the compelling-interest standard. That seems to me not what the equal protection clause, or the Court's application of the clause, is really about. What has been at stake is the constitutionality of state-based racial oppression—the caste system—and it is in that context—to deal with that problem—that race was denoted a suspect classification.

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9. In March of this year, the Civil Rights Division announced its intention to intervene in this challenge to Birmingham's policy, even though that policy had been initiated pursuant to a consent decree that the Division had previously obtained in a suit to eliminate discrimination against blacks, *see* United States v. Jefferson County, Civ. Act. No. 75-P-0666-S (N.D. Ala. Aug. 21, 1981) (approving consent decree); *U.S. to Support Whites in Suits On Bias Decree*, N.Y. Times, Mar. 5, 1984, at A1, col. 2.

10. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287–320, 355–79 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part).

In this connection, but with quite a different outcome in mind, Justice Powell noticed the obvious: that the United States is (he said has "become") "a Nation of minorities, . . . a 'majority' composed of various minority groups."[11] It is this fact, I think, that disturbs both the courts and all commentators committed to the cause of racial justice. What applies to members of the racial minorities to relieve their oppression should, in justice and in law, be applicable to members of all racially, ethnically, culturally, nationally, and religiously identifiable groups. But I do not believe that the equal protection clause is, or can ever have been, intended to prohibit recognition of the truth noted by Justice Powell, or to prohibit action in response to it, even by government. The Constitution generally, and the Fourteenth Amendment specifically, should not be contorted to command the establishment of a rule of law inconsistent with the history and the composition of the United States. They do not mean that racial, cultural, ethnic, national, or even religious identification must be excluded from the considerations that lead to actions by government officials, or legislatures, reflecting the pluralism of American society. They cannot mean, for example, that decisions on judicial appointments, political candidates, cabinet officials at all levels, or even bureaucrats in the instrumentalities of the state can never reflect racial, ethnic, cultural, or religious constituencies. If these considerations are valid for the political apparatus of government, they must also be valid, so far as the constitutional command is concerned, for other state decisions with regard to who is, and who is not, included in the discretionary allocation of benefits and power.

It is of course a fact that any decision by the state that takes such considerations into account disadvantages every one who does not possess the characteristics sought. The standard for distinguishing among such classifications, however, should not be based upon some judicially acceptable notion of remedy or upon a static concept of past injury to the group. Nor is it appropriate, in expounding a constitutional standard applicable through time in a highly diverse society, to draw lines based on judicial assessments of which classifications carry "stigma," although that is a factor clearly relevant to legislative and executive decisions. The constitutional point must instead be whether the classification is, at bottom, for inclusionary rather than exclusionary purposes. The policies this test would permit include, but are not limited to, the type of transitional compensation for past wrongs that has been advocated by many supporters of affirmative action. They would also apply to different groups, at different times, depending in part on the political strength of the groups, in a sort

11. *Id.* at 292 (Powell, J.).

of rough equivalent of proportional representation. The standard would therefore challenge the ability of the judiciary—and the other instruments of government—to distinguish between what is inclusionary and what is exclusionary. I do not mean that the courts should base their decisions on the intent of the government in making the classification; rather, they should take a hard look at what was in fact done. In most cases, it would be sufficient to understand the composition, size, and diversity of the groups involved, and the relation between them. At least it is clear that to include a member of one particular group is to exclude all members of all other groups, regardless of political power, from the position at issue, whereas to exclude all members of one specific group—such as blacks—is to place a special burden on them not shared by those in any other group. I believe courts can tell the difference between exclusion and inclusion. I believe they will be able to tell whether the state is oppressing blacks, enforcing the sign that says, "No Irish need apply," adhering to anti-Semitic state-sponsored housing policies, or interning persons based on their Japanese ancestry, or whether the state is including the members of any of those groups in state programs. It is the recognition and the prohibition of such state action that is to me the thrust of the judicial task, so far as the Constitution is concerned.

This compressed constitutional proposition is conceived of with a good deal more diffidence than is apparent from its statement. Its development (or destruction) and testing by hypotheticals must await other work. I propose it out of frustration with the incapacity of present doctrine to deal with the emerging political strength of minority groups and women, and out of respect for the ability of these groups to make government devise and implement programs designed to bring them into the mainstream of American institutions in ways that promote participation in the allocation of social, economic, cultural, and political resources. It is my conviction that the underlying policy of the equal protection clause and related constitutional constraints should fit into this political and legal landscape, not force the judicial branch to try to reshape it.