Constitutional Law - Fourteenth Amendment - Strict Scrutiny of Affirmative Action - Racial Quotas

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CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—STRICT SCRUTINY OF AFFIRMATIVE ACTION—RACIAL QUOTAS—The United States Court of Appeals for the Fourth Circuit has held that student government regulations of a state university providing for minority representation on student committees are unconstitutional.

_Uzzell v. Friday_, 591 F.2d 997 (4th Cir. 1979)

On June 13, 1974, two white male students at the University of North Carolina at Chapel Hill, a state institution receiving federal financial assistance, brought suit in a North Carolina federal district court seeking declaratory and injunctive relief against the university. The students alleged that certain university regulations violated rights guaranteed to them by the fourteenth amendment, the Civil Rights Act of 1871, and Title VI of the Civil Rights Act of 1964. The challenged regulations provided for the appointment of minority students to the student governing council, allowed a student charged with a violation of the Honor Code to have a majority of his judges be of his own race, and permitted university funding of the Black Student Movement (BSM). The district court granted the defendant’s motion

2. This statute provides as follows:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
3. Title VI provides that: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (1976).
4. The University of North Carolina student constitution, art. 1, § 1D, provided for protective representation of minority races and both sexes on the council. If at anytime there were not at least two minority councillors, two male councillors and two female councillors, the president of the student body, with the consent of the council made whatever appointments were necessary to ensure compliance with this section. See Petitioner’s Brief for Certiorari at 4, Friday v. Uzzell, 438 U.S. 912 (1978). Art. IV, § E(2)(e)(2) of the university’s constitution provides:
   If requested by the defendant, provision shall be made for racial or sexual representation (but not both) on the trial court, as follows:
   a) At least four of the seven members of the trial court shall be of the same sex as the defendant;
   b) When a defendant is not a member of the majority race, at least four of the
for summary judgment. The court concluded that the propriety of the university’s disbursements to the BSM was moot, and that no claim or controversy was presented by the challenges to the validity of the minority appointment and judge selection procedures. The court determined that since the student government provision allowed for the appointment of blacks, females, and males to ensure equitable representation, it would not have an injurious effect on the plaintiffs. Similarly, the court held that the application of the honor court provision was not discriminatory, since it applied to all students. The students appealed to the United States Court of Appeals for the Fourth Circuit.

A three-judge court affirmed the district court’s ruling that the funding issue was moot, but reversed the lower court’s holding that the plaintiffs presented no justiciable controversy by their challenge to the university’s minority appointment and judge selection provisions. The court reversed on the “plain and simple ground” that without a showing of either a reasonable basis or a compelling interest, the composition of the council and the selection of the student honor court judges were formulated on the basis of race. The court of appeals found that this “blatantly fouled the letter and spirit of both the Civil Rights Act and the Fourteenth Amendment”, and remanded with directions that the district court enter summary judgment for the plaintiffs on both issues. After a rehearing en banc, in which the decision of the three-

seven members of the trial court shall not be of the majority race;

591 F.2d 997, 998 n.4 (4th Cir. 1979).

5. On September 18, 1974, the membership policy of the BSM was amended to allow any student, regardless of race, to be a member if the views of the applicant were consistent with the goals of the BSM. Uzzell v. Friday, 401 F. Supp. 775, 777 (M.D.N.C. 1975). The university had also indicated to the Department of Health, Education, and Welfare that it would terminate funding to any organization with discriminatory membership policies. Id. at 779.

6. Id. at 780-81.

7. The court granted the defendant’s motion for two reasons: (1) the provision had never been used, and (2) the provision was in no way discriminatory toward the plaintiffs. Id. at 780.

8. Id. at 781.


10. Id. at 804.

11. Id. Summary judgment was ostensibly granted because the university failed to demonstrate a compelling justification for the challenged provisions. However, in light of the majority’s interpretation of Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), it may be that the majority was of the opinion that the appellees could never present a compelling justification. See also text accompanying note 22 infra.

12. Uzzell v. Friday, 547 F.2d 801 (4th Cir.), aff’d on rehearing, 558 F.2d 727 (4th Cir. 1977) (en banc).
judge court was affirmed, the United States Supreme Court granted the university's petition for certiorari, vacated the judgment, and remanded the case to the Fourth Circuit for further consideration in light of the Supreme Court's decision in *Regents of the University of California v. Bakke*.

On remand, a divided court of appeals again granted summary judgment for the students. The court held that the remedial measures were invalid because they impinged upon the rights of others. Further, the majority contended that the program's exclusive reliance on racial criteria violated the strictures of *Bakke*, which held that benefits can be neither denied nor conferred to others solely because of race. The court concluded that the permeating defect in the appointive provision was the exclusive use of a racial classification which precluded non-minority students from eligibility for appointment to the council. Moreover, the presence of unelected members on the student council diluted the representative character of the student legislative body, and this disenfranchisement on racial grounds denied equal protection to the white student body.

In examining the justifications put forth by the university for the racially structured program, the court adhered to Justice Powell's opinion in *Bakke* which stated that any race conscious measure is subject to strict scrutiny. The court then determined that the appointment of unelected students was not the least restrictive means to ensure 13. Friday v. Uzzell, 438 U.S. 912 (1978).
15. Uzzell v. Friday, 591 F.2d 997 (4th Cir. 1979).
16. Id. at 1000.
17. Id. at 998.
18. Id.

19. *Id.* In the traditional two-tiered equal protection analysis, fundamental interests such as voting and the right to travel are subject to strict scrutiny. *See*, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (residence requirements for voting are subject to strict scrutiny); United States v. Guest, 383 U.S. 745 (1966) (an individual's right to free interstate passage is fundamental). Additionally, suspect classifications based on race or alienage have been subjected to strict scrutiny. *See*, e.g., Graham v. Richardson, 403 U.S. 365 (1971) (a denial of welfare benefits to aliens was in violation of equal protection); McLaughlin v. Florida, 379 U.S. 184 (1964) (statute prohibiting an unmarried interracial couple from engaging in a meretricious relationship is unconstitutional without a compelling justification). The proponents of the classification bear a heavy burden of justifying its use by asserting not only a compelling state purpose, but also by showing that the challenged classification was the least restrictive means to accomplish the stated purpose. Justice Powell's opinion in *Bakke* deviates from the historical basis of strict scrutiny, in that he applies strict scrutiny to *any* race conscious measure, including those classifications which are designed to benefit classes that have been historically discriminated against. 438 U.S. at 305. *See also* text accompanying notes 52 & 53 *infra.*
minority representation; therefore, the provision failed to satisfy a
strict scrutiny analysis.\textsuperscript{20}

The court then examined the honor court rule that an accused could
request a majority of his judges to be of his own race. The majority
observed that this particular recourse to race was a "preposterous de-
fiance"\textsuperscript{21} of equal protection. The court perceived that the procedure
would neither provide justice nor inspire confidence in the student
judicial process.

The majority concluded that there was no reason to remand to the
district court for a full hearing because a trial was not necessary. They
deduced that Bakke approved racial preferences only if others were
not prejudiced by the remedial action. Since the rights of the white
plaintiffs were impinged upon here, the race conscious student regula-
tions could not be upheld, even if the regulations were an attempt to
eradicate specific past discrimination.\textsuperscript{22}

The dissenters, speaking through Judge Winter,\textsuperscript{23} disagreed both
substantively and procedurally with the majority's disposition of the
case. In contrast to the majority, the dissenters did not read Bakke as
holding that racial quotas may never be the sole determinant in fixing
the rights of students.\textsuperscript{24} They denounced, as simplistic, the majority's
proposition that racial preferences could be approved only if others are
not thereby prejudiced.\textsuperscript{25} The dissenters argued that Bakke approved
the use of racial criteria to redress wrongs worked by adjudicated in-
tances of racial discrimination.\textsuperscript{26}

Although the dissenters agreed that all racial classifications were to
be subjected to strict scrutiny, they noted that Justice Powell had also
held that a judicial or legislative finding of past discrimination would
satisfy the compelling justification requirement. Judge Winter concluded
that a just disposition of the issues required a more complete factual
record. Therefore, the dissenters would have remanded the case to the
district court for complete disclosure as to the need for, and the ef-
ficacy of, the present regulations.\textsuperscript{27}

\textit{Uzzell v. Friday} is the first federal appellate court interpretation of
Bakke to deal with educational affirmative action outside of the univer-

\begin{itemize}
  \item \textsuperscript{20} \textit{591 F.2d at 999-1000.}
  \item \textsuperscript{21} \textit{Id. at 999.}
  \item \textsuperscript{22} \textit{Id. at 1000.}
  \item \textsuperscript{23} Chief Judge Haynsworth and Judge Butzner joined in Judge Winter's dissenting
    opinion.
  \item \textsuperscript{24} \textit{591 F.2d at 1000 (Winter, J., dissenting).}
  \item \textsuperscript{25} \textit{Id. at 1000-01 (Winter, J., dissenting).}
  \item \textsuperscript{26} \textit{Id. at 1001 (Winter, J., dissenting).}
  \item \textsuperscript{27} \textit{Id.}
\end{itemize}
sity admission process. The Bakke decision was the first "reverse discrimination" case decided on the merits, and the most significant race case since Brown v. Board of Education. In a four-one-four decision the Bakke Court ordered Alan Bakke, a white male, admitted to medical school and declared the University of California's quota system invalid. More importantly, however, a majority of the Court upheld affirmative action in principle and refused to strike down all racial quotas. Although no single majority spoke for the Court, it has been suggested that the shifting coalitions of the Bakke Court would validate the use of racial quotas to cure a specific finding of past discrimination. If past discrimination is not established, schools may still use race in conjunction with other factors in determining who is to be admitted. However, Bakke does prohibit the elevation of race to a dispositive position in the admission process. The Uzzell court was tasked with determining how these few resolutions of Bakke were to be applied in a situation apart from the university admission process. Unfortunately, the court chose to rely exclusively upon a literal reading of Bakke rather than to undertake a thorough affirmative action analysis.

The real issue before the Uzzell court was whether or not the quota system was valid, and if so, whether any constitutional limitations should be placed upon the use of quotas. A second issue was whether a

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30. Nine Justices authored six separate opinions. Justice Powell held that Alan Bakke should be admitted because the university's special admission program denied equal protection to non-minority applicants. 438 U.S. at 319-20. The Chief Justice and Justices Stewart, Rehnquist and Stevens agreed with the result of Justice Powell's opinion, but based their decision on statutory grounds. Id. at 421 (Stevens, J., concurring in part and dissenting in part). Justices Brennan, White, Marshall and Blackmun agreed with the portion of Powell's opinion holding that a school can constitutionally consider race in its admission process. Id. at 324-25 (opinion of Brennan, White, Marshall and Blackmun, JJ.). The consequence of this four-one-four split was that Powell's opinion, although not fully shared by any other Justice, spoke for the five-four majorities on each of these issues.
31. In Seligman, Special Admissions Are Still Special, STUDENT LAW., Dec. 1978, at 24, Laurence Tribe is quoted as stating that "the Court might be willing to uphold the quota approach . . . if an appropriate government body had reasonably determined that no less extreme remedy would adequately offset past discrimination." See also text accompanying notes 60-63 infra.
33. 438 U.S. at 317-18.
rational quota should be subjected to strict or intermediate scrutiny.\textsuperscript{34} The majority, however, determined that another issue was whether voluntary remedial racial classifications were per se invalid because they prejudiced others.\textsuperscript{35} After taking a few excerpts out of context from Justice Powell's opinion in \textit{Bakke}, the majority decided that voluntary remedial racial classifications were per se invalid and failed to address the crucial issues presented by the case.\textsuperscript{36}

Notwithstanding the \textit{Uzzell} court's interpretation of \textit{Bakke}, and the superficial appeal of a color-blind view, the Supreme Court has never announced a per se test in cases involving racial discrimination.\textsuperscript{7} Even in those cases in which invidious classifications that imposed heavy criminal penalties on minority groups have been invalidated, the Court has narrowly confined its rulings to the facts of each particular case.\textsuperscript{38} In fact, courts have freely resorted to racial classifications in both public school desegregation and employment discrimination cases.\textsuperscript{39}

\begin{enumerate}
\item Justice Powell held that strict scrutiny is required whenever any racial classification is used. \textit{Id.} at 290-91. \textit{See also} note 19 supra. The four Justices who joined Justice Powell in upholding affirmative action called for intermediate scrutiny. The other four Justices never reached the constitutional issue, and thus made no determination as to the level of scrutiny required in benign racial classifications. 438 U.S. at 412 (Stevens, J., concurring in part and dissenting in part).
\item 591 F.2d at 1000.
\item Ironically, Justice Douglas hinted at the possibility that all race classifications were per se invalid, stating that "[t]he consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination . . . . The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." \textit{DeFunis v. Odegaard}, 416 U.S. at 333-34 (Douglas, J., dissenting) (quoting \textit{Loving v. Virginia}, 388 U.S. 1, 10 (1967)). \textit{But see Motley, From Brown to Bakke}, 14 \textit{Harv. Cr.-C.L. L. Rev.} 315, 325 (1979) (the author states that the opinions of Douglas in other race cases leave no doubt that Douglas would have joined the opinion of Justice Brennan in \textit{Bakke}, thereby putting to rest the affirmative action controversy).
\item \textit{See} O'\textsc{\textsc{n}}\textsc{\textsc{i}l}, \textit{supra} note 37, at 927 & n.8.
\item \textit{See} Swann \textit{v. Charlotte-Mecklenburg Bd. of Educ.}, 402 U.S. 1 (1971) (use of mathematical ratios of white to black students is valid); Contractors Ass'n \textit{v. Secretary of Labor}, 442 F.2d 159 (3d Cir.), \textit{cert. denied}, 404 U.S. 854 (1971) (bidders for federal projects are required to meet minority hiring goals); Porcelli \textit{v. Titus}, 431 F.2d 1254 (3d Cir. 1970), \textit{cert. denied}, 402 U.S. 944 (1971) (seniority lists for the selection of principals can be suspended to increase the number of blacks in supervisory positions). The constitutional aspects of affirmative action have been cogently described as follows:

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm or im-
Recent Decisions

Most recently, the Court in *United Jewish Organizations v. Carey* rejected a per se rule against the voluntary use of racial criteria in an apportionment context. Moreover, the most recent pronouncement in *Bakke* is that affirmative action is constitutionally permissible, provided that the racial measures pass the appropriate scrutiny.1

The *Uzzell* court, both majority and dissent, may also be faulted for accepting Justice Powell's view that all racial classification must pass a strict scrutiny analysis. Justice Powell alone decided that state educational programs which disadvantaged white students should be held to the same strict scrutiny as programs which disadvantaged black students.42 The Stevens faction, who joined with Justice Powell to order Alan Bakke admitted, did not find it necessary to reach the constitutional issue, and thus, gave no indication in *Bakke* as to their views on the appropriate scrutiny.45 However, each member of the Stevens faction has approved some form of affirmative action at an earlier time,46 and in one instance intermediate scrutiny was used.47 Justices Brennan, White, Marshall and Blackmun applied intermediate scrutiny to the quota system at issue in *Bakke.*48 This level of scrutiny was used to determine if the program stigmatized non-whites or burdened other minorities.47 The *Uzzell* court, armed with judicious commentary on the type of scrutiny appropriate for benign classifications,48 should have at least considered the applicability of intermediate scrutiny.


40. 430 U.S. 144 (1977) (upholding a race conscious redistricting plan designed to guarantee non-white voters a viable majority).

41. *See* note 34 and accompanying text supra.


43. *See* note 30 supra.

44. *See* Tribe, *supra* note 42, at 865 n.4.

45. In Califano v. Webster, 430 U.S. 313 (1977) (per curiam) the Court employed intermediate scrutiny to determine the constitutionality of a social security retirement benefit program which provided higher payments to women than to men with equal past earnings. The Court upheld the validity of the gender-based classification, finding that it was designed to compensate women for past economic disabilities they had suffered. *Id.* at 320. *See also* The Supreme Court, 1976 Term, 91 HARV. L. REV. 70, 177 (1977).

46. 438 U.S. at 357-58 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

47. *Id.* at 358-60. *See also* Tribe, *supra* note 42, at 865.

The Bakke Court's split on the scrutiny issue is traceable to a fundamental disagreement about whether or not there can be a 'benign' racial classification. Justice Powell opined that discrimination could never be benign, since in pluralistic society, there is no principled basis for assessing which faction deserves heightened judicial scrutiny. Although Justice Brennan disagreed with Justice Powell's statement of principle, he conceded that the mere recitation of a benign purpose would not preclude judicial inquiry into the actual underlying purposes. Justice Brennan believed that the Davis program, having met four requirements, should be subject only to intermediate scrutiny.

Although Justice Powell's color-blind rationale has merit, his view of strict scrutiny in Bakke is inconsistent not only with his earlier opinions on the subject, but also with the historical basis for strict scrutiny. From its inception, the rationale for strict scrutiny has been to protect "insular and discrete minorities" from unfair majoritarian measures. Not until Bakke was it thought that strict scrutiny was necessary to protect the majority from itself. Yet under Justice Powell's view, if the majority "discriminates" against itself, the self-imposed burden is constitutionally suspect. This ignores the obvious fact that no burden is cast upon a group powerless to reject it by the political process. Justice Powell's view that strict scrutiny applies to all racial classifications stifles not only the undesirable expressions of majority rule, but all expressions of majority rule.

Justice Powell's Bakke opinion is also incompatible with his earlier opinions which relied upon the traditional indicia of suspectness. In


50. 438 U.S. at 357-58 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). The four tests were that no fundamental right be involved, that the disadvantaged class not have the traditional indices of suspectness so as to command extraordinary protection from the majoritarian process, that race be relevant to the goal sought, and that the classification neither be based on a presumption of racial inferiority, nor promote racial hatred or separatism. See L. Tribe, AMERICAN CONSTITUTIONAL LAW 90 (1979 Supp.).

51. See note 55 and accompanying text infra.

52. In Carolene Prods. Co. v. United States, 304 U.S. 144 (1938), the Court announced for the first time that legislation would be more carefully scrutinized if it affected discrete and insular minorities. Id. at 152 n.4.

53. See Ely, supra note 48, at 727.

54. See Tribe, supra note 42, at 865, where the author suggests that strict scrutiny is inapplicable unless the classification stigmatizes a group with a stamp of inferiority or reflects hostility toward the burdened group. See also note 56 and accompanying text infra.
Recent Decisions

San Antonio Independent School District v. Rodriguez, Justice Powell stated that distinctions based upon wealth created no suspect class since the poor taxpayers were neither historically saddled with disabilities nor politically powerless. Therefore, strict scrutiny was inappropriate in reviewing such a large and amorphous class united only by the common factor of residence. This reluctance to protect a large and amorphous class disappears in Bakke, where protection is given to a member of the majority. To accomplish this paradoxical result, Justice Powell did not state what he considered to be the single unifying factor of the majority class. Had he done so, the only plausible answer would be their will.

By applying strict scrutiny, the Uzzell court suggested that benign racial classifications are equivalent to invidious discrimination. This suggestion implies that benign classifications result in such destructive effects that they can be justified only if a compelling need for remedial action is shown. Unfortunately, the result of this implication is that many remedial race-conscious efforts could be unnecessarily thwarted if required to pass a strict scrutiny analysis.

The second issue which the Uzzell court inadequately addressed was the validity of racial quotas. The legitimacy of the popularly mandated racial quota at issue in Uzzell should not have been summarily denounced by the majority. In Bakke only Justice Powell held that the University of California’s quota system was invalid. He was offended by a system in which a member of a non-preferred group was completely foreclosed from being considered along with members of the preferred group. Thus, Justice Powell approved the use of race in the admission process only if done in a subtle manner.

Although Justice Powell’s approach has the salutary effect of deemphasizing race, the superiority of a flexible program cannot justify a

56. Id. at 28. In refusing to apply strict scrutiny, Powell stated: The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian process.

Id.
57. 438 U.S. at 297-99.
58. Id. at 319 n.53.
59. Id. at 317-18. For a discussion of how admission committees could easily evade Powell’s no-quota principle, see Karst & Horowitz, The Bakke Opinions and the Equal Protection Doctrine, 14 HARV. C.R.-C.L. L. REV. 7, 9 (1979) [hereinafter cited as Karst & Horowitz].
constitutional distinction.\(^\text{60}\) Quota systems and the use of race as a plus factor are only different methods of achieving the same goal.\(^\text{61}\) A constitutional distinction between the two methods is only valid if a quota impinges upon the rights of white students as individuals in some way that the more flexible programs do not.\(^\text{62}\) In reality, both methods affect the white participant the same way since his overall chances of being selected for the benefit are reduced.\(^\text{63}\) This is especially true under Justice Powell's formulation that race can be a factor in promoting diversity, since to so use it requires identifying groups of people sharing certain characteristics which separate them from other groups.\(^\text{64}\) The weight of the racial "factor" will depend upon the number of other applicants possessing a similar characteristic.\(^\text{65}\) Thus, once a university commits itself to diversity, the individual is invariably considered in light of his relation to the group. At best, this is a subliminal quota, but a quota nonetheless.

Fashioning a valid affirmative action remedy is both a constitutional and practical problem, and the validity of a remedy once it is fashioned requires a full factual inquiry. The parties to the \textit{Uzzell} case, in which summary judgment was granted in four hearings, were never given this opportunity. Although it is difficult to derive much meaning from \textit{Bakke}'s message in the area of expanding equal protection,\(^\text{66}\) the \textit{Uzzell} court was incorrect in suggesting that \textit{Bakke} held that voluntary race classifications which impinge upon the rights of others are per se invalid. The court should have recognized that any effect which the university's quota system may have created would not constitute invidious discrimination, and, therefore, that strict scrutiny was not warranted. As one commentator has suggested, "[i]f racial quotas are to be condemned, it should be because they will not work to achieve the desired result. It should not be because they seek either to perpetuate

\begin{itemize}
  \item \textit{See Dworkin, supra note 48, at 27.}
  \item \textit{Id. at 27-28.}
  \item \textit{Id.}
  \item \textit{Id. See also Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 SUP. CT. REV. 1, 9. The author states that although race may be irrelevant to the education process, it is a convenient proxy for attributes that are relevant. \textit{Id.}}
  \item \textit{64. Although the theme of "individual consideration" was of prime importance to Powell's determination that quotas were invalid, this requirement is of secondary concern in his diversity concept. See Karst & Horowitz, supra note 59, at 17-19.}
  \item \textit{Id.}
  \item \textit{66. See Karst, The Supreme Court, 1976 Term-Forward: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 3 (1977) (suggesting that the equal protection doctrine is now at the point of maximum incoherence).}
\end{itemize}
an unjust society or to realize a corrupt ideal." The majority decision in *Uzzell* represents a lamentable judicial insensitivity to the difficult task of structuring a viable affirmative action program.

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