

Fullilove v. Klutznick
Preferences for everyone from Negroes to Aleuts

A federal statute authorized billions to state and local governments for use in public works projects. There was of course a kicker. The “minority business enterprise” provision of the law required that at least ten percent of each grant be awarded to contactors who were members of a statutorily-defined minority. And who were the lucky ones? Why, “Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.”

The Supreme Court upheld the provision, as not violating the Constitution.

Justices Stewart and Rehnquist disagreed. [I have made no substantive changes in the dissenting opinion.]

Justice Stewart’s dissent

"Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color. . . ." Those words were written by a Member of this Court 84 years ago. *Plessy v. Ferguson*, (Harlan, J., dissenting). His colleagues disagreed with him, and held that a statute that required the separation of people on the basis of their race was constitutionally valid because it was a "reasonable" exercise of legislative power and had been "enacted in good faith for the promotion [of] the public good. . . ." Today, the Court upholds a statute that accords a preference to citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts," for much the same reasons. I think today's decision is wrong for the same reason that *Plessy v. Ferguson* was wrong, and I respectfully dissent.

A

The equal protection standard of the Constitution has one clear and central meaning—it absolutely prohibits invidious discrimination by government. That standard must be met by every State under the Equal Protection Clause of the Fourteenth Amendment. And that standard must be met by the United States itself under the Due Process Clause of the Fifth Amendment. [This footnote and all others have been omitted.]

Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid.

The hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court. And our cases have made clear that the Constitution is wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims. In *Anderson v. Martin* for

instance, the Court dealt with a state law that required that the race of each candidate for election to public office be designated on the nomination papers and ballots. Although the law applied equally to candidates of whatever race, the Court held that it nonetheless violated the constitutional standard of equal protection. "We see no relevance," the Court said, "in the State's pointing up the race of the candidate as bearing upon his qualifications for office."

Similarly, in *Loving v. Virginia* and *McLaughlin v. Florida* the Court held that statutes outlawing miscegenation and interracial cohabitation were constitutionally invalid, even though the laws penalized all violators equally. The laws were unconstitutional for the simple reason that they penalized individuals solely because of their race, whatever their race might be.

This history contains one clear lesson. Under our Constitution, the government may never act to the detriment of a person solely because of that person's race. The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." In short, racial discrimination is by definition invidious discrimination.

The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. The guarantee of equal protection is "universal in [its] application, to all persons . . . without regard to any differences of race, of color, or of nationality." The command of the equal protection guarantee is simple but unequivocal: In the words of the Fourteenth Amendment: "No State shall . . . deny to any person . . . the equal protection of the laws." Nothing in this language singles out some "persons" for more "equal" treatment than others. Rather, as the Court made clear in *Shelley v. Kraemer*, the benefits afforded by the Equal Protection Clause "are, by its terms, guaranteed to the individual. [They] are personal rights." From the perspective of a person detrimentally affected by a racially discriminatory law, the arbitrariness and unfairness is entirely the same, whatever his skin color and whatever the law's purpose, be it purportedly "for the promotion of the public good" or otherwise.

No one disputes the self-evident proposition that Congress has broad discretion under its spending power to disburse the revenues of the United States as it deems best and to set conditions on the receipt of the funds disbursed.

No one disputes that Congress has the authority under the Commerce Clause to regulate contracting practices on federally funded public works projects, or that it enjoys broad powers under [Section] 5 of the Fourteenth Amendment "to enforce by appropriate legislation" the provisions of that Amendment. But these self-evident truisms do not begin to answer the question before us in this case. For in the exercise of its powers, Congress must obey the Constitution just as the

legislatures of all the States must obey the Constitution in the exercise of their powers. If a law is unconstitutional, it is no less unconstitutional just because it is a product of the Congress of the United States.

B

On its face, the minority business enterprise (MBE) provision at issue in this case denies the equal protection of the law.

The Public Works Employment Act of 1977 directs that all project construction shall be performed by those private contractors who submit the lowest competitive bids and who meet established criteria of responsibility.

One class of contracting firms—defined solely according to the racial and ethnic attributes of their owners—is, however, excepted from the full rigor of these requirements with respect to a percentage of each federal grant. The statute, on its face and in effect, thus bars a class to which the [non-minorities] belong from having the opportunity to receive a government benefit, and bars the members of that class solely on the basis of their race or ethnic background. This is precisely the kind of law that the guarantee of equal protection forbids.

The Court's attempt to characterize the law as a proper remedial measure to counteract the effects of past or present racial discrimination is remarkably unconvincing. The Legislative Branch of government is not a court of equity. It has neither the dispassionate objectivity nor the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination.

But even assuming that Congress has the power, under 5 of the Fourteenth Amendment or some other constitutional provision, to remedy previous illegal racial discrimination, there is no evidence that Congress has in the past engaged in racial discrimination in its disbursement of federal contracting funds. The MBE provision thus pushes the limits of any such justification far beyond the equal protection standard of the Constitution. Certainly, nothing in the Constitution gives Congress any greater authority to impose detriments on the basis of race than is afforded the Judicial Branch. And a judicial decree that imposes burdens on the basis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination.

The provision at issue here does not satisfy this condition. Its legislative history suggests that it had at least two other objectives in addition to that of counteracting the effects of past or present racial discrimination in the public works construction industry.

One such purpose appears to have been to assure to minority contractors a certain percentage of federally funded public works contracts. But, since the guarantee of equal protection immunizes from capricious governmental

treatment "persons"—not "races"—it can never countenance laws that seek racial balance as a goal in and of itself. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

Second, there are indications that the MBE provision may have been enacted to compensate for the effects of social, educational, and economic "disadvantage." No race, however, has a monopoly on social, educational, or economic disadvantage, and any law that indulges in such a presumption clearly violates the constitutional guarantee of equal protection. Since the MBE provision was in whole or in part designed to effectuate objectives other than the elimination of the effects of racial discrimination, it cannot stand as a remedy that comports with the strictures of equal protection, even if it otherwise could.

C

The Fourteenth Amendment was adopted to ensure that every person must be treated equally by each State regardless of the color of his skin. The Amendment promised to carry to its necessary conclusion a fundamental principle upon which this Nation had been founded—that the law would honor no preference based on lineage. Tragically, the promise of 1868 was not immediately fulfilled, and decades passed before the States and the Federal Government were finally directed to eliminate detrimental classifications based on race. Today, the Court derails this achievement and places its imprimatur on the creation once again by government of privileges based on birth.

The Court, moreover, takes this drastic step without, in my opinion, seriously considering the ramifications of its decision.

Laws that operate on the basis of race require definitions of race. Because of the Court's decision today, our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white.

Moreover, racial discrimination, even "good faith" racial discrimination, is inevitably a two-edged sword. "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."

Most importantly, by making race a relevant criterion once again in its own affairs the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. Notions of "racial entitlement" will be fostered, and private discrimination will necessarily be encouraged.

There are those who think that we need a new Constitution, and their views may someday prevail. But under the Constitution we have, one practice in which government may never engage is the practice of racism—not even "temporarily" and not even as an "experiment."

[Justice Stewart's convincing dissent failed to persuade the majority, who were more interested in racial preferences, and thus racism, than to justice.]