Heavy on Congress, Light On The Constitution

The Supreme Court rules on Bakke, Price-Anderson and the rights of the snail darter

The Supreme Court, acting in three major cases decided at the end of the 1978 spring term, demonstrated an instinctive commitment to the constitutional principles required for an expanding economy — flawed significantly by rampant judicial conservatism

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reminiscent of the late anglophile Supreme Court Justice Felix Frankfurter. The three cases — **Duke Power v. Carolina Environmental Study Group** (a challenge to the Price Anderson Act), **Tennessee Valley Authority v. Hill** (invoking the Endangered Species Act to prevent completion of the Tellico Dam), and **Regents of the University of California v. Bakke** (a challenge to racial quota affirmative action programs) — presented questions pivoted on the natural law principles of the U.S. Constitution as a framework for a government committed to economic and scientific progress. However, to a greater or lesser extent in each decision, the Supreme Court sidestepped the crucial constitutional question, and adhered to the dictum of 19th century Supreme Court Justice Oliver Wendell Holmes — "the Constitution does not embody any particular economic theory."

The Bakke Case

The Supreme Court's decision in the **Bakke** case best reflected the confusion which can beset nine men, lacking a firmly rooted understanding of natural law, seeking an answer for a question based on faulty premises. The **Bakke** case, orchestrated by the media to become a confrontation point between left and right, and to trigger race riot scenarios, represented an insoluble problem. How, with government constrained by austerity and zero growth policies, can the skills of the entire population be upgraded? The conservatives on the court, relying upon "free enterprise" principles of rugged individuality, chose to interpret congressional intent in the 1964 Civil Rights Act absolutely literally. ". . . the meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program." As succinctly phrased during the Senate debate, under Title VI it is not "permissible to say yes to one person, but to say no to another person, only because of the color of his skin."
joined by Chief Justice Burger, and Justices Steward and Rehnquist.) It is this "tough luck" approach which has fueled left countergang demonstrations against the Bakke ruling.

The liberals, relying upon the principle of carefully and deliberately sharing an ever-shrinking pie, held that racial quotas and other such techniques are perfectly appropriate. Ignoring the anguish of white workers trying to educate their children, this faction of the court opined, "Our cases have always implied an 'overriding statutory purpose' could be found that would justify racial classifications . . . Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to medical school."

Justice Powell, in a carefully constructed opinion designated as the opinion of the court, ruled that, although Bakke should be admitted to the University of California Medical School which applied hard and fast racial quotas, affirmative action criteria, among other considerations, could be a legitimate part of any admissions program. Powell wrote his decision with the clear intention of defusing the right-left confrontation which threatened to develop over the case. He made a number of careful distinctions, designed to stem the flood of equal protection cases, and reverse discrimination cases, while protecting affirmative action as a remedy for proven cases of past discrimination.

"The white 'majority' is itself composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals," Powell wrote. "Not all of these groups can receive preferential treatment . . . for them the only 'majority' left would be a new minority of white Anglo-Saxon Protestants. 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 consistenly." Powell took the court off the hook, leaving liberals and conservatives to argue among themselves as to who made off with the prize. As UN Ambassador Andrew Young pointed out, California's recently passed tax-cutting Proposition 13, which will lay waste to the state's educational and other social services, will have much greater impact than the Bakke decision.

Congress or Constitution?

The Tellico Dam case and the Price Anderson Act case presented a problem of a different sort to the justices. In these, the court was asked to rule on the legitimacy and intent of Congress and the legislation bearing directly upon projects vital for economic development. In the Tellico Dam case, the court ruled 6-3 to uphold a literal interpretation of congressional legislation (the Endangered Species Act) despite clear cut indications that Congress did not intend its legislation to bar completion of the Tellico project. As Chief Justice Burger wrote in his majority opinion, "It may seem curious to some that the survival of a relatively small

number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional appropriations committees were apprised of its apparent impact upon the survival of the snail darter. We conclude however, that the explicit provisions of the Endangered Species Act require precisely that result."

Indeed, it does appear curious. Although Chief Justice Burger may have delivered an object lesson Congress, he failed to note that the courts have the obligation to apply *the Constitution* to such legislation, and that the Constitution clearly embodies a commitment to the health and welfare of the *human* population as the paramount duty of Congress.

Justices Powell and Rehnquist, in two separate dissents, while not reaching the underlying constitutional question, objected to the Burger opinion's extreme nominalism, noting that a statute should not be construed so as to give an absurd result when any other reading is possible, and that the court may exercise its equity jurisdiction to reconcile apparently conflicting private claims and public interest. This argument was recognized as particularly dangerous by environmentalists who knew, as a representative of the Sierra Club told Congress, that any qualification of the act "could be construed to be a declaration of congressional policy that other agency purposes are necessarily more important than protection of endangered species . . . " The Constitution establishes that beyond question, although the Supreme Court has left the issue in doubt.

Price-Anderson

In the Price-Anderson Act case, the Court was finally able to lean upon definitively stated congressional legislation to formulate its policy. Southern environmentalists had challenged the Price-Anderson Act of 1957 which provided a federal insurance umbrella and liability limitation in the case of nuclear power plant accidents. The environmentalists had stated that they were aware, as was the lower court judge who ruled in their favor, that overturning Price-Anderson would mean the end of the nuclear industry. The Supreme Court ruled unanimously that the act should stand, that it "bears a rational relationship to Congress' concern for stimulating the involvement of private enterprise in the production of electric energy through the use of atomic power."

— Felice Merritt

Eximbank Recharter Passed By Senate Subcommittee

Stevenson adds weak 'by-pass' of Jackson-Vanik amendment

The Senate Banking Committee's subcommittee on International Finance, headed by Adlai E. Stevenson of Illinois, has passed favorably on legislation to recharter the Export-Import Bank and to raise its credit facility from the present $25 billion to the Administration's

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requested $40 billion. The amendments attached to the bill, primarily by Senators Stevenson and Percy, reflect the nature and depth of the fight raging in Congress, and within the Administration and different executive departments, over whether to repeal the Jackson-Vanik amendment to the 1974 Trade Act.

The Jackson-Vanik amendment has curtailed Eximbank credits for trade with "communist" countries because of their so-called emigration restrictions. The fight against it is aimed at ending the restrictions on nuclear and nuclear-related technology transfers and in general all restrictions which have lessened the ability of the United States to participate in East-West trade arrangements.

The general consensus within the American business community is that unless the Eximbank's operating guidelines are liberalized especially vis-á-vis trade with the East block, the U.S. will be shut out of expanding trade opportunities which the other Western industrial nations are pursuing at full throttle. A recent issue of Chase Manhattan Bank's *International Finance* newsletter reports that despite U.S. efforts to impose limitations on East bloc and Soviet credit lines by the OECD, several European nations and Japan have increased their credit lines. Italy recently replenished an exhausted credit line to the Soviet Union with $900 million of additional credit, while France, Britain, and Japan are now extending credits at interest rates below the minimum established by the OECD Export Credits Group in April of this year.

But the U.S. Eximbank as constituted by the new charter, even with the expansion of credit, and Senator Stevenson's attempts to liberalize trade with the East Bloc, cannot take advantage of expanding trade opportunities. A major problem is that Stevenson's amendments set up eligibility requirements for trade financing, which could more severely brake an overall expansion of trade, depending on how Congress and the President choose to interpret or enforce his criteria. Secondly, the bill now contains an amendment by Senator Percy