

**(Cite as: 28 J.C. & U.L. 153)**

Journal of College and University Law  
2001

**Note**

**\*153 RACE-CONSCIOUS ADMISSIONS IN HIGHER EDUCATION**

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In 1978, the Supreme Court decided the case of Board of Regents of the University of California v. Bakke, [FN1] and while this decision declared the University of California's use of racial classifications in admissions unconstitutional, it created the proverbial "carrot and stick" situation for admissions directors across the country. Justice Powell, announcing the judgment [FN2] of the Court and joined by no other justices, said that diversity "clearly is a constitutionally permissible goal for an institution of higher education" [FN3] and is "compelling in the context of a university's admissions program." [FN4] With these words, Justice Powell seemed to give diversity the nod, but he did not give the particulars, the logistics, the method or mechanism through which an admissions scheme that considered the race of the applicant could be constitutionally implemented. [FN5] Since Bakke, many institutions of higher learning have attempted to devise a system of admissions that achieves the desired goals without running afoul of the Equal Protection Clause of the Fourteenth Amendment [FN6] or Title VI of the Civil Rights Act of 1964. [FN7] In doing so, some of these institutions have found themselves in court and often have had their system of admissions declared unconstitutional or violative of federal statutory law. [FN8]

**\*154** This Note seeks to explore diversity as a justification for racial classifications in institutions of higher learning. Specifically, this Note examines federal court cases addressing the question of whether diversity is a constitutionally permissible goal for colleges and universities and, if so, whether the means employed to achieve this goal are permissible in light of Title VI and the Fourteenth Amendment's Equal Protection Clause. In Part I, this Note examines the scattered opinions of Bakke and seeks to understand the rationale recent courts have used to find precedent in this badly fractured opinion. Part II discusses five post-Bakke Supreme Court cases, the earliest decided in 1986 and the most recent in 1995, addressing racial classifications in various contexts. Part III discusses

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a 1996 case from the United States Court of Appeals for the Fifth Circuit, *Hopwood v. State of Texas*, dealing with racial classifications in the context of higher education admissions. [FN9] Part IV discusses the four cases from 2000 and 2001 that make up the focus of this Note: *Johnson v. Board of Regents of the University System of Georgia*, [FN10] *Smith v. University of Washington Law School*, [FN11] *Grutter v. Bollinger*, [FN12] and *Gratz v. Bollinger*. [FN13] Part IV concludes with a brief discussion of various methods states and universities have employed to maintain racial diversity without the use of race-conscious admissions. Part V contains a discussion of how policy-makers can incorporate race-consciousness into the admissions process in ways that minimize the chances of the admissions program being found violative of Title VI and the Equal Protection Clause.

#### I. Regents of the University of California v. Bakke

There is no place to begin quite like the beginning and the beginning for racial classifications in college and university admissions is *Bakke*. [FN14] In \*155 *Bakke*, the United States Supreme Court for the first time addressed the use of racial classifications in this specific setting. Unfortunately, its decision would not even begin to put the issue to rest.

#### A. The Facts

When the Medical School of the University of California at Davis opened in 1968, it had an entering class of fifty students. [FN15] Although the class contained three students of Asian decent, it contained no black, Mexican, or Native American students. [FN16] Over the next two years, the incoming class size was expanded to one hundred, and the faculty devised a special admissions program in order to increase the number of "disadvantaged" students in each incoming class. [FN17] Under this new program, applications received from "disadvantaged" students would no longer be substantively considered by the ordinary admissions committee but would be directed to a special subcommittee, a majority of whom were members of a minority group. [FN18] Although no formal definition of "disadvantaged" was established, the chairman of the special committee screened each application to determine economic or educational deprivation. [FN19] By 1973, the applicants for that year's fall class received information outlining the goals of the new program and discussing the "special subcommittee of the Admissions Committee" that would be handling the applications of these "disadvantaged" students. [FN20] The 1973 application form provided for applicants to opt to be considered "economically and/or educationally disadvantaged" and in the 1974 form, the applicants were asked if they wished to be considered a member of a "minority group," which the school viewed as "Blacks," "Asians," "Chicanos," and "American Indians." [FN21]

In order to manage the numerous applications the school received, the general admissions program (which was the only admissions program until 1973) eliminated those applicants whose undergraduate grade point average fell below 2.5 on a 4.0 scale and granted interviews to approximately one sixth of the remaining candidates. [FN22] If a candidate was granted a personal interview, the interviewer and four or five other members of the admissions committee would rate the candidate on a scale of one to one hundred. [FN23] These ratings were based on the interviewer's summaries, the candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, \*156 extracurricular activities, and other biographical data. [FN24] The sum of the ratings would be the applicant's "benchmark" score. [FN25] Since, in 1973, five members of the admissions committee would rate the applicant, a score of 500 represented a perfect score for that year while in 1974, when six members rated the applicant, 600 was a perfect score. [FN26] Based on this "benchmark" score, applicants were admitted on a rolling basis. [FN27]

If, on the 1973 or 1974 application, the applicant claimed to be "disadvantaged" or a minority, the applicant would be segregated from the main pool of applicants and subjected to a different procedure. [FN28] Under the different procedure, the candidate would not be subjected to the 2.5 GPA cut off in order to remain eligible for admission. [FN29] Approximately one fifth of special applicants were invited for personal interviews. [FN30]

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Based on the interview and other information, the special committee assigned the special applicant a "benchmark" score and subsequently presented the top special applicants to the regular admissions committee. [FN31] Although the regular admissions committee rejected some special applicants for failure to meet course requirements or other specific deficiencies, at no time were the special applicants compared to the regular applicants. [FN32] After a specific number of special applicants, predetermined by the faculty, had been admitted, the special admissions program was complete. [FN33] In the four years after the increase in class size, 1971 through 1974, the special admissions program resulted in the admission of sixty-three minority students. [FN34] During this same four year span, the regular admissions program resulted in the admission of forty-three minority students, of which thirty-seven were Asian. [FN35] Although many disadvantaged white students applied to the special program, none was granted admission and at least in 1974, the special committee considered applicants "disadvantaged" only if they were members of one of the designated minority groups. [FN36]

Allan Bakke, a white male, applied to the Davis Medical School in 1973 and 1974 and was granted an interview both times. [FN37] In 1973, although Bakke's interviewer considered him "a very desirable candidate for the medical school" and he received an impressive benchmark score of 468 out of 500, \*157 he was denied admission. [FN38] Bakke was not considered for the four remaining special admissions slots available at the time at which his application was considered. [FN39] Following his rejection, Bakke wrote to the Associate Dean and Chairman of the Admissions Committee, Dr. George H. Lowery, protesting and claiming the special admissions program operated as a racial and ethnic quota. [FN40]

In 1974, Bakke was again granted an interview and, as the interview process had changed, was this time afforded an interview with a student and a faculty member. [FN41] The student interviewer found Bakke to be "friendly, well tempered, conscientious and delightful to speak with" and gave him a score of ninety-four. [FN42] The faculty interviewer was ironically the very same Assistant Dean Lowery Bakke had written to earlier, and, Dr. Lowery found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than on a study of the whole problem." [FN43] Dr. Lowery gave Bakke his lowest score, eighty-six, resulting in a sum of 549 out of 600 and Bakke was rejected for the second time. [FN44] During both years, special applicants were admitted with GPAs, MCAT scores, and benchmark scores dramatically lower than Bakke's. [FN45]

After the second rejection, Bakke filed suit in the Superior Court of California seeking to enjoin the school's future use of race in admissions and to compel his admission to the Medical School. [FN46] Bakke alleged that the Medical School's special admissions program violated the Equal Protection Clause of the Fourteenth Amendment, the California Constitution, and Title VI of the Civil Rights Act of 1964. [FN47] The University cross-complained seeking a declaration that its special admissions program was lawful. [FN48] The trial court found that since the special program reserved a certain number of seats for minority applicants and segregated these applicants from the rest of the nonminority \*158 applicants, the special program operated as a racial quota and therefore violated of the Equal Protection Clause, the California Constitution, and Title VI. [FN49] The trial court granted the injunction prohibiting the medical school from taking race into account when making admissions decisions but denied Bakke admission to the medical school because he had failed to prove that he would have been admitted had there been no special admissions program. [FN50] Bakke appealed the denial of admission and the University appealed the trial court's conclusion that its special admissions process was illegal and the University could no longer consider race in its admissions decisions. [FN51] The California Supreme Court transferred the appeal directly from the trial court citing the "importance of the issues involved." [FN52]

The California Supreme Court, in an opinion written by Justice Mosk, accepted the trial court's finding that the special admissions program involved a racial classification and therefore subjected the program to strict scrutiny. [FN53] Justice Mosk, found the medical school's asserted interests in integrating the medical profession and seeking to increase the supply of doctors willing to work within minority communities compelling but concluded

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that the special admissions program was not narrowly tailored to achieve the interests. [FN54] Specifically, Justice Mosk found the medical school's "claim that if special consideration is not afforded to disadvantaged minority applicants, almost none of them would gain admission," simply untrue. [FN55] Justice Mosk pointed out that "[w]hile minority applicants may have lower grade point averages and test scores than others, we are aware of no rule of law which requires the University to afford determinative weight ... to these quantitative factors." [FN56] In reference to the medical school's asserted interest in increasing the supply of doctors willing to work in minority communities, Justice Mosk found that "there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive." [FN57] Having concluded that the University's special program failed to comply with the Equal Protection Clause, the Justice Mosk did not address the state constitutional and federal statutory grounds. [FN58]

Justice Tobriner dissented, arguing that the type of classification instituted by the medical school was not "the traditional 'invidious' racial classifications \*159 embodied in laws or state policies which discriminated against blacks and other racial or ethnic minorities." [FN59] Justice Tobriner also disputed Justice Mosk's assertion "that the minority students accepted under the special admission program are 'less qualified' - under the medical school's own standards - than nonminority applicants rejected by the medical school." [FN60] Justice Tobriner argued that when the medical school adopted the special admissions program, it:

indicated that in its judgment differences in academic credentials among qualified applicants are not the sole nor best criterion for judging how qualified an applicant is in terms of his potential to ... satisfy the needs of both the medical school and medical profession that are not being met by other students. [FN61]

As for Bakke's appeal, Justice Mosk analogized Bakke's situation to a Title VII case and ruled that once Bakke had established that the University was using an illegal racial classification in its admissions program, the burden shifted to the University to prove that Bakke would not have been admitted absent the illegal classification. [FN62] Justice Mosk remanded in order to give the University the opportunity to prove that Bakke indeed would not have been admitted even without the special program. [FN63] In its brief for the remand proceeding, the University conceded that it would not be able to bear the newly allocated burden and the California Court subsequently amended its opinion and directed the trial court to order Bakke's admission to the Davis Medical School. [FN64]

The order granting the admission was stayed and the United States Supreme Court granted certiorari "to consider the important constitutional issue." [FN65]

## B. The Bakke Opinions

The United States Supreme Court issued a badly fractured plurality opinion with Justice Powell, joined by no other justices, announcing the judgment of the Court while two camps, one comprised of Justices Brennan, White, Marshall, and Blackmun, the other comprised of Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger produced divergent opinions further muddying the waters. Even today, there is much argument as to the exact contours of any precedent established in this case. [FN66]

### \*160 1. Justice Powell's Opinion

Justice Powell initially confronted and quickly dismissed the problem of whether a private right of action exists under Title VI. [FN67] Citing the failure of the courts below to address the problem, and the Supreme Court's "hesitan[cy] to review questions not addressed below," Justice Powell "assume [[d], only for the purposes of this case, that [Bakke] has a right of action under Title VI." [FN68]

Moving to the text of Title VI, [FN69] Justice Powell warned of the "varying interpretations" of words and

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phrases like "discrimination" and "equal protection of the laws," and vowed to leave no stone unturned in an attempt to ascertain the statute's true meaning. [FN70] Turning to the Congressional Record for guidance, Justice Powell quoted several legislators who had discussed the intent of Congress in creating Title VI as a means to provide for the fair disbursement of federal funds and to address the historically unfair treatment of blacks with respect to the distribution of these funds. [FN71] Repeatedly tying the contours of Title VI to the Constitution, Justice Powell finally said, "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment." [FN72]

Justice Powell next discussed the disputed standard applicable in a case of this sort. The University of California conceded that state university admissions decisions based on race are subject to review under the Fourteenth Amendment but argued that the California Supreme Court erred in applying strict scrutiny, "as this inexact term has been applied in our cases." [FN73] Justice Powell noted that the University of California was asserting that because Bakke was white, he was not a member of a "discreet and insular minority" for which strict scrutiny is exclusively reserved. [FN74] Justice Powell agreed with **\*161** Bakke on this issue and decided that the "rights established [by the Fourteenth Amendment] are personal rights" [FN75] and that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." [FN76] Justice Powell eventually said that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination" [FN77] and added that "when [these distinctions] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear ... is precisely tailored to serve a compelling governmental interest." [FN78]

Having established strict scrutiny as the applicable standard for a classification of this type, Justice Powell moved on to discuss the four proffered justifications for the special admissions program:

(a) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; [FN79] (b) countering the effects of societal discrimination; (c) increasing the number of physicians who will practice in communities currently underserved; and (d) obtaining the educational benefits that flow from an ethnically diverse student body. [FN80]

Justice Powell addressed each of the University's stated goals in turn.

a) Reducing the Historic Deficit of Traditionally Disfavored Minorities in Medical Schools and in the Medical Profession

Justice Powell characterized this first stated goal as an attempt to "assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." [FN81] Calling it "discrimination for its own sake," Justice Powell quickly dismissed this goal as "facially invalid" and Constitutionally forbidden. [FN82]

**\*162** b) Countering the Effects of Societal Discrimination

With respect to the second goal, Justice Powell began by referring to the line of school desegregation cases beginning with *Brown v. Board of Education* and acknowledged the substantial state interest in making educational opportunities available to all. [FN83] He subsequently distinguished these cases by pointing out that they all required States to "redress the wrongs worked by specific instances of racial discrimination," not general societal discrimination as in this case. [FN84] Justice Powell claimed the Court has never approved of classifications designed to remedy discrimination without a judicial, legislative, or administrative finding of a statutory or constitutional violation. [FN85] Without such a finding, he said, the extent of the injury and the remedy are not defined and thus the government cannot have a substantial interest in helping one individual as opposed to another. [FN86] In contrast to the cases upholding classifications, this case, Justice Powell said, dealt with a classification

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predicated on societal discrimination, which he described as an "amorphous concept of injury that may be ageless in its reach into the past." [FN87] He further argued that not only had the University of California failed to produce findings of specific instances of discrimination, but also it would have been unable to do so had it desired or attempted to produce such findings. [FN88] As Justice Powell explained, the university's "broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." [FN89] He went so far as to state that in the absence of "legislative mandates and legislatively determined criteria," entities such as federally funded universities are "isolated segments of our vast governmental structures [and] are not competent to make those decisions ...." [FN90] What the university had done in response to the societal discrimination, he explained, was to create a classification that burdens persons like Bakke, "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." [FN91]

In short, Justice Powell acknowledged that classifications designed to remedy past or ongoing discrimination can survive strict scrutiny but not if they are prompted only by perceived societal discrimination. [FN92] Without determining more specifically the discrimination that is the target of the remedial classification, the imprecisely prescribed classification can lead to the direct, illegal discrimination that took place in Bakke's case, he said. [FN93] Moreover, Justice Powell asserted that only a judicial, legislative, or administrative finding **\*163** of specific instances of discrimination would suffice to justify a race-based classification. [FN94]

c) Increasing the Number of Physicians Who Will Practice in Communities Currently Underserved

While Justice Powell conceded that improving the health care of currently under-served communities was a compelling state interest, he argued that the university had not proven that its special admissions program would do much to remedy the problem. [FN95] Specifically, he cited the lack of evidence that minority doctors are more likely to work in under-served areas simply because they are minorities themselves. [FN96] Quoting Justice Mosk of the California Supreme Court, Justice Powell said

The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an 'interest' in practicing in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority communities than the average white doctor. Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. [FN97]

Because the University had failed to establish a sufficient nexus between the special admissions program and the stated problem, the university's classification, Justice Powell said, was not narrowly tailored and did not survive strict scrutiny. [FN98]

d) Obtaining the Educational Benefits that Flow from an Ethnically Diverse Student Body

Justice Powell, without hesitation, declared this final justification a "constitutionally permissible goal for an institution of higher learning" [FN99] and "compelling in the context of a university's admissions program." [FN100] Justice Powell argued, moreover, that this goal is a component of academic freedom, a "special **\*164** concern of the First Amendment." [FN101] He further attempted to describe the many ways in which students benefit by learning from within a diverse student body. "[T]he 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples," he said. [FN102] He then quoted the President of Princeton University in saying:

