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Robert M. O'Neil

Indiana University School of Law - Bloomington

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Justice Powell's leading opinion in the Bakke case stressed educational diversity over state responsibility. However, even when "diversification" fails as a goal, the desire to overcome the effects of past discrimination may nonetheless avail.

what *Bakke* leaves to the states: preliminary thoughts

robert m. o'neil

The resolution of the *Bakke* case, despite the jagged split within the Court, provides a measure of relief to the academic community. While many questions remain unanswered, some guidance has at long last been provided—surely much more than the unhappy disposition of *DeFunis* provided four years ago. In the early months after the decision, many efforts have been made to determine the meaning and the scope of the decision (see McCormack, 1978). Further litigation will be required, and is in fact already in the courts, as the vehicle for further resolution of the many questions the Supreme Court left open.

For institutions of higher learning, major attention is likely to focus on the "diversity" which Justice Powell has said a college or university may seek through race-conscious admissions policies. Since that topic has been extensively covered elsewhere, nothing will be said about it here. Instead, the focus will be on the other principal basis for validation of preferential admission programs—a commitment to alleviate the effects of past racial discrimination. This second rationale played no major part in Justice Powell's opinion, not only because the University of California Regents had not purported to make the requisite findings, but because in Powell's view they lacked the capacity to make them. Thus a host of questions were reserved for a later case—what branches of government could make such findings, how explicit

they need be, what scope should be given to findings made at an earlier time and for a different purpose, and so on through a lengthy list of important issues.

In order to place the “past discrimination” issue in constitutional perspective, it may be useful to review very briefly the alignment of the Justices on the relevant questions. In fact, the Supreme Court rendered two judgments, each by a different 5–4 majority: one, that the Davis medical admissions program was unlawful; the other, that a total ban on use of race (such as the California Supreme Court had decreed) was improper. Two fairly distinct poles thus emerge along a rather wide spectrum of possible admission policies. At one end, both the Brennan group and the Stevens group (and presumably Justice Powell) would have sustained certain practices—for example, the preferential allocation of minority fellowships under a special program enacted for this precise purpose by Congress. An institution could properly use federal funds in this way for one simple reason: Congress enacted in 1964 the ban on which the Stevens opinion turned, and Congress could thus presumably make exceptions to that ban. On this basis the present Court might well uphold the so-called “ten percent set-aside” in the Public Works Employment Act, which has been the subject of much litigation, with conflicting results in the lower federal courts. This is one end of the scale; there may be other programs that would also be acceptable to the whole Court, but this is the clearest example.

At the other end of the spectrum there are policies which would be held unlawful even by the Brennan group. A race-conscious preference, for example, which cast a stigma on a minority group, would run afoul of the Brennan opinion. Any program not designed to remedy the effects of discrimination against the designated group—for example, a preference based on sheer whim or political influence, with no background of exclusion or denial of opportunity—would be invalid. Moreover, a race-conscious remedy must, in the view of the Brennan group, be designed “to remove the disparate racial impact (the institution’s) actions might otherwise have”—that is, its policies must be part of the *solution* even though they may not have been part of the problem.

This analysis brings us to the heart of the difference between the Brennan and Powell approaches, and helps to explain why two wings of the Court that agreed in principle on the use of race diverged when it came to the specific admissions program. Basically, Justice Powell believed that the University of California had no business using race to remedy discrimination which it had not itself created—even though blacks and Chicanos may well have been denied equal opportunity in the elementary and secondary schools of California, Chinese may have been denied employment, and Japanese may have been dis-

advantaged in business and land ownership. The University, in short, could correct the injustices which it had caused, but could not use race to cure the effects of a general condition of discrimination or exclusion.

We must then look more closely at the fourth justification which Justice Powell offered for use of race: "The State," he wrote, "certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination" (1978, pp. 3-7). But the judgment required to invoke this principle was not one the University itself could make. Not only had the University of California not in fact found racial discrimination in its past admission policies, but in Justice Powell's view "it was in no position to do so." The mission of the University, he continued, "is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." (It is noteworthy that the Regents of the University of California are in fact a constitutional body—one of twenty-two state universities in the country which enjoys such status. Thus their inability to make such a judgment would apply more clearly to the greater number of public college and university governing boards which are creatures of legislation rather than of the constitution.)

There is no clear explanation for Justice Powell's belief that the critical judgment must be made by some entity other than the regents or trustees. Surely he could not be unaware of the processes by which governing boards work. Perhaps he felt that university trustees have a kind of self-interest that is not wholly to be trusted in such matters, or that they are subject to kinds of pressures on the campus from which other agencies are more isolated. There is also a strong suggestion that such sensitive decisions should be made by a politically accountable body, which is answerable to the electorate for the uneven dispensation of burdens and benefits—especially where the benefit is as valuable as admission to a state medical school. Justice Powell may also have felt that the governing board of a single university might fail to recognize all competing claimants, and might thus through incomplete judgment, disfavor some eligible minorities. The reasons for Justice Powell's distrust of the university Regents remain obscure, and need to be probed more fully at a later time. Even the question whether, under different conditions, the University of California Regents might be trusted to make such sensitive decisions, may remain open because the facts of the *Bakke* case did not really present it to the Court. For the moment, however, we may accept the limitation and turn to other possible governmental sources of the critical judgment which triggers the "past discrimination" basis of race-conscious policies.

Clearest and most obvious among the decision-makers are the courts. A judicial finding of past racial discrimination would permit race-conscious remedies as readily as in the school desegregation cases—

with which Justice Powell is intimately familiar, and which he cited with obvious approval. The higher education systems of some south-eastern states may well be the object of judicial findings which not only permit but may actually require race-conscious remedies. Surely the Supreme Court would not preclude the use of race to remedy a condition which a lower court has held must be corrected — unless, of course, the underlying judgment were to be reversed.

There is a more difficult question on the judicial side: What of the old decrees, going back to the 1940s and 1950s—some before and others just after *Brown v. Board of Education*—finding racial discrimination in certain southern state universities? The Court did not say much about the *duration* of such a basis for race-conscious policies. Justice Blackmun, in his brief separate opinion, spoke of a “transitional inequality” and expressed the hope that a time would come when race-conscious remedies would no longer be necessary. There is no clear benchmark by which to gauge that time. A strong argument could therefore be made that Justice Powell’s opinion has breathed new life into old cases like *Sweatt v. Painter* and the Georgia and Alabama cases of the mid-1950s, to the extent that a justification beyond the recent dual-system litigation may be needed.

So much for the role of the courts. The role of legislatures and administrative bodies is less clear. What, for example, of a state higher education coordinating board or agency? Could it make findings of discrimination which would be acceptable where those of the university’s own governing boards might not be? Its business, too, is education, and it does not customarily engage in “adjudication of particular claims of illegality,” to use Justice Powell’s phrase. Perhaps what he had in mind is state antidiscrimination boards or commissions, which know less about higher education but do have at least a quasi-judicial role and thus might well make such findings about the admission or financial aid policies of a particular college or university. It would now appear that such a judgment, even in an individual grievance case, would allow a university to do what the University of California at Davis could not do in the absence of such findings. (Let me raise one major caution at this point: We know how the Brennan group would resolve such a case; since they found the Davis program valid as it was, they would more easily have reached that conclusion after an administrative finding of discrimination. We think Justice Powell would now join them to make a fifth. But we know nothing of the view of the Stevens group, who scrupulously avoided going beyond the facts of the *Bakke* case and the reach of Title VI. They would presumably allow race-conscious remedies after a *court* had found discrimination—to the same extent as in the public school cases—but how far they would go with the “legislative and administrative” portion of the Powell opin-

ion is unclear. Five votes makes a court, to be sure, but it is a margin too close for comfort on questions as portentous as these.)

Finally, we come to the possible role of the legislature. It seems that Justice Powell—and of course the Brennan group—would permit a college or university to use race, for example to implement a state equal opportunity program in admission or financial aid. Even if the statute did not in terms declare that the colleges and universities of the state had in the past been guilty of racial discrimination—a declaration which lawmakers would understandably view with some caution the enactment and the clear purpose of the program might meet the Powell test. On the other hand, two federal laws which were cited in this context—one dealing with voting rights and the other with special bilingual education—are somewhat more explicit in finding past discrimination than is the preamble of the typical equal opportunity scholarship law. Thus the issue is a difficult and sensitive one: To say too little may run the risk that the program will be held legally inadequate under the Powell test; on the other hand, to say enough to invoke that test with certainty risks admitting a culpability which legislators and university officials are loath to admit solely for the purpose of expanding opportunity. Moreover, some such programs now extend to groups that could not really be said to have been discriminated against in the past by college admissions or financial aid policies. The framing of state legislation in this area thus becomes a delicate and demanding task, and there will probably be many more cases defining the limits on use of race under state laws and agency rulings.

Obviously we have only scratched the surface. Since the major attention in the *Bakke* opinions—the Powell and Brennan opinions at least—was devoted to the “diversity” issue, we are left to speculate on the possible application of the other major rationale. Even before *Bakke* we would have assumed that a state college or university could take steps to remedy past discrimination which, in the judgment of a court, its own past exclusionist admission policies had caused. Less clearly understood is the possible significance of administrative or legislative findings of the kind which Justice Powell has now suggested may be constitutionally relevant. It remains to be determined to what extent such findings—both explicit and implicit—may now serve to validate race-conscious admission policies which would have been vulnerable in the past. Even where “diversification” fails as a goal, the desire to overcome the effects of past discrimination may nonetheless avail.

reference

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Robert M. O'Neil, vice president and professor of law at Indiana University, Bloomington, graduated from Harvard College and Harvard Law School and served as law clerk for Justice Brennan during 1961-62 before joining the faculty of the School of Law at the University of California, Berkeley. From 1967 to 1969 he served as executive assistant to Martin Meyerson, president of SUNY at Buffalo; after returning to Berkeley for three years, he later served as vice president and provost of the University of Cincinnati before assuming his current position at Indiana University.