

**REGENTS OF THE U.C. v. BAKKE (1978)**

**UC DAVIS ADMISSIONS PROGRAM 1973-74**

In 1973-74, UC Davis Medical School employed a form of race-based preferential treatment in admissions. Out of 100 spots, 16 were reserved for “minorities” in 1974 (“Blacks”, “Chicanos”, “Asians”, “American Indians”), the rest for all other applicants.

Two-track admissions process

Grade point average cutoff for one pool, but not the other.

Applicants from one pool were not compared to applicants of the other.

Each candidate was given a benchmark score (reflecting interview, GPA, GPA in science courses, MCAT score, rec letters, extracurricular activities, and other biographical data).

Those with the highest benchmark scores in the regular pool were admitted through the regular application process (unless they had certain “special skills”); similarly for those in the special “minority” applicant pool.

**BAKKE’S APPLICATION**

Allan Bakke applied to UC Davis Medical School in 1973 and 1974, and was rejected both times.

His benchmark score was not good enough to get him admitted through the regular application process, but his score was significantly higher than the average score of those who were admitted through the special “minority” application process.

**BAKKE’S COMPLAINT**

Bakke filed suit in California State Court, charging that the school’s special admissions process (SAP) violated his rights under

- (a) the EP Clause
- (b) Title VI of the Civil Rights Act of 1964
- (c) the California Constitution

## **THE FRACTURED COURT**

Stevens, Burger, Stewart, Rehnquist

SAP violates Title VI.

So, no need to discuss whether SAP violates the EP Clause.

Since UC Davis can't prove that Bakke would have been rejected if SAP had not been in effect, Bakke should be admitted.

Brennan, White, Marshall, Blackmun

SAP violates Title VI only if it violates the EP Clause.

Racial classification for remedial purposes violates the EP Clause only if it fails the Intermediate Scrutiny Test.

SAP has a remedial purpose and passes the Intermediate Scrutiny Test.

So, SAP violates neither Title VI nor the EP Clause; Bakke has no right to be admitted.

Powell: Man in the Middle

SAP violates Title VI only if it violates the EP Clause. [~Brennan]

Racial classification of any kind violates the EP Clause if it fails the Strict Scrutiny Test.

SAP fails the Strict Scrutiny Test.

So, SAP violates both Title VI and the EP Clause; Bakke should be admitted. [~Stevens]

## **STEVENS ON TITLE VI**

SAP Violates Title VI: [Plain Meaning]

Title VI: "No person in the U.S. shall, on the ground of race, ...be excluded from participation in...any program or activity receiving Federal financial assistance."

UC Davis receives Federal financial assistance.

UC Davis, through SAP, excluded Bakke from participation in its program of medical education on the ground of race.

So, UC Davis, through SAP, violated Title VI.

SAP Violates Title VI: [Original Intent]

As Title VI was being debated in Congress, “the proponents of the legislation gave repeated assurances that the Act would be “‘colorblind’ in its application”.

So, Title VI applies as much to racial classifications that discriminate against whites as it does to racial classifications that discriminate against blacks.

Since SAP violates Title VI, there is no need to discuss whether SAP violates the EP Clause.

“Our settled practice...is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground.”

### **POWELL ON TITLE VI**

SAP violates Title VI only if it violates the EP Clause: [Original Intent]

“Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that [Title VI] enacted a purely color-blind scheme, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.”

The problem addressed by Title VI was discrimination against blacks, not discrimination against whites.

Full examination of the legislative debates reveals that “supporters of Title VI repeatedly declared that the bill enacted constitutional principles”.

## POWELL ON RACE AND SCRUTINY

Racial Classification of any kind violates the EP Clause only if it fails the Strict Scrutiny Test.

Precedents: *Hirabayashi* and *Korematsu*

“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.” [*Hirabayashi*]

“All legal restrictions which curtail the civil rights of a single racial group are immediately suspect... Courts must subject them to the most rigid scrutiny.” [*Korematsu*]

UC Davis claimed that the Strict Scrutiny Test in the area of race and equal protection applies only to “stigmatizing” racial classifications that burden “discrete and insular minorities”, not to “benign” racial classifications that burden majorities (*Carolene Products*, fn. 4).

Powell rejected UC Davis’s claim

Instability

Since “the concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments”, there would be instability in the application of UC Davis’s proposed principle.

Arbitrariness

Since identification of the relevant minorities would require “sociological and political analysis [that]... does not lie within the judicial competence”, there would be arbitrariness in the application of the principle.

UC Davis’s position rejected

Disutility

If the level of judicial scrutiny of a racial classification depends on whether it is ‘benign’ or ‘stigmatizing’, then the level of scrutiny “may vary with the ebb and flow of political forces”, and hence “exacerbate racial and ethnic antagonisms”.

## Inconsistency

Such politically sensitive variation in the level of judicial scrutiny “undermines the chances for consistent application of the Constitution” across time.

Why racial classifications of any kind should be subjected to the Strict Scrutiny Test:  
Justice

1. Refusing to apply the Strict Scrutiny Test to “benign” racial classifications would allow obviously unconstitutional “burdens [to be] imposed upon individual members of a particular group in order to advance the group’s general interest”.
2. Refusing to apply the Strict Scrutiny Test to “benign” racial classifications could “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.”
3. Refusing to apply the Strict Scrutiny Test to “benign” racial classifications would produce a “measure of inequity” in so far as innocent persons (in *Bakke*’s position) would be forced “to bear the burdens of redressing grievances not of their making”.

UC Davis claimed that the Court had previously applied a more relaxed level of scrutiny to cases involving “benign” preferential classification.

Powell’s reply

These cases differ from *Bakke* in that the preferential treatment at issue in them was either designed to remedy identifiable violations of constitutional rights (e.g., busing) or based on sex (not race).

Race vs. Sex

Practical Difference

“With respect to gender there are only two possible classifications... Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable... The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications.”

Historical Difference (more important)

“The perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share.”

### **POWELL ON SAP AND STRICT SCRUTINY**

SAP fails the Strict Scrutiny Test

Of the goals that UC Davis sought to reach by using SAP, only Health and Diversity are compelling, and SAP is not necessary to reach either.

However, less quota-like forms of racial preference in university admissions might be justified as necessary to reach the compelling goal of Diversity, and so might pass the Strict Scrutiny Test.

Example: Harvard’s more holistic approach

Two Goals that are Not Compelling

“Reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession.”

Problem: Discrimination “for its own sake.”

“Countering the effects of societal discrimination.”

Problem: “Amorphous concept of injury that may be ageless in its reach into the past.” Remedial measures require “judicial, legislative, or administrative findings of constitutional or statutory violations”.

Two compelling goals, but SAP not necessary to reach them

“Increasing the number of physicians who will practice in communities currently underserved.”

Problem: “There are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race.”

“Attainment of a diverse student body.”

## **POWELL ON DIVERSITY AND STRICT SCRUTINY**

Why Diversity is a Compelling End

1. Protecting the value of a constitutional right is a compelling end.
  2. Freedom of speech is a constitutional right. [1st Amendment]
  3. Protecting the value of freedom of speech (i.e., the attainment of truth) requires protecting the university's academic freedom to select a student body that will "provide that atmosphere which is most conducive to speculation, experiment, and creation."
  4. "The atmosphere of 'speculation, experiment, and creation' ... is widely believed to be promoted by a diverse student body."
- C. So, diversity is a compelling end.

## **POWELL ON SAP AND DIVERSITY**

Why SAP is not necessary to achieve diversity

There are other ways to achieve diversity than through the use of a separate admissions track. Race could be used as a "plus" factor to be weighed together with narrow academic criteria and a number of other diversity-enhancing factors (e.g., geography, music, sport, nationality). This holistic approach would permit each application to be weighed against every other application in order to achieve true diversity.

## **BRENNAN ETC. ON TITLE VI**

Same Analysis as Powell's

SAP violates Title VI only if it violates the EP Clause.

## **BRENNAN ETC. ON RACE AND SCRUTINY**

According to Supreme Court precedents, the Strict Scrutiny Test applies only when state action is based on a "suspect" classification (*Carolene Products*, fn. 4) or threatens a "fundamental" right (*Palko*).

No fundamental right is at issue in *Bakke*.

Whites as a class 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 political process.”

Racial classification for remedial purposes violates the EP Clause only if it fails the Intermediate Scrutiny Test.

“A number of considerations...developed in gender-discrimination cases but which carry even more force when applied to racial classifications...lead us to conclude that racial classifications designed to further remedial purposes ‘must serve important governmental objectives and must be substantially related to achievement of those objectives.’” [See *Craig v. Boren*]

### **BRENNAN ETC. ON RACE, SEX, AND SCRUTINY**

Why Race and Sex Demand the Same Level of (Intermediate) Scrutiny

1. Both race and sex have been “inexcusably utilized to stereotype and stigmatize politically powerless segments of society.” To avoid the “hazard of stigma”, a race-based classification, like one that is gender-based, demands a higher level of scrutiny than is provided by the Rational Basis Test.

2. “Race, like gender..., is an immutable characteristic which its possessors are powerless to escape or set aside...Divisions [on the basis of an immutable characteristic] are contrary to our deep belief that ‘legal burdens should bear some relationship to individual responsibility or wrongdoing,’ and that advancement sanctioned...by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual.”

### **BRENNAN ETC. ON SAP AND INTERMEDIATE SCRUTINY**

SAP has a remedial purpose and passes the Intermediate Scrutiny Test.

SAP has the “articulated purpose of remedying the effects of past societal discrimination.”

This remedial purpose is important.

SAP is “substantially related” to this remedial purpose.

SAP is substantially related to the purpose of remedying the effects of past societal discrimination

Poverty or family educational background is a poor substitute for race as an indicator of past discrimination.

SAP favors only those “minority applicants likely to have been isolated from the mainstream of American life.”

### **BLACKMUN’S FAMOUS DICTUM**

“In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.”