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The High Court and the Bakke decision:

Is Affirmative Action Reverse Discrimination?

Many who have examined Bakke are shocked not so much at the nature of the injury inflicted on special admissions programs as at the fact that the assailant was the Supreme Court of California. To those who have watched that court in its strict enforcement of compulsory integration of secondary schools, for example, it seems strange indeed.

Even a member of the court, Justice Mathew Tobriner—the sole dissenter in the Bakke case—was startled by the result. He wrote, “It is anomalous that the Fourteenth Amendment that served as the basis for the requirement that elementary and secondary schools could be compelled to integrate, should now be turned around to forbid graduate schools from voluntarily seeking that same objective.”

The court was obviously concerned about Third World entry into the professions, and the decision’s author indicated that he accepted the importance of Third World admission to medical schools as, arguendo, a compelling state interest (the highest level of interest under equal protection). The Supreme Court of Washington in the De Funis case had expressly found that the state had a compelling interest in special admissions programs. Nonetheless, the California court struck down the scheme chosen to achieve that end — relying on what appear to me to be two major fallacies concerning equal protection.

The first fallacy is to be found in the court’s acceptance of the idea that equal protection is an individual, as opposed to a group, claim. It makes a great difference whether Bakke be allowed to claim that he was discriminated against personally, as opposed to 16 other people specially admitted to the medical school, or whether he is seen as pressing a claim for all others similarly situated, as in white males, against the persons admitted through the special admissions program. (Although the majority opinion talks about the possibility of subgroups within the larger group of white males, there is no indication that Bakke was a member of any group more deserving of special admissions attention than his Caucasian race.) It is difficult to make a claim that white males, as a group, require special assistance in admission to medical schools.

While there is language in equal protection cases which suggests that equal protection is an individual right, that idea seems difficult to square with the nature of the equal protection claim. An equal protection claimant must necessarily attack a classification. The result of abandoning the classification will necessarily be to treat those previously classified separately in the same manner as others in a more favored group. Bakke, in effect, asked that the favorable minority group classification be ended. If his claim is correct, it must of necessity benefit all others not in the favored minority.

By George J. Alexander
group — namely all whites. Benefiting whites as a group at the expense of minorities as a group sounds a lot less attractive than one individual's claim to personal equality.

That brings us to the second error in the court's opinion: its acceptance of the idea that equal protection applies equally to all groups. While the court recognizes the potential importance of racial discrimination designed to increase Third World presence in the professions, it ultimately succumbs to the idea that racial classification is almost impossible to justify, whatever race is disadvantaged. That finding ignores the fact that the Fourteenth Amendment (which brought equal protection into the Constitution) was part of a trilogy of amendments designed to end the vestiges of slavery. It also ignores the fact that the compelling state interest test on which it relies is a special test reserved for selected cases: those affecting special constitutional rights (not relevant here) and those affecting politically impotent groups. All other equal protection cases are reviewed under later standards.

It was precisely because of the political impotence of racial minorities that the United States Supreme Court announced that it would require a compelling state interest to justify using race as a classifier. No such interest was ever found by the California Supreme Court. By contrast, all claimants who objected to unequal application of state regulation governing commerce were relegated to the rational relationship test and all failed in the court. The court saw them as not in need of special protection. If there are reasons for requiring a showing of a compelling state interest to use race in a classification that disadvantages minorities, surely there is no reason to require so high a standard when racial classification disadvantages a less politically impotent group.

Another way of stating the same point is to say that Bakke was disadvantaged by a number of preferences. The school preferred applicants from some geographic locations to applicants from others; the school preferred physicians planning to practice in certain fields of medicine over others. Would Bakke have succeeded in a suit claiming disadvantage because he lived in the wrong place or planned to practice the wrong type of medicine? Almost certainly not.

What then singles out race as requiring so high a standard of justification? It is the political impotence of racial minorities who have previously complained of discrimination against them. Without that basis, there is no reason to be more concerned about racial preference than geographic preference. (Of course there are instances in which it is not easy to distinguish racial classifications which benefit racial minorities from those which act to their detriment. Professional special minority admissions, however, is not one.)

The court makes a good deal of the social cost of special admissions programs. It points out that special admissions programs impose a badge of inferiority on all racial minority applicants accepted. If that is correct, it must still be balanced against the claim made by the University of California that the present alternative to programs of the sort at Davis is to return to the pattern of admitting whites almost exclusively.

The social balance is a difficult one. The real vice in Bakke, however, is that the California Supreme Court precludes a state from weighing these alternatives and arriving at its own conclusion. It forbids any state to conclude that the costs of the program are socially warranted.

Finally, the decision recognizes that present admissions processes are not so sacrosanct that they must be used to the exclusion of somewhat more subjective criteria, such as interviews and recommendations. I think it important to note that at a time when the ratio of applicants to seats in professional schools (both in medicine and in law) is so great, it is virtually certain that a large number of well qualified applicants are turned away by all schools every year. Thus, it seems to me proper to view the admissions process as one of selecting among a large number of qualified applicants those that best meet the academic objectives of the school.

Many conceive of special admissions as "lowering standards"; yet, until we know a good deal more about how to measure professional success, it seems extremely improbable that one can select from so large a group of applicants solely on the basis of formal credentials with any hope of picking the best doctors or the best lawyers. If that is true, why cannot a school select racial minority applicants (at least in the numbers in which they are presently accepted) in preference to taking an entire class of whites? The California court was willing to permit such selection for "disadvantaged" applicants.

At the time of this writing the Supreme Court of the United States has granted a stay, pending the filing of an appeal, which the regents of the University of California have decided to do. The granting of the stay suggests the willingness of the Court to make a decision on the merits. (And for the purposes of this discussion, I will assume the probability of such review.)

There are essentially five options for the Court. First, it can summarily affirm the decision of the Supreme Court of California.

Second, it can summarily reverse that decision based on clear conflict with prior law.

Third, it can find a procedural reason for avoiding the result and perhaps even vacate the decision, as was done in De Funis v. Odegaard.
Fourth, it can ameliorate the impact of the Bakke decision, either by holding that discrimination against whites is not cognizable at all or, more likely, that it is reviewable only under easier tests of equal protection.

And finally, it can adopt the decision of the Supreme Court of California insofar as it rules out racial preference and delete the portion of the opinion which continues to authorize special admissions for so-called disadvantaged students. Other minor possibilities suggest themselves, but the most likely conclusions are the last two mentioned.

The single most likely conclusion appears to be the acceptance of the Bakke prohibition against racial preference and the rejection of the special admissions standards for disadvantaged students. This half-Bakke'd solution could be seen as an extension of a recent ruling holding employment discrimination against whites by affirmative action programs to be cognizable under the Civil Rights Act. It would be consistent with another recent decision holding that District of Columbia police applicants must pass a general screening test, although that test has not been validated for police skills and despite the fact that blacks disproportionately fail the test.

Despite these clues pointing to a restrictive result for minority admissions programs, other factors point toward what I believe to be the second most likely outcome: a reversal based on finding the California court to have applied the wrong test.

The Burger Court has been reluctant to follow the Warren Court's lead in equal protection tests from the beginning. In a number of cases, the Court has expressly noted the possibility that the compelling state interest test might be appropriate but that, since even the rational relationship test was sufficient to invalidate the state program, it would not decide which test was required. The Court has also, without quite admitting it, adopted a number of intermediate equal protection tests in which the state's interest and the interest of the affected group are balanced.

At the same time, the Court has developed a new doctrine prohibiting irrebuttable presumptions. Under that doctrine, a legislative classification may be challenged on the grounds that it irrebutably presumes a difference between those adversely classified and others. For example, if pregnant school teachers are required to take maternity leave at the end of their sixth month of pregnancy, that may be viewed as an irrebuttable presumption that they are no longer fit to teach. On that basis, the Court may require that a functional test be substituted for the "irrebutable presumption."

The test is an obvious alternative to equal protection analysis in dealing with the classification. And the Court has also made it clear recently that it feels free to be selective in the application of the test from case to case.

The point of these comments has been to sketch some of the present law of equal protection to show that the Burger Court has moved closer to balancing the equities in each claim and farther from the Warren Court's notion of clear strata of equal protection enforcement.

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Since Bakke presents a state system far less outrageous (to say the least) than the systems of enforced segregation reviewed in many of the prior cases, the Burger Court seems in a better position than was the Warren Court to act in favor of the affirmative action program at Davis. While it seems unlikely that the Court would review and approve the special admissions program at Davis, it seems within the realm of possibility that it would see that the program should be judged by a standard more permissive than compelling state interest.

Once announcing that the test which the California court applied was the wrong one, the Supreme Court would then be in a position to reverse and remand the case. Freed of the necessity of applying the compelling state interest test, the Supreme Court of California might very well then reverse itself.

Assuming that the High Court will take the better part of a year before it decides the Bakke case, there is still the question of what one does in the interim. Justice Mosk spent a good portion of his opinion addressing that question, indicating that it was not necessary that one admit students through a unitary admissions scheme. In fact, he specifically suggested the acceptability of a second rung of admissions decisions made principally for disadvantaged students.

Furthermore, he indicated the appropriateness of recruiting, interviewing and receiving letters of recommendation as aids in the admission of disadvantaged students. (He did, however, say that these factors must be racially neutral and must be applied in a racially neutral manner.) Finally, he seemed optimistic that such an admissions program would not necessarily reduce the number of minority students enrolled in medical school and might in fact increase them.

Unfortunately, Justice Mosk did not specifically propose a definition of disadvantaged. For some schools, that will not matter; for them, the permission which the Supreme Court of California has given for abandoning special admissions will suffice. For those who want to continue, however, a difficult task lies ahead.

It seems to me that disadvantaged can be defined in a racially neutral way—and be applied in a racially

(continued on page 47)
neutral way — without substantially diluting present minority admissions programs. To the extent that it is correct that racial minorities have been disadvantaged educationally and economically (to mention but two areas), those factors can probably be used as criteria for defining disadvantaged.

For example, a factor in being disadvantaged may well be some description of the neighborhood in which the applicant grew up. Economic disadvantage may be reached by questions concerning parental employment and the need for the applicant to have worked. Educational disadvantage can be picked up by the quality of the secondary schools attended. Inquiry into native language and language spoken by parents should also be helpful. And some question about career objectives (even though one recognizes that students cannot be held to them) seems useful.

I am not yet in a position to come up with a longer or better list, though during the next year I will continue to try to develop one. Believing as I do that disadvantages have been disproportionately visited on racial minorities, I feel fairly optimistic that one can define them in such a way as to make the new programs available to racial minorities.

It has always been true that special admissions programs have been open to some whites whose disadvantages approximated that of racial minorities. It has also been true that some members of racial minority groups have not been given the benefits of special admissions consideration because they seemed less disadvantaged than others. It would seem to me that one's new disadvantaged-persons policy might well not go beyond those present limits.

A second alternative is simply to hold fast to whatever special admissions program presently exists. Especially outside of California this seems an acceptable interim solution. In a state, such as Washington, in which the Supreme Court has held special admissions to be constitutionally appropriate, the decision seems most defensible. Similarly in New York, where the Court of Appeals has upheld special admissions — at least in dictum — one would seem to be in a defensible posture.

Alternatively, one might look to distinctions between the Bakke holding and one's own situation. The Bakke decision said that black doctors were not needed for black patients. However correct that is, can it not be argued that black lawyers are needed for black clients? Is it not true that in criminal law, for example, there is a great need for immediate rapport and client confidence in the attorney, and does not our experience show a greater likelihood of obtaining such confidence if black people are provided black lawyers?

And second, Bakke indicated that the only problem with the program was the failure of the state to demonstrate the necessity of this racial distinction as a means of more fully integrating the medical profession.

The court viewed the Davis admissions program as a racial quota system. Perhaps one can distinguish one's program as not being based on an established quota. Those in private schools can certainly note that Davis is a state school and that an argument can be made that private schools cannot be challenged for similar programs because there is no "state action." I personally have grave reservations about that argument, since the U.S. Supreme Court this term decided in Runyon v. McCrory that discrimination against blacks in Southern private schools can be reached under the Civil Rights Act. A similar finding about Northern private schools engaged in what the Court might see as racial discrimination seems likely.

Nonetheless, one might argue that the foreclosure attendant on denial at free or inexpensive state schools is far more damaging than denial at a full tuition institution; the denial runs not only to admission to professional training but to state subsidy as well.

There remains one last avenue. The Court expressly stated that cases requiring affirmative action could be distinguished because they were premised on prior discrimination. To the extent that it is possible to claim prior discrimination, one would seem able to provide an affirmative program for its eradication. Indeed, one could presumably be compelled to provide such a program under these circumstances.

A lot remains to be seen about this category of rationale for affirmative action. For one thing, it is not known whether any schools will willingly admit prior discrimination. Both principle and fear of the mandatory programs that might follow probably militate against there being a large number.

Second, it remains to be seen whether claimants, such as Bakke, will be able to prove that universities have previously discriminated. Somehow, the spectacle of a university pleading with a jury to find that it was in fact guilty of past discrimination seems just a bit ludicrous.

And finally, it is not even completely clear whether one is free to act because of one's past discrimination or whether one must await some court or legislative or executive finding dictating a certain prescription for redress.

Bakke was, in my judgment, wrongly decided. There appears to me to be a substantial chance that the Supreme Court will reverse the case and direct that it be retried under a less rigorous standard. In the interim, it seems possible for schools to live with Bakke — if not to avoid it — without dismantling their minority admissions programs.

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