

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KATURIA E. SMITH, et al.,

Plaintiffs,

V.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, et al.,

Defendants.

NO. C97-335Z

ORDER

This matter comes before the Court on the plaintiffs' motion for partial summary judgment (docket no. 217), and defendants' motion for summary judgment on all claims (docket no. 193). The Court, having considered the motions, and all papers filed in support of and in opposition to the motions, hereby DENIES the plaintiffs' motion for partial summary judgment and the defendants' motion for summary judgment.

I. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs move for partial summary judgment on the issue of whether defendants sued in their official capacity violated the Equal Protection Clause of the Fourteenth Amendment

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and 42 U.S.C. sec. 1981, [Fn. 1] and whether the Law School violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000d, et seq. Plaintiffs motion is premised on defendants' admission that they considered race in their admissions decisions for the purpose of achieving educational diversity. Plaintiffs argue that educational diversity is not a compelling state interest that would justify a race-conscious admissions program.

The thrust of plaintiffs' argument is that Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 316-19, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), which viewed achievement of "educational diversity" as a compelling state interest, was not the holding of the Court in Bakke, and should not be considered the law of the case. This argument was accepted by the Fifth Circuit in Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir.), cert. denied, 518 U.S. 1033, 116 S.Ct. 2581, 135 L.Ed.2d 1095 (1996), which noted that "Justice Powell's argument in Bakke garnered only his own vote and has never represented the view of the majority of the Court in Bakke or any other case." Plaintiffs argue in the alternative that subsequent Supreme Court authority makes clear that the educational diversity interest will not satisfy strict scrutiny, and that race may be considered only to remedy the present effects of past discrimination by the institution in question.

A. Bakke as Precedent

In Bakke, the Supreme Court considered whether the University of California at Davis Medical School's admissions policy, which had reserved sixteen of 100 seats in the entering class for disadvantaged members of minority races, violated the Equal Protection Clause of the Fourteenth Amendment and Title VI. Although unable to agree on an opinion as to the

Fn. 1 Consistent with the Eleventh Amendment, claims against the defendants sued 'in their official capacity, as opposed to their personal capacity, are limited to prospective claims for declaratory and injunctive relief. By separate Order entered February 10, 1999, the Court dismissed all individual and class claims for injunctive and declaratory relief, with the exception of plaintiff Pyle's claim for an injunction ordering that he be admitted to the Law School. Although the plaintiffs specified that they seek summary judgment against the official capacity defendants, the Court will proceed with this motion because plaintiffs have also asked for partial summary judgment on the Title VI claims against the Law School and because the issues raised in the motion are relevant to other remaining claims.

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major issues, five justices agreed that the California Supreme Court's judgment must be affirmed insofar as it held that the medical school's special admissions program was unlawful and that plaintiff must be admitted. A different five-member majority agreed that the California Supreme Court's judgment must be reversed insofar as it prohibited the defendant from according any consideration to race in its future admissions process.

Justice Stevens and three concurring justices (the Stevens group) concluded that under Title VI race cannot be the basis for excluding anyone from participation in a federally funded program, and therefore the University's special admissions program violated Title VI by excluding Bakke because of his race. The Stevens group did not reach the constitutional question of whether the program violated the Equal Protection Clause because the case could be decided on statutory grounds (Title VI).

Justice Brennan and three concurring justices (the Brennan group) concluded that the admissions program would be legal under both Title VI and the Equal Protection Clause. The Brennan Group, applying an intermediate standard of review, concluded that UC Davis's goal of admitting minority students disadvantaged by the effects of past discrimination was sufficiently important to justify the use of race-conscious admissions criteria.

Justice Powell, writing for himself, held that racial and ethnic distinctions of any sort are inherently suspect and thus call for a strict scrutiny review. Applying this standard, Justice Powell found that attainment of a diverse student body was a constitutionally permissible goal for an institution of higher learning; however, that state interest was not served by a two-track system with a prescribed number of seats set aside for an identifiable category of applicants. Rather, he endorsed a "Harvard-type" plan, which viewed racial and ethnic diversity as only one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body. Because the University of California at Davis used race as the sole diversity factor, its admissions program could not withstand constitutional scrutiny. Powell's opinion was limited to the question of whether the

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admissions policy was constitutional. He did not specifically address the legality of the program under Title VI because he concluded that Title VI proscribed only those racial classifications that would violate the Equal Protection Clause.

In *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), the Supreme Court instructed that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds. . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). The application of the *Marks* principle to the *Bakke* decision is particularly vexing because in many ways the opinions of the Justices are at odds with each other. Nevertheless, the Court concludes that Justice Powell's opinion represents the narrowest grounds for the Court's judgment under the *Marks* analysis, and therefore should be considered the holding of the Court.

Some courts have assumed that *Marks* requires the lower courts to find a common enominator among the various opinions that would garner the approval of at least five stices. See, eg., *Rappa v. New Castle County* 18 F.3d 1043, 1057 (31" Cir. 1994) (quoting *lanned Parenthood v. Southeastern Pa. v. Casey*, 947 F.2d 693 (3rd Cir. 199 1), aff'd in part d rev'd in-part, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)); *King v. Palmer* 50 F.2d 771, 781 (D.C. Cir. 1991), cert. den 505 U.S. 1229, 112 S.Ct. 3054, 120 L.Ed.2d 920 (1992). This Court concludes that *Marks* would be unworkable if it were interpreted in such a manner. [fn. 2] Rather, *Marks* requires a more simplistic analysis. The Court

Fn 2 Plaintiffs also cite lower court cases that have hold that where there is no common enominator *Marks* is inapplicable and the Supreme Court case is given no precedential value. See e.g. *Ass'n of Bituminous Contractors. Inc. v. Apfel* 156 F.3d 1246, 1254-55 (D.C. Cir. 998); *Rappa* 18 F.3d at 1058. But the Supreme Court has often repeated that the precedential alue of cases must be determined in accordance with *Marks*. The plaintiffs cite *Baldasar v. Illinois*, 446 U.S. 222 (1980), as an example of a Supreme Court case that cannot be deciphered Using the *Marks*, analysis, but the Supreme Court has suggested that *Marks* still provides the key o uncovering the meaning of such fragmented opinions. In a subsequent opinion, the Supreme ourt, addressing the confusion of the lower courts as to *Baldasar's* meaning, reiterated the

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should look to which of the opinions concurred in the judgment on the narrowest grounds without regard to whether that position would be accepted by at least five of the other Justices. [fn. 3]

Plaintiffs argue that to the extent any one rationale in *Bakke* can be viewed as the narrowest, it is Justice Brennan's. In almost every way, however, Justice Powell's opinion in *Bakke* is narrower than the Brennan group's opinion. First, the Brennan group would apply only an intermediate standard of review to race-conscious admissions programs, whereas Justice Powell would require strict scrutiny. Second, the Brennan group would find that remedying past societal discrimination is a sufficient justification for race-based programs, whereas Justice Powell concludes that the interest in remedying past societal

discrimination is too broad and amorphous and "would convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." Bakke, 438

fn. 2 (cont.) Marks rule, but noted that rather than "pursue the Marks inquiry to the utmost logical possibility when it has baffled and divided the lower courts that have considered it," the Court would reexamine the issues in Baldasa anew. See Nichols v. United States, 511 U.S. 738, 746, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). This suggests that the Supreme Court expects that the precedential value of any case can be determined by applying the Marks rule.

fn. 3 See Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764-65, 108 S.Ct. 213 8, 100 L.Ed.2d 771 (1988), in which a majority of the Supreme Court viewed the plurality opinion of Justice Reed (joined by two other Justices) in Kovacs v. Cooper, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 15 74 (1948), as the law of the case, and rejected the dissent's argument that Kovacs was not good law because it "was not the Court's view at all, but rather, an opinion for a three-Justice plurality" see id. at 785 (dissenting opinion). The majority explained:

The dissent suggests that the Kovacs plurality distinction of Saia is somehow not good law because four other Justices (three of whom were in dissent) adopted the far broader rationale that Saia was actually repudiated. Justice White's interpretation of Kovacs does not square with our settled jurisprudence: when no single rationale commands a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgmen[t] on the narrowest grounds. (citing Marks] Clearly, in Kovacs the plurality opinion put forth the narrowest rationale for the Court's judgment.

Id. at 764 n. 9. Thus, the Court has made clear that the opinion that sets forth the narrowest rationale for the Court's judgment is the holding of the Court regardless of whether that position would garner approval of at least five Justices.

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U.S. at 310 (Powell, J.). Thus, the Brennan group rationale would subject race-based admissions programs to less scrutiny and would result in a broader range of race-conscious admissions programs being upheld as constitutional.

The opinion of Justice Powell, which calls for strict scrutiny of racial classifications and permits race to be used in university admissions only to achieve educational diversity, is narrower in scope and application than the Brennan opinion. Thus, under Marks it should be viewed as the holding of the Court.

This Court's decision to follow Bakke is consistent with the way Bakke has been viewed by almost every court except Hopwood. The Ninth Circuit has written approvingly and applied Justice Powell's Bakke rationale in Higgins v. City of Vallejo. 823 F.2d 351 (9th Cir. 1987), and several other courts have treated Justice Powell's opinion as the holding of the Court. See, eg., McDonald v. Hogness, 92 Wash. 2d 431, 439-40, 598 P.2d 707 (1979), cert. denied, 445 U.S. 962, 100 S.Ct. 1650, 64 L.Ed.2d 23 8 (1980); DeRonde v. Regents of the Univ. of Cal., 28 Cal.3d 875, 172 Cal. Rptr. 677, 625 P.2d 220 (1981), cert. denied, 454 U.S. 832, 102 S.Ct. 130, 70 L.Ed.2d 110 (1981); University & Community College Sys. of

Nevada v. Farmer 113 Nev. 90, 930 P.2d 730 (1997), cert. denied, ___ U.S. ___ 118 S.Ct. 1186, 140 L.Ed.2d 317 (1998). Finally, members of the Supreme Court have continued to refer to Justice Powell's Bakke opinion in subsequent affirmative action cases, see Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 218, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), and City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-497, 109 S.Ct. 706, 102 L.Ed.2d 54 (1989), and at least one Justice has suggested that the issue of educational diversity as a compelling interest remains open. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context

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of higher education, to support the use of racial considerations in furthering that interest.") (citing Bakke, 438 U.S. at 311-15).

B. Educational Diversity Considered in Light of Subsequent Supreme Court Authority

Plaintiffs argue that regardless of whether Justice Powell's opinion in Bakke is the holding of the Court, subsequent Supreme Court authority has made clear that governmental units may consider race only for remedial purposes. Because the Law School's program is not tailored to remedy past discrimination, but rather designed to foster diversity, plaintiffs argue that it is unconstitutional. [fn. 4]

The Supreme Court has held since Bakke that if certain conditions are met a state may consider race to remedy the effects of past discrimination. See Shaw v. Hunt, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996). The issue presented by plaintiffs' motion for partial summary judgment, however, is whether post-Bakke Supreme Court cases have clarified that race may be considered only for remedial purposes.

In Part III-A of Justice O'Connor's plurality opinion in Croson, joined only by Justices Rehnquist, White and Kennedy, Justice O'Connor writes:

Classifications based on race carry a danger of stigmatic harm. **Unless they are strictly reserved for remedial settings** they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.

Croson, 488 U.S. at 493 (emphasis added). Plaintiffs argue that this statement makes clear that non-remedial race-conscious programs are unconstitutional. Plaintiffs argue further that Justice O'Connor's statement is the holding of the Court because Justice Scalia stated in his concurring opinion that he agreed with much of Justice O'Connor's opinion.

Plaintiffs have misinterpreted the scope of Justice O'Connor's statement concerning remedial race-conscious programs. The issue of whether race could be considered for any purpose other than remediation was not before the Court, and Justice O'Connor never

fn. 4 The Law School does not contend that its admissions policy was adopted to remedy the effects of past discrimination.

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explicitly stated that remediation is the only compelling state interest that would justify raceconscious government action. Rather, this statement was merely one part of her lengthy explanation of why the Court needs to apply strict scrutiny review to all racial classifications. [fn 5] To interpret this statement as creating a bright-line rule regarding remedial and non-remedial race-conscious programs is simply to read too much into Justice O'Connor's statement. In addition, while Justice Scalia did agree with much of Justice O'Connor's opinion, particularly her conclusion that strict scrutiny must be applied to all racial classifications, he **disagreed** with Justice O'Connor's "**dictum** suggesting that despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) 'to ameliorate the effects of past discrimination.'" Id. at 520 (emphasis added). Justice Scalia would not support the use of race for any purpose except to declassify racially classified state systems. Thus, he did not endorse Justice O'Connor's view that states may adopt race-conscious programs to remedy the effects of past discrimination.

The Supreme Court has never held that educational diversity cannot be a compelling state interest. In the absence of such a holding, this Court will follow Justice Powell's opinion in Bakke that educational diversity "is a constitutionally permissible goal for an institution of higher education." Bakke, 439 U.S. at 311-12. This Court declines to hold that recent cases, by implication, have overruled earlier Supreme Court precedent. Rather, this Court must follow the case which directly controls the issue, and leave to the Supreme Court the prerogative of overruling its own decisions. See Rodriguez dc Quijas v. Shearson/American Express Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 2017, 138 L.Ed-2d 391 (1997).

fn. 5 The Court notes that Justice O'Connor cited Justice Powell's opinion in Bakke as support for this principle. Justice Powell stated in Bakke that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." Bakke 438 U.S. at 298.

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While the Court concludes that Justice Powell's opinion in Bakke remains good law, it nevertheless must be considered together with all subsequent Supreme Court cases dealing with racial preferences. In these cases, the Supreme Court has subjected race-conscious , programs of all sorts to the most exacting scrutiny possible. The Supreme Court's decisions in Croson and Adarand make plain that a majority of the Justices are highly skeptical of racial preferences and believe that the Constitution imposes a heavy burden of justification on their use. Thus, while educational diversity may be a compelling interest, the defendants's program must be subjected to rigorous scrutiny to determine whether it was narrowly tailored to achieve genuine educational diversity.

II. Defendants' Motion for Summary Judgment

The Court denies the defendants' motion for summary judgment because questions of fact exist

concerning whether the defendants followed a Harvard-type plan in making their admissions decisions. Until the Court hears the evidence concerning how the admissions decisions as to the three named plaintiffs were actually made by the defendants, the Court cannot determine whether there has been a constitutional violation. For the same reasons, the Court cannot determine at this time whether there was intentional discrimination under Title VI or whether the individual defendants are entitled to qualified immunity. III.

Conclusion

The Court DENIES plaintiffs' motion for partial summary judgment and defendants' motion for summary judgment.

IT IS SO ORDERED.

DATED this 12th day of February, 1999.

THOMAS S. ZILLY UNITED STATES DISTRICT JUDGE

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