The Honorable Thomas S. Zilly

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

KATURIA E. SMITH, ANGELA ROCK,

and MICHAEL PYLE,

for themselves and all others

similarly situated,

Plaintiffs,

v.

THE UNIVERSITY OF WASHINGTON

LAW SCHOOL, et al.,

Defendants.

Civil Action # C-97-335

MEMORANDUM OF

LAW IN OPPOSITION

TO DEFENDANTS' PARTIAL

SUMMARY JUDGMENT

MOTION (Title VI)

NOTE ON MOTION CALENDAR:

Friday, March 6, 1998

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TOTHE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON TITLE VI DAMAGE CLAIMS

Plaintiffs submit this Memorandum of Law in opposition to the University of Washington's motion for partial summary judgment on the Title VI damage claims.

Introduction

Once again, as with their qualified immunity motion, defendants do not argue that their program is in compliance with the Fourteenth Amendment and Title VI. Rather, they only argue that Title VI, because it is a Spending Clause statute, precludes damage claims unless defendants intentionally violated an "unambiguous condition" (Dfs' Mot. 11) of which they were "unambiguously aware" (Dfs' Mot. 3). See also Dfs' Mot. 12 ("intentional violation of an unambiguous term"). Relying again on Justice Powell's lone opinion in Regents Of University Of California v. Bakke, 438 U.S. 265 (1978), and the alleged endorsement of a "Harvard" plan (whatever that is) therein -- as well as a nineteen-year old policy interpretation from the Carter Administration whose position was rejected in Bakke and which would allow educational institutions to use race-conscious decision-making to "[e]stablish and pursue numerical goals to achieve the racial and ethnic composition of the student body it seeks" (Dfs' Memo. 8) -- defendants conclude that they cannot be liable for damages under Title VI because it does not "unambiguously forbid" (Dfs' Mot. 4) race-conscious decisionmaking of the kind they engaged in.

Indeed, defendants are really arguing that there is "qualified immunity" for entities under Title VI, as can be seen from the fact that they are only trying to dismiss the damages claims under Title VI, and not the injunction claims. Dfs' Mot. 3 n.3. Of course, there is no such qualified immunity for entity defendants, under Title VI or anywhere else, and plaintiffs here are not seeking Title VI damages against the individual-capacity defendants. Jackson v. Katy Independent School District, 951 F. Supp. 1293, 1298 n.3 (S.D. Tex. 1996). See also Shuford v. Alabama State Bd. of Educ., 968 F. Supp. 1486, 1513 n.157 (M.D. Ala. 1997) (qualified immunity inapplicable in claims against Alabama colleges under, inter alia, Title IX); Timmons v. New York State Dep't of Corrections Services, 887 F. Supp. 576, 582 (S.D.N.Y. 1995) ("[t]he defense of qualified immunity is available to state actors who are sued in their individual capacities, not to sovereign state bodies . . . that only exist in official capacities" (emphasis in original)); Rothschild v. Grottenthaler, 716 F. Supp. 796, 801 (S.D.N.Y. 1989) (in case brought pursuant to Rehabilitation Act § 504, "[o]nly the individual defendant . . . may be eligible for qualified immunity").

Ultimately, defendants argue that it would be "unfair" to hold them liable for damages. But Title VI does not distinguish between damages and any other kind of relief for intentional discrimination. Neither does defendants' primary authority, Pennhurst State Hosp. v. Halderman, 451 U.S. 1 (1981), which focused on liability, not any particular form of relief. So, defendants' "fairness" argument leads to the conclusion that they cannot be held liable at all under Title VI, and cannot even be enjoined from future violations. Since Title VI simply requires parties to comply with the standards of the Fourteenth Amendment, defendants' argument is that they cannot be enjoined from engaging in future unconstitutional conduct in violation of Title VI. It also means that the result in Bakke was wrong since the law prior to that decision was hardly "unambiguous." These absurd conclusions cannot be right, and neither can the premises which led to them.

Argument

I.

DEFENDANTS' ARGUMENT IS DEPENDENT UPON THE ERRONEOUS PREMISE

THAT TITLE VI IS SOLELY A SPENDING CLAUSE STATUTE

Defendants' argument is premised on their claim that Title VI is only a Spending Clause statute. Dfs' Mot. 1, citing Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582 (1983). But Congress passed Title VI, and its abrogation of State sovereign immunity, pursuant to Section 5 of the Fourteenth Amendment.

In 1986, Congress passed the Civil Rights Restoration Act of 1986 (42 U.S.C. § 2000d-7), which amended, and applies to, inter alia, Title VI, Title IX, and Rehabilitation Act § 504, and ensured that plaintiffs could recover damages against States that receive federal funds under any of those statutes. The courts generally have held that the application of these statutes to the States was passed pursuant to Congress' power under Section 5. The Ninth Circuit has so held for Section 504, a statute concerned with discrimination against the handicapped, a concern far less central to the Fourteenth Amendment than the race discrimination regulated by Title VI. Clark v. State of California, 123 F.3d 1267, 1270 (9th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 27, 1997). Cf. Palmore v. Sidoti, 466 U.S. 429, 432

(1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally-imposed discrimination based on race" (emphasis added)).

Any number of cases have held that Title VI and its sex discrimination analogue, Title IX, as applied to the States, were passed pursuant to the Fourteenth Amendment. E.g., United States v. Yonkers Board of Education, 893 F.2d 498, 503 (2d Cir. 1990) (Congress acted pursuant to its 14th Amendment authority in abrogating states' immunity against Title VI claims); Middlebrooks v. University of Maryland, 980 F. Supp. 824, 827-28 (D. Md. 1997) (same); Franks v. Kentucky School for the Deaf, 956 F. Supp. 741, 750-51 (E.D. Ky. 1996) (Title IX); Hopwood v. Texas, Civ. No. 92-CA-563-SS (W.D. Tex. November 12, 1996) (Title VI) (see Rosman St. Ex. D); Lesage v. Texas, Civ. No. A-96-CA-286 JN (W.D. Tex. October 9, 1996) (Title VI) (see Rosman St. Ex. D).

Since Title VI is within Congress' Fourteenth Amendment enforcement power, which is "plenary," Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), the narrower scope of Congress's Spending Clause power is irrelevant. See City of Rome v. United States, 446 U.S. 156, 179 (1980) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments `by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty"); Fontenot v. Louisiana Bd. of Education, 835 F.2d 117, 121 (5th Cir. 1988) ("When Congress imposes restrictions on the states under its fourteenth amendment enforcement power, spending-clause limitations do not apply" citing Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)). Thus, even if (contrary to law) the underlying standard of conduct for Spending Clause statutes had to be "unambiguous," the standards under Title VI, a statute passed pursuant to Section 5, need not be. State employers are liable under Title VII, for example, if any of their policies have a "disparate impact" (which plainly involves unintentional discrimination) not justified by "business necessity."

II.

EVEN IF TITLE VI WERE ONLY A SPENDING CLAUSE STATUTE, DEFENDANTS'

"UNAMBIGUOUS CONDITION" ARGUMENT WOULD STILL FAIL

Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." The Supreme Court has stated that "retroactive relief is available to private plaintiffs for all discrimination . . . that is actionable under Title VI." Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 70 (1992) (quoting Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630 n.9 (1984)) (emphasis added). Defendants' argument that retroactive relief (or, perhaps, any relief) is not available for some intentional discrimination flies in the face of this straightforward rule of liability. It is cobbled together from irrelevant pieces of Supreme Court dicta, and has no basis in law. Thus, even if Title VI were only a Spending Clause statute, defendants' argument should be rejected.

A. Defendants' Cases Do Not Support Their Argument

Defendants claim that Pennhurst State Hosp. v. Halderman, 451 U.S. 1, 17 (1981) and Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 70 (1992) support their claim that a Spending Clause statute must give the defendants "unambiguous notice" that its conduct is forbidden. Dfs' Mot. 11. Neither does so.

Pennhurst -- which, again, involved liability, not types of relief -- only supports the proposition that Congress, in imposing liability under Spending Clause statutes, must make clear which conditions are ones whose violation leads to liability. The statute in question in Pennhurst, 42 U.S.C. § 6010, provided a general "bill of rights" for the developmentally disabled, and spoke of "appropriate treatment" in the "least restrictive setting," phrases which the Court recognized are less than unambiguous. The Court nonetheless held:

> The crucial inquiry . . . is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice. In this case, Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010.

Pennhurst, 451 U.S. at 25 (emphasis added). Plainly, if Congress had made the obligation to comply with § 6010

unambiguous, the Court would have found the States liable regardless of any ambiguity in the underlying standard of conduct.

Pennhurst also makes clear that any "contract" is with Congress, not regulatory agencies like the federal Office for Civil Rights ("OCR"). See Pennhurst, 451 U.S. at 17 ("Congress . . . impose[s] a condition on the grant of federal moneys" and "the State . . . accepts the terms of the `contract'"). The lesson of Pennhurst, then, is that agencies cannot impose liability where Congress has not clearly said so. Here, the defendants want agencies to insulate discriminators from liability where Congress and the Courts have said that Title VI implements the obligations of the Fourteenth Amendment. As noted infra, pp. *-*, to defer to agencies here would be contrary to Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

Nor does Franklin, which held that Title IX prohibits sexual harassment of students by teachers, support defendants' argument. Franklin held that monetary damages are available in cases involving intentional discrimination, and that no notice problem exists when intentional discrimination is involved. Franklin, 503 U.S. at 74-75. Moreover, it allowed the plaintiff to bring a damages claim against a school board for being harassed by her teacher even though there was then a split of authority in the lower courts over whether harassment by teachers was prohibited by Title IX. Compare Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa. 1989) (not prohibited), aff'd on other grounds, 882 F.2d 74, 77 (3d Cir. 1989) (leaving the issue open) with Moire v. Temple Univ., 613 F. Supp. 1360, 1366 (E.D. Pa. 1985) (prohibited) (dictum), aff'd mem., 800 F.2d 1136 (3d Cir. 1986). Surely, prior to Franklin, Title IX did not unambiguously require schools to remedy or resolve students' complaints of sexual harassment by teachers; yet nowhere was there any suggestion in Franklin, or in any other harassment case after it (but based upon conduct prior to the decision) that such ambiguity precluded a damages remedy.

B. Other Case Law Rejects Defendants' Argument

If defendants' argument had any basis, one would expect decisions precluding liability where prior case law or administrative interpretations could have led defendants to believe that their liability would not be the subject of a damages suit. As the prior discussion of Franklin suggests, however, those cases do not exist. Rather, authorities under Title VI and similar statutes undermine defendants' argument because they impose liability even though the standard of conduct required by prior judicial or administrative interpretations of the underlying statute might be less than "unambiguous."

1. Title VI. -- The federal appeals courts have held that universities cannot escape liability for reverse discrimination under Title VI, even if such discrimination is required as a desegregation remedy by the OCR. In Hopwood v. Texas, 78 F.3d 932, 957 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996), the Fifth Circuit held that the University of Texas Law School was liable for compensatory damages for its race-conscious affirmative action program. This was so even though the Court conceded that "[t]his is a difficult area of the law, in which the law school erred with the best of intentions." Id. at 959. Indeed, the Court rejected defendants' argument that their affirmative action program was justified because it "was the direct result of the state's negotiations with [OCR]," holding that "[e]ven if the law school were specifically ordered to adopt a racial preference program," its implementation still would have to meet current standards of "strict scrutiny." Id. at 954 n.47.

Similarly, in Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992), the Fourth Circuit reversed summary judgment for defendants in a case involving a blacks-only scholarship at the University of Maryland which "was intended as a partial remedy for past discriminatory action by the State of Maryland," which had been adopted as part of a comprehensive remedial plan only after OCR had rejected three earlier plans, and which had been specifically mentioned to OCR when the university had submitted details of its "Black Undergraduate Recruitment Program" in 1985 and 1987. Id. at 54-55. See also Hopwood v. Texas, 861 F. Supp. 551, 569 (W.D. Tex. 1994) (noting that blacks-only scholarship in Podberesky had been "adopted in response to protracted litigation and OCR guidelines"), vacated and remanded on other grounds, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). In a subsequent decision, the Fourth Circuit declared that the blacks-only scholarship violated Title VI, and required the University to "re-examine [plaintiff's] admission to the [scholarship program] as of the date it was made." Podberesky v. Kirwan, 38 F.3d 147, 162 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995).

2. Title IX. -- Courts have disputed whether Title IX covers certain kinds of sexual harassment, like peer-on-peer harassment. Compare Brzonkala v. Virginia Polytechnic Institute, 132 F.3d 949 (1997) (peer-on-peer harassment actionable under Title IX), rehearing en banc granted, __ F.3d __ (Feb. 5, 1998) with Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (en banc) (not actionable) and Rowinsky v. Bryan School District, 80 F.3d 1006 (5th Cir.) (same), cert. denied, 117 S. Ct. 165 (1996). Courts finding that Title IX covers such conduct have not held that a school is immune from damages liability because the controlling judicial constructions did not "unambiguously" require schools to remedy or respond to peer-on-peer harassment. E.g., Brzonkala, supra (reviving Title IX claim for compensatory and punitive damages for peer harassment).

Indeed, in a 1995 qualified immunity case, Doe v. Petaluma City School District, 54 F.3d 1447 (9th Cir. 1995), the Ninth Circuit held that it was ambiguous as of 1992 whether Title IX provided a student with a cause of action against a school district for harassment committed by the students' peers, granting qualified immunity to a guidance counselor who failed to stem the harassment. Yet on remand, the trial court -- which had previously found peer-on-peer harassment to be generally not actionable at all -- reversed itself with respect to liability for the school district itself. Doe v. Petaluma City School District, 949 F. Supp. 1415, 1417 (N.D. Cal. 1996) (reasoning that "`sexual harassment is a rapidly expanding area of the law,'" and that "several new cases on school district liability under Title IX for student-on-student harassment have been decided since this Court's [earlier] order"). Thus, a recipient of federal funds can be liable under Title VI or Title IX for violating evolving legal norms that were not "unambiguous" at the time of the defendants' conduct. See also, e.g., Clay v. Board of Trustees of Neosho County Community College, 905 F. Supp. 1488, 1493-95, 1496 (D. Kan. 1995) (retaliation claim permitted under Title IX against Board of Trustees even though "the law was not clearly established [at the time of the retaliation] that Title IX provides a private cause of action for damages for whistle blower retaliation").

3. Rehabilitation Act. -- Section 504 of this statute creates liability for a recipient of federal funds who discriminates against an "individual with a disability" who is "otherwise qualified" for a benefit. 29 U.S.C. § 794(a). An "individual with a disability" is one "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B). If employment discrimination is involved, an individual with a handicap is "otherwise qualified" if (s)he can perform the "essential functions" of a job "with or without reasonable accommodation." 29 U.S.C. § 794(d); 42 U.S.C. § 12111(8), (9).

Although this definition contains a plethora of vague terms, and courts disagree about their application, they have never hesitated to hold grant recipients liable under it, even when a handicapped individual's coverage under the statute is so uncertain that individual defendants are entitled to qualified immunity. See, e.g., Mackey v. Cleveland State Univ., 837 F. Supp. 1396, 1410 (N.D. Ohio 1993) (plaintiff stated claim for damages even though his "rights under the Act as a current alcohol abuser were not clearly established"); Rothschild v. Grottenthaler, 716 F. Supp. 796, 801-02 (S.D.N.Y. 1989).

Nor have ambiguities in what grant recipients are covered by the Rehabilitation Act prevented those recipients from being held liable. For example, Crawford v. Indiana Dept. of Corrections, 115 F.3d 481 (7th Cir. 1997) reinstated a damages suit brought by a state prisoner under both the Rehabilitation Act and the Americans with Disabilities Act (whose provisions are "materially identical to" the Rehabilitation Act, id. at 483) despite the fact that the Seventh Circuit had earlier expressed "doubt" that the ADA applies to state prisons, Bryant v. Madigan, 84 F.3d 246, 248 (7th Cir. 1996), the fact that other circuits had held or suggested that the Rehabilitation Act and ADA are inapplicable to state prisons, e.g., White v. Colorado, 82 F.3d 364, 367 (10th Cir. 1996) (so holding), and the fact that "[i]t might seem absurd to apply the Americans with Disabilities Act to prisoners." Crawford, 115 F.3d at 486. State prisons were still liable for damages under the Rehabilitation Act despite the fact that coverage of them under prior authorities was obviously not "unambiguous."

III.

GENUINE ISSUES OF MATERIAL FACT EXIST PRECLUDING SUMMARY JUDGMENT REGARDLESS OF WHICH INTERPRETATION OF TITLE VI IS EMPLOYED

As demonstrated above, there is no requirement under Title VI, or any similar statute, that damages are available only

for intentional violations of an unambiguous standard of conduct. Thus, the issue is not whether defendants believed their conduct to be consistent with the law, but rather whether it was.

Defendants do not confront that question on this motion, and, given space limitations, plaintiffs cannot undertake a complete analysis of Title VI's prohibition on race-conscious decision-making. Suffice it to note that (1) the regulations, policy interpretations, and OCR investigations that defendants rely upon are of no assistance to them, (2) neither Bakke nor any other Supreme Court decision endorsed non-remedial "compelling interests," and (3) for the reasons set forth in plaintiffs' opposition to defendants' qualified immunity summary judgment motion, genuine issues of fact would exist even if Justice Powell's lone opinion in Bakke somehow reflected the "controlling rationale" of the Court's judgment.

A. The OCR Interpretations Are Of No Assistance To Defendants

The defendants cite Education Department regulations (see Dfs' Mot. 6-7) to support their claim that their race-differential treatment does not violate Title VI. But these regulations do not address "diversity" -- defendants' purported justification for using race in admissions. Most refer to remedies for past discrimination or current discriminatory barriers. See, e.g., 34 CFR 100.3(b)(6)(i) ("recipient has previously discriminated"); 100.5(h) ("the consequence of [past discriminatory] practices continue to impede the full availability of a benefit"); § 100.3(b)(6)(ii) ("conditions which resulted in limiting participation to persons of a particular race"). Others simply permit the use of race as a consideration in outreach. See 34 CFR § 100.5(h)(i) (recipient "may establish special recruitment policies"). These regulations do not provide any legal support for a race-conscious admissions system to serve non-remedial purposes.

The regulations are not entitled to deference in any event. An administrative agency is only entitled to deference in construing a statute when it has greater expertise in interpreting the statute than the courts. Title VI simply implements the commands of the Fourteenth Amendment. United States v. Fordice, 505 U.S. 717, 732 n.7 (1992). The meaning of the Fourteenth Amendment is a "pure question" of Constitutional law on which agencies are entitled to no deference. See INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987). Moreover, "[e]ven if an agency enjoys authority to determine . . . a legal issue administratively, deference is withheld if a private party can bring the issue independently to federal court under a private right of action" (Kelly v. E.P.A., 15 F.3d 1100, 1108 (D.C. Cir. 1994), cert. denied, 513 U.S. 1110 (1995)) as is the case under Title VI. Finally, to the extent that OCR interprets Title VI to encourage racial preferences, that raises serious constitutional questions which make it inappropriate to accord any deference to OCR's interpretation. Miller v. Johnson, 515 U.S. 900, 923 (1995) ("we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions . . . When the Justice Department's interpretation of the [Voting Rights] Act compels race-based districting, it by definition raises a serious constitutional issue . . . and should not receive deference").

These general rules are particularly applicable here. The Supreme Court already has rejected OCR regulations to the extent that they purport to require or authorize race-conscious policies that go beyond the Fourteenth Amendment. Fordice, 505 U.S. at 732 n.7. Thus, it would have been rather foolhardy for defendants to rely upon them (or any outdated "policy interpretation") without regard to the Constitution or any more recent judicial authorities.

In addition to the regulations, defendants also rely upon a 19-year old policy interpretation of the OCR, never codified as a regulation, as well as a series of OCR administrative opinions that their attorney apparently gathered through a Freedom of Information Act request in response to this lawsuit. For the same reasons, none of these provides them with any authoritative interpretation of Title VI. Moreover, the policy interpretation in question would particularly authorize the use of a race-conscious admissions system to "[e]stablish and pursue numerical goals to achieve the racial and ethnic composition of the student body it seeks" (Dfs' Memo. 8). "Numerical goals" are precisely what Justice Powell's opinion in Bakke prohibits. Bakke, 438 U.S. at 289 ("This semantic distinction [between quota and goal] is beside the point . . . Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status"). Cf. DeFunis v. Odegaard, 416 U.S. 312, 332-33 (1974) (Douglas, J. dissenting) (where Law School had "target" of 15% to 20% minority applicants, "[w]ithout becoming embroiled in a semantic debate over whether this practice constitutes a `quota,' it is clear that, given the limitation on the total number of applicants who could be accepted, this policy did reduce the total number of places for which DeFunis could compete -- solely on account of his

race"). Although defendants assert that they do not use goals, their argument would nonetheless insulate from damages liability even open defiance of what they themselves consider to be the "controlling construction" on Title VI, viz., Justice Powell's Bakke opinion.

Finally, it is implausible for defendants to argue that they relied on any OCR decisions, since the defendants apparently did not have any until their attorney made a FOIA request after start of this lawsuit.

B. Neither Bakke Nor Any Subsequent Supreme Court Authority Supports Race-Conscious Measures For Non-Remedial Purposes

Defendants assert that in Bakke "five justices agreed that a `Harvard Plan' would not violate Title VI." To the extent that defendants intend a "Harvard Plan" to include race-conscious admissions policies for non-remedial purposes, their contention is simply false. Bakke, 438 U.S. at 326 n.1 (Brennan, J., concurring and dissenting) (endorsing a "Harvard Plan" only to the extent that it is intended to remedy societal discrimination); Hopwood, 78 F.3d at 944 ("the four-Justice opinion [authored by Brennan] . . . implicitly rejected Justice Powell's position"). Defendants nowhere explain how the position taken by one of nine Justices has become the controlling judicial construction of that statute. Rutledge v. United States, 116 S. Ct. 1241, 1249 (1996) (earlier decision on which Justices arguably split four to four on a particular issue was "a judgment not entitled to precedential weight" as to that issue "no matter what reasoning may have supported it").

Nor do defendants explain why controlling judicial construction ended after Bakke. The Court in Bakke held that Title VI had the same substantive prohibitions as the Fourteenth Amendment, and the Court has interpreted the Fourteenth Amendment on any number of occasions since Bakke. In doing so, it has rejected the non-remedial use of race that would have no stopping point. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989) ("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" (emphasis added)) (opinion of O'Connor, J.); id. at 520 (opinion of Scalia, J.). Id. at 497-98 (opinion of O'Connor, J.) ("role model theory" was rejected in Wygant v. Jackson Bd. Of Ed., 476 U.S. 267 (1986); because "the role model theory had no relation to some basis for believing a constitutional or statutory violation had occurred, it could be used to `justify' race-based decisionmaking essentially limitless in scope and duration . . . `In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future'" quoting Wygant, 476 U.S. at 276 (opinion of Powell, J.)). See also, e.g., Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 422 (7th Cir.) ("The whole point of Croson is that disadvantage, diversity, or other grounds favoring minorities will not justify governmental racial discrimination . . . ; only a purpose of remedying discrimination against minorities will do so" (emphasis added)), cert. denied, 500 U.S. 954 (1991).

If space permitted, other subsequent decisions and analyses could further demonstrate defendants' error in relying upon Justice Powell's opinion in Bakke as the "controlling" judicial construction. But enough has been set forth here to demonstrate that, to the extent defendants' analysis was intended to show what the law is under Title VI (as opposed to what they thought it was) -- and, contrary to defendants' "unambiguous notice" argument, the current interpretation of Title VI is the only relevant question under the cases -- they have failed to meet their burden of demonstrating that there are no genuine issues of fact because they have failed to identify any legitimate remedial purpose for their consideration of race.

* * *

It is hardly a secret that the legality of race-based affirmative action has become increasingly questionable in the twenty years or so since the authorities upon which defendants now rely (Justice Powell's Bakke opinion and the OCR policy interpretation) were promulgated. Defendants easily could have complied with Title VI by not considering race at all in their admissions process. Having stepped out onto the thin ice of differential racial treatment, they can hardly complain if it has broken underneath them.

C. Even If Justice Powell's Decision In Bakke Were The Controlling Construction Of Title VI, Summary Judgment Should Still Be Denied

Finally, even if Justice Powell's lone opinion in Bakke had controlling effect here, summary judgment should still be denied for the reasons set forth in plaintiffs' opposition to the individual defendants' qualified immunity summary judgment motion. Specifically, defendants have failed to meet their required burden of proof, i.e., they have not demonstrated the absence of a genuine issue of material fact; and plaintiffs are entitled to additional discovery pursuant to Rule 56(f), Fed. R. Civ. P.

Plaintiffs previously have shown that defendants have not established the absence of a genuine issue of fact with respect to the motive which supported the implementation of their race-conscious admissions program, to the weight that was given race and ethnicity in that system, or to whether the system permitted individual comparisons. Defendants' reply papers on the previous motion took the position that these were not "material" facts; that is, that it really does not matter why they consider race or how much weight they give to race or whether individual comparisons can be made.

This is nonsense. Defendants cite Bakke for the proposition that actual motive does not count, arguing that the "structure of [Powell's] opinion" demonstrates that one can have "constitutionally insufficient" (Dfs' Qual. Imm. Reply Memo. 3) motives in engaging in race-conscious decision-making. (Thus, they claim, a race-conscious policy is constitutional so long as one motive is constitutional, no matter how minor a role that motive may have had.) Defendants ignore the fact that Justice Powell was reviewing part of the State court judgment which precluded the use of race in the future; accordingly, it made sense for him to consider possible rationales that could justify future race-conscious decision-making, regardless of whether they were the actual motives. Nothing in Bakke is inconsistent with the subsequent decisions cited by plaintiffs' earlier opposition papers -- which, unlike Bakke and the other cases cited by defendants, actually address the question of motive.

In any event, defendants' arguments misconstrue the nature of a summary judgment motion. It is the moving party's burden to demonstrate the absence of a genuine issue of material fact. Defendants' moving papers -- both on qualified immunity and here -- make no mention at all of the Law School's purpose in utilizing racially-differential treatment in their admissions program. For that reason alone, their motions can and should be denied. Further, plaintiffs have offered additional material from which a reasonable trier of fact could conclude that "educational diversity" was not a particularly important purpose for defendants, and may have been a pretext for unconstitutional purposes.

Similarly, defendants err in asserting that Justice Powell's decision does not place any limit on the weight given race as a "diversity" factor, and does not preclude decisions from being timed so that minority applicants are essentially shielded from individual comparison. Justice Powell's decision concededly said many things; but it must be read to make sense as a whole. As defendants concede, Justice Powell specifically prohibited "race" and "ethnicity" from being the sole factors in a diversity calculus. Dfs' Qual. Imm. R. Memo. 4 n.4. It just makes no sense to suggest that this was simply a formalistic requirement, and that defendants can circumvent it by including a wide array of "diversity" factors while giving minuscule weight to all of them but race and ethnicity. So, too, Justice Powell's emphasis on individual comparisons (e.g., Bakke, 438 U.S. at 318 n.52 (Powell, J.)) makes no sense if certain races and ethnicities are given offers so quickly or advantages so large that no such comparisons can be made. Indeed, even one of the OCR decisions submitted by defendants demonstrates that a law school cannot give special attention to race to the detriment of candidates with other diversity characteristics. Madden Declaration Ex. 5, p. 6 (where law school "maintains that it seeks more than racial or ethnic diversity, but that it can accomplish educational diversity without giving other factors similar attention to that given race and ethnicity," system violated Title VI; "other aspects of diversity must be given similar consideration, although not necessarily identical weight").

Finally, for the same reasons set forth in plaintiffs' papers in opposition to defendants' qualified immunity summary judgment motion, summary judgment should be denied pursuant to Rule 56(f). The accompanying statement of Michael E. Rosman further describes the state of discovery in this matter.

Conclusion

For the foregoing reasons, it is respectfully requested that the Court deny defendants' motion for partial summary judgment on plaintiffs' Title VI claims.

Dated: June 17, 1998

Respectfully submitted,

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Certificate Of Service

I hereby certify that, on February 25, 1998, I caused the foregoing Plaintiffs' Memorandum of Law to be served by hand, to the individuals and at the addresses identified below:

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