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ABSTRACT

Perspectives on the Supreme Court's decision in Bakke are considered. It is suggested that the decision was like a remand to the nation and especially to the universities to try to devise and work toward affirmative action programs within certain parameters. Justice Powell gives the schools a great degree of latitude but does give guidance for the necessary self-analysis that now must occur. First, all two-track systems and all overt and covert quotas must be eliminated, except where imposed by court order to correct past discrimination. Second, pre-Bakke race-conscious programs, especially nondiversity predicated programs (e.g., those which directly sought to counter the effects of societal discrimination) must be evaluated. It is suggested that the kinds of diversity beyond race and ethnicity that are legitimate for a medical or law school are open for discussion. Justice Powell's opinion in regard to citing the fundamental 14th Amendment conflict and First Amendment concepts of academic freedom raises some conceptual questions. However, he does not require universities to seek diversity, but approves of the goal under the rubric of academic freedom. Now work must be done to make legitimate affirmative action efforts with individualized determinations and without divisive quotas and two-track systems. At the same time affirmative action has been endorsed. Within these parameters, those on both sides of the Bakke case now have guidelines within which to work constructively together. (SW)

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The Remand of Bakke

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In commenting on the Supreme Court's decision in Bakke, there are a number of pitfalls which must be avoided. The first is reading the decision too much in terms of the position advocated prior to the decision. Thus, immediately upon the Court's rendering of its decision commentators announced that "Blacks lost" or that almost all existing university admissions systems have been approved. Neither of these conclusions appear correct. Both conclusions suggest a dispositive decision by the Court resolving all the basic issues.

Actually the result was more a remand to the nation and especially to the universities to try to devise and work toward affirmative action programs within certain parameters. It almost appears as if Justice Powell was advising that basic principles underlying the conflicting arguments on 14th Amendment grounds should be set aside so the real business at hand of increasing minority participation and strengthening our democratic system can proceed. Thus, to the extent university administrators view the 154 pages of legal argumentation made in the six different opinions as directing "business as usual" they are being deficient in their responsibilities.

The University of California at Davis' approach was too simplistic to deal with complex and pervasive problems. Thus, what was presented to the Supreme Court was a poor record upon which to proceed, and too much reliance was placed upon the case and the Court as the vehicle for answering all the pending difficult problems. Although the Court has given some guidance it has imposed the burden on the universities to devise better

and more effective programs.

Justice Powell gave the schools a great degree of latitude but does give guidance for the necessary self-analysis which now must take place. First, all two track systems and all overt and covert quotas must be eliminated, except where imposed by court order to correct past discrimination. Second, pre-Bakke race-conscious programs, especially non-diversity predicated programs, (e.g., those which directly sought to counter the effects of societal discrimination), must be evaluated. Certainly many universities had not modeled their admissions program on the Harvard College model as it is described in the appendix to the opinion. The applicability of such a model to them is a question each school must determine. Undoubtedly there are many universities in this country that wish they had the applicant pool available to them that Harvard College has available to it. Harvard (at least the idealized Harvard referred to in the appendix to the opinion) may be able to secure a heterogeneous student body by adding a plus for race comparable to a plus it adds for geography or athletic skills, but this may not be possible for many or most schools in this country.

One irony of the opinion is that the diverse types as sought by Harvard College in the idealized version of Justice Powell's opinion (geography, city, farm, violinists, painters, football players, biologists, historians, etc.) is rarely if ever sought by the professional schools, and I question whether it is educationally justified. What kind of diversity beyond racial and ethnicity is legitimate for a medical or law school is open for discussion. For example, is a sexually balanced class, age balanced class, politically balanced class, educationally desirable? Of greater concern is the fact that, if diversity as a goal is sought because it broadens the educational exposure of students, certain suspect

conclusions may follow. For example, can a school on the basis of diversity give a plus for political views, party affiliation and religion?

Problems of this type flow in part from the fact that the effort by Justice Powell to tamper the fundamental 14th Amendment conflict, by injecting 1st Amendment concepts of academic freedom, appears dictated more by the desire for a political compromise than constitutional mandates. Bakke had argued that the 14th Amendment in its protection of "persons" is colorblind. The pro-university proponents argued that equality of outcome, history of past color consciousness and the purpose of the 14th Amendment required color conscious remedial action. Only because academic freedom here is supportive of affirmative action does the principle seem viable. But what if the university sought heterogeneity and gave a plus for majority status and a minus for racial minority status? Would academic freedom be seriously considered in the argument? However, too much diversity in the form of restrictions on out of state residence has occurred. Similarly, limitations on Jews or on Blacks in order not to destroy the "homogeneous nature of the school" are matters which occurred in the not too distant past.

It therefore appears that the Powell opinion conceptually raises questions despite its statesmanlike quality in terms of a political compromise. Thus, the second pitfall to be avoided is viewing this "majority of one" opinion as a landmark. It certainly is a milestone. But the opinion itself will be clarified, evaluated and reevaluated on the road toward increasing minority participation in this country.

To those universities which choose to await the next test case upon the assumption that the Powell opinion is not stable and the so-called Brennan opinion will in time prevail, I suggest they try to distinguish their attitude from the attitude of certain Southern schools 20 years ago.

But even if a university concludes that its program can pass constitutional muster, and even if it concludes that it can and is following the Harvard model, the self-analysis should go further. Justice Powell did not require universities to seek diversity. Rather, he approved of the goal of diversity under the rubric of academic freedom. A great degree of flexibility exists for universities under the academic freedom rubric. The ball has been passed back to the universities. If they are serious in their commitment to affirmative action they need not be restricted to the concept of diversity.

For example, a medical school may decide to provide extensive services to the local community. If it skewed its admission system to those willing to service the local community such an admission system may appear justifiable under Powell's opinion. Or if a medical school wishes to only provide course work in clinic programs, it may deem science scores above a certain point irrelevant. This may result in more minorities admitted. I am certainly not in a position to suggest educationally relevant criteria for admissions to medical schools. My point is that the inquiry need not begin or end with diversity under Powell's opinion.

We must remember the basic fears expressed by advocates of both sides before the Bakke decision came down. I recall a pre-Bakke conference where the moderator forced the advocates on each side to predict the outcome. They were unanimous in one regard, they each thought the Court would undercut their position and predicted victory for the other side. Thus the so-called anti-Bakke advocates feared the undermining of all affirmative action programs and the so-called pro-Bakke advocates feared the imposition of racial quotas leading toward an undermining of individualized evaluations.

Despite the suspect stability of Powell's opinion in terms of its being a landmark, no one can really say their worst fears came to pass. After the consciousness of this country was raised on very basic issues, the responsibility has been remanded, at least in terms of university admissions, to admissions personnel where good faith will be a major factor in shaping the real impact of Bakke. We therefore find ourselves today in a position where the outside principle and princpled desires and fears on both sides did not come to pass.

The parameters have been set by the Court, a model has been identified, but that only starts the process; it does not end it. The work must now be done to make legitimate affirmative action efforts with individualized determinations and without divisive quotas and two track systems a reality in all areas. Affirmative action has been endorsed without voluntary racial quotas and two track systems. Within these parameters those on both sides of the Bakke case now have guidelines within which to work constructively together. The Court remanded the case to all of us for this basic work.