

No. 98-100414

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CENTRAL UNIVERSITY SCHOOL OF LAW
&
COMMONWEALTH OF DAVIS, Petitioners

v.

Ewing T. BOLES, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Counsel for Respondent

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September 1998

QUESTIONS PRESENTED

1. Has the Central University School of Law violated the Equal Protection Clause of the United States Constitution by failing to demonstrate a compelling state interest to support its use of race in the admissions process?
2. Has the Central University School of Law adopted an unconfined use of race in its admissions program that exceeds the "narrowly tailored" grounds permitted under the Equal Protection Clause of the United States Constitution?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Central University School of Law ("Law School") removed the last remnants of its state-mandated discrimination policy in 1962. Although it began admitting and successfully graduating African American students in the mid 1960s, the Law School enacted an affirmative action admissions program ("Program") in the early 1970s as a response to a federal investigation of all higher education in the Commonwealth of Davis ("Davis"). The Program utilized automatic increases in minority applicant CUI scores (a ranking system based on 100 points using a mathematical combination of an applicant's grade point average and LSAT score) and numerical "goals" in order to admit greater numbers of minority students. Pursuant to this Program, an African American student with a nearly identical academic record to Respondent Ewing T. Boles received admission to the 1996-1997 Law School class.

Respondent Boles (who was placed on the waiting list and later denied acceptance) initiated this action against the Law School in the District Court for the Western District of Davis alleging, *inter alia*, violations of the Equal Protection Clause of the Fourteenth Amendment stemming from the Program's use of racial classifications. Respondent Boles argued in the District Court that the admissions program violated his rights of Equal Protection by granting an unconstitutional racial preference to minority applicants. The Law School claimed that the Equal Protection

Clause permits such a "plus" to further diversity of the student body and remedy past discrimination in Davis. Respondent Boles asserted further that ill-defined diversity failed to meet the "strict scrutiny" requirement of "compelling state interest" and that the Law School had failed to demonstrate any discrimination attributable to it warranting the Program. The Law School maintained in its reply that diversity indeed qualified as a compelling state interest and that the history of discrimination in the Davis educational system as a whole necessitated the current, albeit strong, "narrowly tailored" remedial action.

The District Court rejected the arguments presented by Respondent Boles and found that both diversity and the past discrimination presented by the Law School met the constitutional requirements of strict scrutiny. The court also found that the Program was sufficiently "tailored" so as not to violate the Equal Protection Clause.

The United States Court of Appeals for the Sixteenth Circuit reversed in all respects. It rejected the "diversity" argument and found no continuing need for preferential classifications. Finally, the Court found the Program failed to meet the four-part constitutional mandate of "narrowly tailored" as set forth by this Court.

Petitioners Davis and the Law School filed a petition for a writ of certiorari, which this Court granted on September 1, 1998.

SUMMARY OF THE ARGUMENT

The Law School admissions Program violates the Equal Protection Clause in its purpose and actual effects. The Equal Protection Clause, as interpreted under strict scrutiny analysis, prevents the utilization of diversity as a compelling state interest to justify racial classifications. In order to maintain its focus on protecting the individual, the Equal Protection Clause only permits the utilization of racial classifications to remedy substantiated instances of past discrimination. The Law School, however, impermissibly relies on ephemeral notions of societal discrimination to support its claims for the necessity of remedial action. The Program ignores the recent history of the Law School regarding the participation of racial minorities and attempts to perpetuate illogical group classifications based on race.

The Program also fails to meet the constitutional mandate of "narrow tailoring." The Law School fails to indicate any consideration of less pernicious remedies while utilizing unsubstantiated "goals" as *de facto* quotas. The Program contains no self limiting principles, and its adverse effects on third parties will extend indefinitely into the future.

ARGUMENT

I. THE CENTRAL UNIVERSITY SCHOOL OF LAW ADMISSIONS POLICY VIOLATES THE EQUAL PROTECTION CLAUSE BY FAILING TO PRESENT A COMPELLING STATE INTEREST TO SUPPORT ITS USE OF RACIAL CLASSIFICATIONS.

A. "DIVERSITY" FAILS TO QUALIFY AS A COMPELLING STATE INTEREST UNDER "STRICT SCRUTINY" ANALYSIS.

The Equal Protection Clause of the Fourteenth Amendment represents a codification of the notion that "the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (citation omitted). Moreover, as "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people," *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), racial classifications imposed by "whatever governmental actor . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

No opinion of this Court holds that diversity constitutes a compelling governmental interest under strict scrutiny analysis. The notion of diversity as a goal worthy of racial classification stems from the singular opinion of Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Only one subsequent case applying "strict scrutiny" mentions diversity as "compelling" but does so only in a concurrence, and there only in

passing. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

The *Adarand* court rejected the intermediate scrutiny test employed in *Metro Broadcasting* that permitted racial classifications based on diversity. Even *Metro Broadcasting* "held only that the diversity interest was 'important' . . . [it was not] elevated to the 'compelling' level." *Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 354 (D.C. Cir. 1998). The contention advanced by the Petitioner thus has no support in the current case law of this Court, but rather rests on the single, unjoined opinion of Justice Powell in *Bakke*.

The use of race as a proxy to estimate the "diverse" impact of a student on the educational community employs the very "group" assumptions the Equal Protection Clause was designed to destroy. "The [diversity] policies impermissibly value individuals because they presume that persons think in a manner associated with their race." *Metro Broadcasting*, 497 U.S. at 618 (O'Connor, J., dissenting). Racial classifications, by their nature, cause "fundamental injury to the individual rights of a person." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (citation omitted) (emphasis added). The diversity rationale suggests nothing other than class-based generalizations "equating race with thoughts and behavior." *Metro Broadcasting*, 497 U.S. at 615 (O'Connor, J., dissenting).

If mere racial heterogeneity correlated, *per se*, to a

diversity of viewpoints in the educational environment, then the Caucasian "race" of Anglos, Germans, Irish, French and other Europeans could not produce a dominant opinion that necessitated diversifying. The very idea that race approximates diversity of opinion or outlook belies the fundamental individualistic basis of American society. There is no indication of "how one would define or measure a particular viewpoint that might be associated with race, or even how one would assess the diversity of [law student] viewpoints." *Metro Broadcasting*, 497 U.S. at 614 (O'Connor, J., dissenting). Inevitably, such generalizations would "not apply to certain individuals, and those persons may legitimately claim that they have been judged according to their race" *Id.* at 620.

B. RACIAL CLASSIFICATIONS CANNOT QUALIFY AS A COMPELLING STATE INTEREST UNDER THE EQUAL PROTECTION CLAUSE EXCEPT WHEN UTILIZED TO REMEDY WELL-DOCUMENTED PAST DISCRIMINATION.

The Equal Protection Clause only recognizes racial classifications when they specifically remedy past discrimination. "Unless they [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (citation omitted). See also *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting) (stating that "[m]odern equal protection doctrine has recognized only one such [compelling] interest: remedying the

effects of racial discrimination); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421 (7th Cir.), cert. denied 500 U.S. 954 (1991) (finding "that the [E]qual [P]rotection [C]lause forbids states and municipalities to discriminate in favor of blacks and other minorities unless the discrimination is necessary to rectify discrimination against favored groups") (citing *Croson*).

Unquestionably, the Courts of Appeal understand and endorse the position that the Constitution correctly limits racial classifications to remedial situations. See, e.g., *Messer v. Meno*, 130 F.3d 130, 136 (5th Cir. 1997) ("To the extent that the court found that racial preferences are constitutional in the absence of remedial action to counteract past provable discrimination, it erred."); *Podberesky v. Kirwan [Kirwan I]*, 956 F.2d 52, 55 (4th Cir. 1992) ("Because of the danger of stigmatic harm, classifications based on race, understandably, must be reserved for remedial settings.") (citation omitted); *Contractors Ass'n of E. Pa., Inc. v. City of Phila.*, 91 F.3d 586, 596 (3d Cir. 1996) ("The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a 'passive participant.'). This reflects the position announced by the plurality in *Croson* and endorsed in Justice Scalia's *Croson* concurrence. See *Croson*, 488 U.S. at 524 (Scalia, J., concurring) ("States may act by race . . . [only] where that is necessary to

eliminate their own maintenance of a system of unlawful racial classification.").

The Fourth Circuit noted in its two *Podberesky* opinions that the University of Maryland needed to demonstrate specific instances of racial discrimination to justify its use racial classifications for scholarship candidates. These opinions demonstrate that the Equal Protection Clause requires evidence of past discrimination in the educational context. The "state action[s] that [are] traceable to the state's prior de jure segregation" require prompt elimination; however, no opinion of this Court suggests that the state can exceed this limitation. *United States v. Fordice*, 505 U.S. 717, 729 (1992).

C. THE LAW SCHOOL IMPERMISSIBLY RELIES ON BROAD-BASED "SOCIETAL" DISCRIMINATION TO SUPPORT ITS CLAIMS OF THE NECESSITY FOR REMEDIAL ACTION.

The previous discrimination used to justify racial classifications must be attributable to the very state actor promulgating the race-conscious remedies. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant*, 476 U.S. at 276 (plurality opinion). The Equal Protection Clause requires "some showing of prior discrimination by the governmental unit involved." *Id.* at 274. A generalized assertion that discrimination emanates from all vestiges of society fails to justify a specific program of racial entitlements.

An amorphous claim that Davis discriminated throughout its educational system cannot justify, standing alone, the use of racial classifications for the Law School Program. It is "sheer speculation how many minority medical students would have been admitted to the medical school at [U.C.] Davis absent discrimination in educational opportunities [Bakke]" as is it "sheer speculation" how many African Americans would have been admitted to the Law School absent past society-wide discrimination in Davis. *Croson*, 488 U.S. at 499. The attempt by the Law School to justify its discriminatory practices through the use of statistics and other evidence of society-wide discrimination clearly violate the admonition found in *Croson* and elsewhere:

The fact that the City and State are ethnically diverse, the fact that the Bar may be too homogeneous, or the fact that minorities too often may not be able to find adequate legal representation cannot alone or in combination with one another, without more, support the consideration of race by the law school. The law school's remedial powers are limited, under the Equal Protection Clause, to addressing such discrimination as it specifically finds to have been perpetrated by its own institutions - not society at large.

Davis v. Halpern, 768 F. Supp. 968, 981 (E.D.N.Y. 1991).

D. THE LAW SCHOOL FAILS TO DEMONSTRATE ANY PURPOSEFUL DISCRIMINATION ATTRIBUTABLE TO ITSELF THAT NECESSITATES REMEDIAL ACTION.

Undoubtedly, past *de jure* segregation by a state actor may create current discriminatory effects. A university must "eradicate policies and practices traceable to its prior *de jure*

dual system that continue to foster segregation." *Fordice*, 505 U.S. at 728. Nevertheless, the Law School failed to demonstrate any present discriminatory effects attributable "with a strong basis in evidence" to its prior segregationist policies. *Croson*, 488 U.S. at 500.

The Law School noted that it had a "lingering reputation in the minority community" as a "white school;" the student body had an "underrepresentation of minorities;" and that "some" perceived a "negative" racial climate at the Law School. *Boles v. Central Univ. School of Law*, No. 97-2432, slip op. at 9 (W.D. Davis January 28, 1998). These justifications, however, rested on unsupported assertions by the Law School. The "mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight." *Croson*, 488 U.S. at 470.

No one disputes the past history of racial discrimination at the Law School. Nevertheless, "[a]ny poor reputation the [Law School] may have in the African-American community is tied solely to knowledge of the University's discrimination before it admitted African-American students [in 1962]." *Podberesky v. Kirwan [Kirwan II]*, 38 F.3d 147, 154 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995). Knowledge of a "historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books" the Law School could justify its Program. *Id.* at 154. A

poor reputation "is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications." *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting).

If a poor reputation, *arguendo*, satisfied the compelling state interest test, such a problem would manifest itself in a low number of minority applicants. The Law School presents no evidence to suggest it suffers from this malady. Indeed, its successful admission over the past several years of substantial numbers of minority students suggests the absence of such a problem.

The "hostile environment" claim advanced by the Law School has its roots in the societal discrimination addressed above. See Part I (C), *supra*. The Law School advances no substantial evidence to suggest that the purported hostile environment stems from actions taken by it or even Central University as a whole. The Law School took affirmative steps beginning in 1962 to eradicate the "vestiges of [its] past discrimination . . . to the extent practicable." *Missouri v. Hunter*, 515 U.S. 70, 89 (1995). Any hostile environment remaining at the school after over 20 years of concerted affirmative action programs stems from "societal discrimination, which cannot be used as a basis for supporting a race-conscious remedy." *Wygant*, 476 U.S. at 276 (plurality opinion).

The underrepresentation argument advanced by the Law School

belies its own statistics. Notwithstanding the errors in its reference pool or their quota-like characteristics, see Part II (C), *infra*, the percentages of minorities in the student body at the Law School almost *exactly mirror* the percentages produced by the undergraduate institutions in Davis. See *Boles*, slip op. at 5 n.5. The suggestion that such a precise correlation over a number of years equates underrepresentation defies logic.

Moreover, the Law School fails to show how its actions, as the relevant state actor, lead to the alleged underrepresentation. Its only justifications rely on arguments based in the "hostile environment" and "poor reputation" veins rejected above. An institution of higher education cannot insulate itself from the "racial tensions [that] still exist in American society. . . [T]hese tensions and attitudes are not a sufficient ground for employing a race conscious remedy." *Kirwan II* at 155. See also *Croson*, 488 U.S. at 498.

II. THE CENTRAL UNIVERSITY SCHOOL OF LAW ADMISSIONS POLICY VIOLATES THE EQUAL PROTECTION CLAUSE BY FAILING TO MEET THE FOUR-PART TEST FOR A "NARROWLY TAILORED" REMEDY.

A. THE PROGRAM FAILS TO CONSIDER THE EFFICACY OF ALTERNATIVE REMEDIES.

The second aspect of the Equal Protection evaluation mandates an inquiry into whether or not a racial remedy meets the "narrowly tailored" standard set out in *United States v. Paradise*, 480 U.S. 149 (1987), and its progeny:

In determining whether race-conscious remedies are appropriate, we look to several factors, including the . . . efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of a waiver provision; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id. at 171. The District Court made only a cursory inquiry into the first of these factors, alternative remedies.

The Law School submits no evidence that it took into consideration other possible remedies, including, but not limited to, minority scholarships and minority recruitment efforts. The pernicious nature of overt racial classifications mandates their consideration as a remedy of last result, not primary consideration. See *Croson*, 488 U.S. at 519 (Kennedy, J., concurring) (finding strict scrutiny "forbids the use even of narrowly drawn racial classifications except as a last resort.").

If "poor reputation" constituted a valid state interest, remedies more directly focused on recruitment would most assuredly better relieve such problems within various minority communities. A student discouraged from applying due to a poor reputation, as the Law School suggests is one of the problems it is attempting to remedy, will not benefit from an automatic increase in his or her CUI score without submitting an application. Rather, such preferences might engender a new, and equally pernicious, reputation in the community: that "those who are granted this special preference are less qualified in some respect that is

identified purely by their race." *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting).

Moreover, such an automatic quota-like increase (see Part II(B), *infra*) increases the likelihood of the student finding himself or herself in a "hostile environment." "Inevitably, such programs engender attitudes of . . . resentment among those who believe that they have been wronged by the government's use of race." *Adarand*, 515 U.S. at 241 (Thomas, J., concurring).

B. THE ADMISSIONS PROGRAM UTILIZES AN INFLEXIBLE QUOTA ENDURING INDEFINITELY INTO THE FUTURE.

No one questions that a rigid quota, such as the 30% minority set-aside at issue in *Croson*, violates the "flexibility" requirement of *Paradise* without the most compelling of justifications. See *Paradise*, 480 U.S. at 167. The Law School argues that the Program utilizes "goals" that will terminate when the gap in "minority and non-minority credentials has narrowed such that the State will remain in compliance with Title VI without the need for affirmative action. . . ." *Boles*, slip op. at 10. The evidence submitted by the Law School supports neither contention.

Ostensibly designated as "goals," the target percentages utilized by the Program and the actual percentage realized never vary more than 3 percent from the "goal" over a five year span. *Boles*, slip op. at 5 n. 5. This type of rigidity demonstrates the sort of blind, class-based preference the Equal Protection Clause

prohibits. See *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual."). Such "a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice." *Croson*, 488 U.S. at 527 (Scalia, J., concurring) (citation omitted).

Moreover, the two point "plus" automatically added to the CUI score of each applicant clearly evinces a lack of flexibility. The admissions committee makes no individualized determinations on whether or not to include these two points, as it does with all other modifications to an applicant's CUI score. *Boles*, slip op. at 4. Clearly, this procedure grants a substantial privilege to certain favored groups. A practice of "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307 (Powell, J.).

The automatic increase in the applicant's score, taken together with the fact the Law School's thinly disguised "goals" mandate the acceptance of a certain percentage of minority students, creates a reserved percentage of openings in the incoming class for favored groups. This practice denies Caucasian students "the chance to compete . . . for the special admissions seats." *Bakke*, 438 U.S. at 319 (Powell, J.).

The Law School indicates it will drop the quota when it achieves compliance with Title VI. See *Boles*, slip op. at 10. The Program clouds and disguises effective compliance or non-compliance with Title VI by and through the operation of the automatic additions to minority CUI scores. The extra points, combined with the unbending focus of the Program on achieving certain quotas, ensures that minority applicants will never be evaluated in the same searching method non-minority applicants receive. Such a method might well admit comparable percentages of minorities, but the indeterminate deadline placed on the current program, combined with its comfortable guarantees of Title VI compliance, assures its perpetuation *ad infinitum* if for no other reason than administrative convenience. "[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." *Croson*, 488 U.S. at 508.

The *de facto* quota, in coordination with the automatic increase, are indistinguishable from the set-aside in *Bakke*. Craft and complexity or benign motivation in creating racially discriminatory practices make them no less invidious. "Government sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."

Adarand, 515 U.S. at 241 (Thomas, J., concurring).

C. THE ADMISSIONS PROGRAM RELIES UPON UNVERIFIED NUMERICAL "GOALS."

The Law School adopted its goals based on unsupportable assumptions and irrelevant comparison pools. Numerous factors enter into a student's decision to seek higher education following high school; unquestionably, these same factors and many others weigh on the same student's decision to seek post-baccalaureate education. "Unlike attendance at the lower level schools, a student's decision to seek higher education has been a matter of choice." *Fordice*, 505 U.S. at 729. The college graduate must decide whether or not to take his or her degree and enter the workforce or again complete the multifaceted process of choosing an educational institution and course of study. The decision to seek graduate education often determines an individual's career path for the remainder of his or her life, and such decision undoubtedly cannot be accurately predicted.

Moreover, "the choice of which institution to attend is voluntary, and is dependent upon many variables other than race-based considerations." *Kirwan II* at 159. The Law School undoubtedly attracts many applicants from outside the borders of Davis; equally true is the fact that many Davis residents choose to apply to schools in other states. These decisions stem from not only "economic concerns" but also desires to seek different geographic locals, the location of friends and relatives,

availability of post-graduate employment, et cetera. *Id.*

In short, the district court failed to account for that percentage of otherwise eligible [minority college] graduates who either (1) chose not to go to [law school]; (2) chose to apply only to out-of-state [law schools]; (3) chose to postpone application to a [law school] for reasons relating to economics or otherwise . . .; or (4) voluntarily limited their applications to [Davis'] predominantly African-American institutions.

Id. at 159-160.

Additionally, even assuming that ethnic groups seek graduate education in percentages equating their completion of college, the Law School submits no evidence to suggest they always chose law in corresponding percentages. Other fields of study, for whatever reason, might attract a disproportionate number of Caucasians or conversely African-Americans or Native Americans. The Law School offers no explanation of its overt assumptions "that minorities will choose a particular [graduate program] in lockstep proportion to their representation in the [college graduate] population." *Croson*, 488 U.S. 507.

D. THE LAW SCHOOL ADMISSIONS POLICY UNNECESSARILY TRAMMELS ON THE RIGHTS OF UN-BENEFITTED THIRD PARTIES.

The broad sweep of the Law School Program undoubtedly impacts, as all racial classifications inevitably do, the rights of "innocent" third parties. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Wygant*, 476 U.S. at 281. The remedy found

here, however, fails to meet the "narrowly tailored" standard.

The quota utilized by the Law School effectively cordons off a number of applicant slots to minority students, thus denying those slots to non-minority applicants. Unquestionably non-minority applicants such as Respondent Boles bear the weight of this impermissible set-aside. All non-minority applicants have their CUI scores effectively lowered by the use of the automatic addition. These innocent third parties played no part in any of the events or acts that supposedly justify the continuation of the Program; yet, they are forced to bear its entire burden.

The Program leaves no doubt as to "whose ox is gored" for the benefit of preferred groups - non-minority applicants like Respondent Boles. *Adarand*, 515 U.S. at 241 n.* (Thomas, J., concurring). These individuals pay an enormously high price (denial of a legal education of immeasurable value) for the benefit of a class of persons. "This the Constitution forbids."

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court to affirm the ruling of the Sixteenth Circuit Court of Appeals and declare the Admissions Program at the Central University School of Law unconstitutional.

Respectfully submitted,
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