

REGENTS v. BAKKE: IMPLEMENTING PRE-BAKKE ADMISSIONS POLICIES WITH POST-BAKKE ADMISSIONS PROCEDURES

"[T]here is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public."

Mr. Justice William Brennan—
concurring in *Regents v. Bakke*

Reginald Alleyne*

In *Regents of the University of California v. Bakke*,¹ the United States Supreme Court appears to have struck the kind of compromise a labor mediator might suggest for ending a serious labor dispute. Bakke was ordered admitted to the Medical School of the University of California at Davis because a rigid ethnic quota was found to have kept him out. At the same time, it was decided that race and ethnic origin may be taken into account in college admissions decisions. To the extent that the California Supreme Court held that Allan Bakke was unlawfully refused admission to the U.C. Davis Medical School, the United States Supreme Court affirmed the California Court's decision;² but the United States Supreme Court reversed the California Supreme Court's holding that race may not be taken into account in university admissions policies.³

On the surface, the decision appears to be ambivalent—a victory for all, a defeat for none. But close reading reveals that affirmative action is favored much more than is suggested by a less careful analysis of Justice Powell's opinion for a limited majority of a divided Court.⁴

Had the Supreme Court's *Bakke* decision provided no more than ap-

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1. 438 U.S. 265 (1978).

2. *Id.* at 271. *See Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

3. 438 U.S. 265, 272 (1978).

4. Justice Powell announced the judgment of the Court. Justices Brennan, White, Marshall and Blackmun concurred with Justice Powell's opinion to the extent that it approved the use of racial criteria in the admissions process; they dissented from the Powell opinion to the extent that it favored Bakke's admission to the medical school. Justice Stevens, joined by Chief Justice Burger, Justices Rehnquist and Stewart, concurred in the Powell opinion only to the extent that it admitted Bakke. Thus, there were two 5-4 majority holdings. Justices White, Marshall and Blackmun also filed separate dissenting opinions.

proval of ethnic admissions criteria, plus the Court's order that Allan Bakke be admitted to the U.C. Davis Medical School, the decision might have been a meaningless standoff. But the Court went further.

By way of instructive example, the Court approved the admissions program of Harvard's undergraduate college and other university admissions programs "which take race into account in achieving . . . educational diversity."⁵ Harvard, the Court notes, does this without setting racial or other "target-quotas."⁶ The Court's opinion does not observe that the student body at Harvard College is about eight percent black, year after year.⁷

By what magical use of the laws of probability does Harvard enroll a constant percentage of blacks, in a manner singled out by the Supreme Court as constitutionally valid because it does not set a "target-quota?" Is the Harvard admissions program a not-so-obvious Davis minority program under another name? For purposes of implementing the *Bakke* decision, the answers to these questions may not be important, since the end result of *Bakke* is to permit admissions officers and faculties with pre-Bakke commitments to special minority admissions policies to achieve pre-Bakke results with the use of different and Bakke-approved admissions procedures.

So central to the Court's *Bakke* opinion is the Harvard admissions program that a full description of it appears as an appendix to Justice Powell's opinion.⁸ Parts of that description also appear in the text of his opinion. But strangely, and perhaps by chance if not by Freudian mishap, the most graphic and compelling language in favor of affirmative action admissions policies is almost buried in the Court's appendix description of the program.

First, the court notes that the Harvard program's diversity goal embraces elements of geography, urban-rural mix, athletic skills and extraordinary and unique talent, as well as race and ethnic origin.⁹ Next, the Court's appendix reveals that Harvard thinks the enrollment of too few Blacks "might create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential."¹⁰ To avoid that consequence, the Harvard admissions committee, the Court tells us, takes into account a relationship between numbers of blacks admitted and the goal of student diversity, and a relationship between numbers of blacks admitted and a harmful isolated environment for admitted black students.¹¹

5. 438 U.S. 265, 316 (1978).

6. *Id.* at 323 (Appendix to opinion of Mr. Justice Powell).

7. Newsweek, July 10, 1979, at 30.

8. 438 U.S. 265, 321-324. The Appendix to Mr. Justice Powell's opinion is a verbatim statement from the Appendix to the Brief for Columbia University, Harvard University, Stanford University and the University of Pennsylvania as *Amici Curiae* in the *Bakke* case. See 438 U.S. 265, 321 n. 55.

9. 438 U.S. 265, 322-323 (1978). (Appendix to opinion of Mr. Justice Powell).

10. *Id.* at 323. Interestingly, the paragraph in the Powell Appendix which contains the statement on the effect of "small numbers" of black students is quoted in the text of Mr. Justice Powell's opinion, but there an elipsis replaces the Appendix paragraph's reference to the harmful effects of having too few blacks in a special admissions program.

While it is left unstated in the opinion, the too few blacks observation would necessarily apply to other ethnic groups—Chicanos for example—that have traditionally benefitted from special admissions policies.

11. *Id.*

With no quota establishing a ceiling on the number of specially admitted minority students and the Court's approval of minority admissions criteria, the *Bakke* decision effectively permits post-Bakke minority admissions percentages to be higher than pre-Bakke percentages. Interestingly, and somewhat paradoxically, Harvard College, for example, has a nonracial quota that has a direct bearing on its minority admissions numbers. It blurs, almost to a point of nonexistence, distinctions between the Davis quota plan and Harvard's diversity admissions program.¹²

The *Bakke* decision notes that about 150 out of 1100 Harvard College freshmen are selected purely on the basis of extraordinary "intellectual potential."¹³ This means that only about 14 percent of a Harvard freshman class is selected primarily on the basis of grades and aptitude test scores alone; the remainder of the entering class is the product of a search for diversity among students who are outside the top academic 14 percent but judged to be capable of doing "good work" at Harvard.¹⁴ In contrast, 84 percent of the entering class at the Davis Medical School was accepted almost solely on the basis of grades and aptitude test scores, and without minority status as a factor;¹⁵ the remaining 16 percent of the first-year class seats were unqualifiedly reserved for minority students.

Thus, the percentage of Davis Medical School applicants admitted on the basis of academic performance alone was—until Bakke—six times greater than that of Harvard College applicants. That the comparison is between a medical school and an undergraduate school explains part but not all of the difference, for the smaller the pure-academic-performance quota, the larger the available quota for diverse admissions factors, including race and ethnic origin.

Even on the assumption that the Harvard admissions program is a means of achieving indirectly, and with better cosmetics, what the Supreme Court has ruled unlawful in the *Bakke* decision, Harvard-type admissions programs, by any name or characterization, now stand validated by a judgment of the United States Supreme Court.

To anyone favoring the admission of college and university students on the basis of grades and aptitude test scores alone, without using race or ethnic origin as a factor at all—the position, for example, of the anti-Defamation League of B'nai B'rith—the *Bakke* decision is a definite loss. Civil

12. The point that the approved Harvard plan and the condemned Davis plan were in effect indistinguishable, was observed by Mr. Justice Brennan, writing for Justices White, Marshall and Blackmun:

There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here. 438 U.S. 265, 387. . . [T]here is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.

438 U.S. at 379.

13. *Id.* at 322.

14. *Id.* at 323.

15. Since the inception of the special admissions program at U.C. Davis Medical School and until the time of the *Bakke* decision, the percentage of minority students enrolled in the Davis program had remained at a constant 16 percent. *Id.* at 275.

rights proponents who regard the Bakke decision as a setback are almost certainly incorrect in their assessment. Further, the widely publicized efforts of some civil rights groups to let the California Supreme Court's decision in the *Bakke* case stand, so that it could not contaminate the rest of the nation as an unqualified adoption of the United States Supreme Court, must now be regarded as misguided strategy.¹⁶

How will the *Bakke* decision be implemented at professional schools, where its impact will be the greatest? *Bakke* places some limits on methods that may be used to enroll minority students. A rigid and inflexible quota based on race and ethnic origin alone may not be used. *Bakke* makes that clear. At the same time, faculties have the legal discretion to end affirmative efforts to enroll minority students. All of the Justices in the *Bakke* case agreed that minority admissions programs are not required by law,¹⁷ at least in the absence of a finding that the admissions policies affirmatively discriminated on race or other ethnic grounds.

Universities and colleges with vigorously implemented pre-*Bakke* minority admissions policies will undoubtedly continue them to the extent allowed by the *Bakke* decision.

Colleges and universities which, in the absence of constitutional or statutory compulsion, maintained a pre-*Bakke* quota-type minority admissions policy should not be expected to shrink from a more flexible and equally effective post-*Bakke* policy. Admissions applicants are easily divisible into two categories: a numbers-alone (grades and test scores) pool and a diversity pool. Along with other diversity factors, race and ethnic origin may be taken into account in considering the diversity pool. So long as the numbers

16. Under the holding of the California Supreme Court in *Bakke v. Regents*, 18 Cal. 3d 34, *supra* note 2, it is doubtful that any special admissions policies using race as a criterion to any degree could have been lawfully implemented. Further, it was clear, following the Supreme Court's first-time refusal to decide a *Bakke*-type issue in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), that the minority admissions issue could not be kept from the Supreme Court very long, given the widespread publicity over the issue of so-called reverse discrimination. See, e.g., *The Furor Over 'Reverse Discrimination'*, *Newsweek*, Sept. 26, 1977, at 52. Had the California Supreme Court's decision in *Bakke* not been appealed to the United States Supreme Court, other cases presenting the quota-admissions issue would have quickly made their way to the Supreme Court for resolution. It was also argued in support of not appealing the California Supreme Court's *Bakke* decision that the record in the case was poor—which, by all objective standards, was true. Following the medical school's denial of Bakke's application for admission, an Assistant to the Dean of Admissions at the U.C. Davis Medical School advised him to litigate the issue of his admissions denial and gave him advice on litigation strategy. 438 U.S. 265, 278 n. 8. This was strong evidence of the possibility that Bakke's law suit was collusive in that the University defendant and the plaintiff Bakke had the same interests. Straining somewhat the application of agency principles, the Supreme Court held that there was no evidence that the Assistant Dean's views were those of the medical school. *Id.* Further, the University made a questionable concession when it agreed that it could not prove that Bakke would not have been admitted to the Medical school in the absence of a special minority admissions program. *Id.* at 280, n. 14. See *Id.* at 277. Nonetheless, the Supreme Court focused on the rigidity of the quota used at the U.C. Davis Medical School, holding, in effect, that it was *per se* invalid because of its inflexibility and consequent exclusion of any nonminority from consideration in the 16% minority applicant category. The "weaknesses" in the record were virtually ignored by the Court; they neither strengthened nor weakened the University's case (which was not apparent before the decision was rendered). The Supreme Court apparently would have dealt with any quota like the U.C. Davis Medical School quota in the same manner the quota was dealt with in *Bakke*.

17. 438 U.S. 265, 344 (Brennan, concurring).

involved are not predetermined, fixed and *per se* exclusionary, they should pass muster under the new *Bakke* standards.

Special minority admissions policies in law schools have been prompted over the years by a need for minority lawyers that is no less critical now than it was a decade ago. Also, the extraordinarily high number of applicants for admission to law schools continues to make available for acceptance large numbers of the most academically gifted;¹⁸ and this, in turn, continues to drive the average entering grade-point average and aptitude test scores far above what is required to produce a good lawyer. It is this relationship between the pushing effect of applicant numbers on average entering grades and test scores, and the resulting effect on minority admissions capability, that is recognized as being at the heart of minority admissions needs.

Unfortunately, much of the general public tends to view specially admitted minority students as academic cripples randomly plucked from the streets with no regard for their ability, all at the expense of "qualified" white students. In reality, undergraduate grades and test scores of specially admitted minority students at ranking professional schools tend to be such that admitted students are those determined to be qualified to succeed academically and in the professions.

Some will argue that Justice Powell's *Bakke* opinion rejected the minority admissions objective of an increase in minority physicians to benefit "underserved" minority communities, and that the true basis for the Court's approval of the Harvard admissions plan and its enrollment of minority students, was the goal of a diverse student body. Careful reading of the opinion will reveal, however, that rather than reject the objective of helping underserved communities the Supreme Court found that the University of California had placed no evidence on the issue in the trial court record.¹⁹ Justice Powell's opinion does not say what decision might have been reached had the trial record shown, as it surely could have shown, that special minority admissions policies increase the number of minority professionals and that minority communities are served and benefited as a result.

In any event, the need for qualified minority lawyers and doctors is so great that it makes little difference whether they are produced because the United States Supreme Court thinks that the presence of minority students in professional schools is psychologically beneficial to other students, or because they will benefit "underserved communities," so long as qualified minority students are admitted, and "underserved" minority communities can be better served as a result.

The *Bakke* decision has defused the *Bakke* issue, but only in the public mind. Many will tend to see Allan Bakke's personal vindication as a victory for "qualified" whites and a justifiable defeat for "unqualified" minorities. That may be exactly what Justice Powell had in mind—an apparent victory

18. UCLA Law School, for example, receives over 3,000 applications for approximately 350 first year class seats.

19. 438 U.S. 265, 310 & n. 46 (1978). The Court requiring proof that minority doctors serve minority communities would appear to be ludicrous to any black citizen who has lived—as do most black citizens—in black communities. In black communities, it is so well known that overwhelmingly high percentages of black doctors predominately serve black patients that any suggestion to the contrary would probably be viewed with complete disbelief.

for the forces against affirmative action admissions policies, yet a subtle and undramatic, but powerfully effective, victory for affirmative action's proponents.²⁰

20. A clearer victory for affirmative action and one not wholly unpredictable on the basis of the *Bakke* decision, is *Weber v. Kaiser Aluminum & Chemical Corp.*, 47 Law Week 4851 (June 26, 1979), upholding the validity of an affirmative action plan set up to eliminate racial imbalance in a white craft work force, by reserving a fixed percentage of training program slots for black trainees.