

Bakke v. The Regents of the University of California

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In the months since publication of the *Bakke* decision,¹ the court's majority opinion has redefined the nature of the dispute over affirmative action programs, but I still find myself profoundly surprised and troubled by it. How could the usually thoughtful and thorough California Supreme Court strike down racially-based affirmative action programs with such sweeping language when logic, experience, and the reasoned judgments of so many judicial and legislative decisionmakers all concluded that these programs are necessary?

Consider the following examples: The highest courts in both Washington² and New York³ explicitly ruled that racially-based affirmative action programs are constitutional in appropriate circumstances. In 1971, the United States Supreme Court, speaking through Chief Justice Warren Burger, stated:

School authorities are traditionally charged with broad power to formulate and implement educational policy and *might well conclude*, for example, *that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.* To do this as an educational policy is within the broad discretionary powers of school authorities⁴

A racially-based affirmative action program is designed to create that all-important pluralistic environment within the school. More recently, during oral argument in a case involving discrimination by a private

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1. *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977).

2. *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974).

3. *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

4. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (emphasis added).

school,⁵ Justice William Rehnquist indicated that he agreed with Chief Justice Burger's view by posing the following question to the attorney representing the all-white private school: "[W]hy can't the government say that quite as important as reading and arithmetic is learning in an integrated environment?"⁶ The United States Supreme Court has specifically approved governmental efforts to favor disadvantaged groups with special programs (even though these programs necessarily hurt the advantaged group, monetarily or in other ways) in three recent decisions: *Lau v. Nichols*,⁷ *Kahn v. Shevin*,⁸ and *Morton v. Mancari*.⁹

The International Convention on the Elimination of All Forms of Racial Discrimination, which has been formally ratified by over eighty nations and signed by the United States, specifically provides:

*Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*¹⁰

Because of the widespread adoption of this treaty and because our own government collaborated in both its drafting and its promulgation, it could reasonably be viewed as part of that body of international law binding on the United States unless directly contradicted by a congressional enactment.¹¹

5. *Runyon v. McCrary*, 427 U.S. 160 (1977).

6. *San Francisco Chronicle*, Apr. 27, 1976, at 8, col. 1.

7. 414 U.S. 563 (1974) (held the failure of a local school system to provide English language instruction to approximately 1,800 students of Chinese ancestry who did not speak English denied them an opportunity to participate in public educational program in violation of the Civil Rights Act of 1964).

8. 416 U.S. 351 (1974) (held state statute which provided an annual \$500 property tax exemption to widows and not widowers did not violate the equal protection clause and was valid).

9. 417 U.S. 535 (1974) (held that employment preference for Indians in the Bureau of Indian Affairs did not constitute invidious racial discrimination, but was reasonable and rationally designed to further Indian self-government).

10. Article 1(4), International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, 216 (1969).

11. International law is part of our law. *The Paquete Habana*, 175 U.S. 677, 708 (1900). Judges in the United States have an obligation to interpret domestic laws so that they will be consistent with international law unless clear evidence exists on the part of Congress that international law is to be ignored. *The Over the Top*, 5 F.2d 838 (D. Conn. 1925). Because we signed this treaty, we are obliged to adhere to its basic principles. See *The Vienna Convention on the Law of Treaties*, arts. 10, 12, 18, in

Most importantly, racially-based affirmative action programs have now been in existence in California and elsewhere for a number of years, and they have proven themselves to be both the best way of ensuring that at least some nonwhites have the opportunity to practice a profession in our society and also the best method of enriching the educational environment of our professional colleges. I have no hesitation in reporting that during the years I have been teaching at Hastings College of the Law the classroom discussions have been immeasurably enriched by having an ethnically diverse student body.¹²

The California Supreme Court's majority opinion in *Bakke* not only ignores the years of struggle by minorities to achieve racial equality in our country, it also passively accepts racial inequities without demanding that society adopt a means of alleviating them. In fact, the majority opinion seems implicitly to accept a theory of the racial superiority of the white race because it would permit a public professional school to underrepresent nonwhites without imposing any affirmative action obligations on the school. Let me elaborate upon this assertion. Analytically, three possible theories can be offered to explain the lower rate of admission for nonwhites under regular admissions programs:

1. Nonwhites have not been adequately prepared for professional education because of past discrimination and existing inequities in our educational, social, and economic systems.

2. The traditional testing criteria are not appropriate tools for measuring achievement and aptitude among nonwhites because they are culturally and ethnically biased.¹³

S. ROSENNE, *THE LAW OF TREATIES* 146, 170 (1970). The Racial Discrimination Convention is also binding on the United States as an explicit interpretation of articles 55 and 56 of the United Nations Charter, in which the United States has pledged to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

12. The same statement can be made for the University of Hawaii, which has a somewhat different affirmative action program. I taught previously at Catholic University Law School, which at that time (1967-69) had virtually no nonwhites in its student body. My student experience was at Harvard Law School, which was virtually all white at the time (1964-67).

13. The Law School Admission Test (LSAT), which is widely used as the overriding criterion for admission to law schools, is clearly only a very crude device for measuring the skills required of an attorney. The most recent test conducted by the Educational Testing Service in Princeton (the organization that administers and scores the LSAT) revealed that of those persons who achieved the exceptionally high score of 700 or more (out of a possible 800) on the LSAT, only 61 percent finished in the top half of their law school class after the first year. Conversely, about 21 percent of those

3. Nonwhites are inherently inferior to whites, and thus fewer are qualified to become professionals.

Explanation number three, I had thought, is simply not constitutionally acceptable because the Fourteenth Amendment's guarantee to all of equal protection of the laws requires our government to treat people of all races equally.¹⁴ A publicly-financed professional school thus has an obligation to educate people of all races and must establish a program to ensure that it meets that obligation.¹⁵ If either the first or second hypothesis (or both) explains why fewer nonwhites are admitted under normal admissions criteria, the school must help rectify past inequities and prevent continued discrimination by establishing a program that will ensure fair treatment to people of all ethnic groups. The only way to accomplish this task is by utilizing a comparison of the number of persons admitted from each ethnic group with their numbers in the population seeking a professional education, and this comparison necessarily requires using some form of racial quotas in the admission process.

Racially-based affirmative action programs were adopted originally because the continued underrepresentation of nonwhites in professional schools was viewed as a species of racial discrimination that violated the Fourteenth Amendment.¹⁶ The *Bakke* majority ignores that

who scored lower than 400 on the LSAT managed to finish in the top half of their class after the first year. 3 EDUCATIONAL TESTING SERVICE, FINDINGS, No. 2, at 2-3 (1976). The test thus fails to correlate the abilities of a significant sector of persons to the capacity to do above-average work in law school, and, similarly, gives high rankings to a substantial number of persons who wind up doing below-average work.

14. Explanation three also does not seem to be based on any sound evidence whatsoever, and substantial evidence to the contrary exists. See, e.g., Rensberger, *Briton's Classic I.Q. Data Now Viewed as Fraudulent*, N.Y. Times, Nov. 28, 1976, at 26, col. 4, in which some of the early tests purporting to show that one's "intelligence quotient" is inherited are revealed to have been totally fabricated.

15. This result also comports, I think, with our common sense. We know that all races and ethnic groups have the capacity to produce geniuses, leaders, and creative artists. We know particularly that persons of all races have made important contributions to the professions. If our admission policies have the effect of virtually excluding certain races, then we must not be measuring the abilities of members of those races properly. We thus have an obligation to search for the most promising applicants from all races and ethnic groups (particularly those that have suffered cultural, economic, and educational deprivation) in the hope of locating persons from those ethnic groups who will make a contribution to our profession.

16. Indeed, without an affirmative action program most professional schools would be violating the Constitution because they would be substantially all white. Consider the reasoning used by Justice Powell in the case of *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973). He said that the distinction between de jure and de facto segregation has outlived its usefulness and that whenever a public school is segregated "to a substantial

original purpose, although it admits that programs designed to give preferential treatment to persons who come from socially or economically deprived backgrounds are acceptable.¹⁷ Such programs may indeed also be appropriate in professional schools, but the Fourteenth Amendment was explicitly designed to end *racial* discrimination against minorities in our country and publicly-financed professional schools must help achieve that goal. Although the *Bakke* majority would prefer to see our society as one in which the major inequities are primarily economic, the fact remains that racial discrimination has been the major social problem dividing our country throughout our history. For two hundred years, people have been categorized, classified, and ostracized due to their race; enslaved, imprisoned, and lynched because of the color of their skins. For generations, people in the United States have been denied the opportunity to vote, buy land, practice a profession, or become citizens because of their ethnic background. The institution of slavery is, of course, the most blatant example of this intolerable state of affairs, but the extended use of "Jim Crow" laws, the forced evacuation and imprisonment of Japanese-Americans during World War II, the "queue" ordinances designed to punish Chinese-Americans, and numerous other examples could be mentioned to illustrate the systematic discrimination by whites against all other races in this country.

Although progress has been made during the past few years to overcome such prejudice, few nonwhites in America can say that they do not still feel continuing discrimination based on race. Most residential communities in the United States are still racially segregated, most urban schools are still essentially one-race institutions, and most Americans have as their social contacts only persons of their own ethnic background. We *are* still segregated along racial lines, and it is disingenuous for the California Supreme Court to conclude that our divisions are no longer racial in nature and that a color-conscious admissions program is no longer necessary.

The *Bakke* majority cavalierly rejects the argument that the special problems (medical, legal, etc.) of nonwhites will be given more

degree," the burden must shift to the school authorities to prove that they are "operating a genuinely integrated school system." *Id.* at 224 (Powell, J., concurring in part and dissenting in part). Without an affirmative action program, most professional schools would be segregated to a substantial degree, and would have difficulty meeting the burden Justice Powell imposes because they cannot defend their admissions standards as being truly neutral, nondiscriminatory, and substantially related to measuring the skills of professions.

17. 18 Cal. 3d at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

attention by nonwhite professionals than they would be by whites,¹⁸ and thus perpetuates the patronizing attitude that enlightened whites can adequately take care of the needs of nonwhites. Many whites have, of course, devoted their lives to the needs of nonwhites and have assisted in reducing the level of discrimination, but it is hard to believe that the court cannot understand that a person who has directly experienced the problems of racial minorities would be better equipped to articulate those problems to others and to help devise solutions to them.

The majority opinion also argues that whatever compelling interests the state may have in increasing the number of qualified minority professionals can be achieved by "means less detrimental to the rights of the majority,"¹⁹ and then suggests such alternatives as individualized consideration of each applicant (including special consideration for socio-economic deprivation), increasing the size of the student body, aggressively recruiting minority applicants, and providing remedial programs for disadvantaged persons of all races.²⁰ It is difficult to take these proposals seriously. Could it really be constitutionally acceptable to add sixteen places to the Davis medical school's student body and reserve them for nonwhites if it is unconstitutional racial discrimination to reserve sixteen spaces out of the original student body of one hundred for nonwhites? Can it be constitutionally acceptable to allocate public resources for the aggressive recruitment of nonwhites, when that would necessarily discriminate against disadvantaged whites who are not as insistently solicited? And is individualized treatment that gives recognition to the special disadvantages that nonwhites suffer because of their race more palatable than a program that more honestly reserves certain spaces for people of nonwhite races because those races have been disadvantaged in our society? In fact, no alternative less drastic than a racially-based affirmative action program can be devised because the problem that creates the need for such a program is that of *racial* discrimination.²¹

18. *Id.* at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693.

19. *Id.*

20. *Id.* at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

21. See *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974). The Washington Supreme Court held: "The consideration of race in the law school admissions policy meets the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived. . . . [T]he mere fact that a minority applicant comes from a relatively more affluent home does not mean that he has not been subjected to

But perhaps the most disturbing part of the majority opinion is its conclusion that rejected white applicants who are "qualified" for admission to a professional school suffer an injury by the mere existence of a racially-based affirmative action program.²² The idea that qualifications for a professional school can be explicitly devised and articulated must seem novel to anyone who has examined the files of potential entrants and has tried to find ways of differentiating among hundreds of exceptionally well-qualified applicants in order to determine who should be allotted the limited spaces that are available. The admissions process is necessarily subjective, and persons reading admissions files usually resort to a balancing approach aimed at admitting superior applicants who represent a cross-section of the community. Prior to the *Bakke* opinion, no one ever thought that qualifications for admission could ever be articulated so carefully that an applicant meeting them would automatically be entitled to admission. If such qualifications are now articulated, they would undoubtedly be based on the views of the members of the existing various professional classes who are almost entirely white and whose views on the appropriate qualifications for admission to their classes would likely parallel their own background.²³ The articulation of qualifications is thus likely to preserve the status quo rather than to open up the profession to nonwhites. Affirmative action programs have been designed to prevent this type of unconscious discrimination and to ensure that persons of disadvantaged ethnic back-

psychological harm through discrimination. . . . [E]very minority lawyer is critically needed, whether he be rich or poor." *Id.* at 35-36, 42, 507 P.2d at 1184, 1187.

22. 18 Cal. 3d at 50-51, 553 P.2d at 1163, 132 Cal. Rptr. at 691. The notion that a "qualified" white student has a "right" to attend professional school is a novel idea with unknown implications. Some cases do hold that applicants for governmental offerings of one sort or another are protected by fundamental notions of due process and fundamental fairness. *See, e.g.,* *Holmes v. New York City Hous. Auth.*, 398 F.2d 262 (2d Cir. 1968); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964). But the more general approach is that one is entitled to due process only after one has obtained the governmental offering and the government is trying to take it away from the person who has it. *Compare* *Board of Regents v. Roth*, 408 U.S. 564 (1972) *with* *Perry v. Sindermann*, 408 U.S. 593 (1972). *See also* *Bixby v. Pierno*, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971). If all "qualified" applicants have a right or entitlement to attend a public professional school, then the professional school must be obliged, at a minimum, to state explicitly and clearly all the criteria used to evaluate applicants and to make available all evaluations of all applicants' files. If a professional school could not articulate explicit objective criteria to explain how it picks one candidate over another, then it would have to start admitting applicants either on a first-come, first-served basis or by lot. *See* *Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968), where the court made those suggestions in a case involving applicants for public housing.

23. *See* note 13 *supra*.

grounds are admitted. The California Supreme Court has thwarted this goal with its decision in *Bakke*.

Although it may be possible for creative professional schools to find ways of circumventing the *Bakke* decision with "individualized" selection schemes that continue to give preferences to racial minorities, the decision is nonetheless a source of deep disappointment and dissatisfaction to minorities and to all persons who hoped to end racial discrimination in the current generation. The proportion of nonwhites in the nation's medical schools dropped from ten percent in 1974-75 to nine percent in 1976-77,²⁴ and further decreases may be expected if the *Bakke* decision prevails.²⁵ Such a decline in nonwhite professionals is unacceptable if we are committed to a pluralistic society in which all people truly have equal access to positions of leadership. The California Supreme Court's decision in *Bakke* is inconsistent with the conclusions of other courts and legislators in the United States and throughout the world, and it should not stand as the final word on this subject.

24. Maeroff, *Proportion of Minority Students Entering Medical Schools Drops Again, Creating Concern About Future*, N.Y. Times, Nov. 15, 1976, at 19, col. 1 (city ed.). Nonwhite enrollment in law schools stood at 7.5 percent in 1974 and dropped slightly to 7.4 percent in 1975. N.Y. Times, Nov. 21, 1976, § IV, at 7, col. 3.

25. Blacks constitute about 12 percent of the United States population, but only about 1.4 percent of the attorneys and about 2.0 percent of the doctors in the United States are black. Persons of Hispanic origin comprise at least 4.4 percent of the United States population, but only 0.9 percent of the lawyers are Hispanic. Some 0.4 percent of our citizens are Native-Americans, but only an infinitesimal number are attorneys or doctors. See 1970 CENSUS, SUBJECT REPORTS: OCCUPATIONAL CHARACTERISTICS, Table 39, at 593.