

# Why Bakke Has No Case

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On October 12 the Supreme Court heard oral argument in the case of *The Regents of the University of California v. Allan Bakke*. No lawsuit has ever been more widely watched or more thoroughly debated in the national and international press before the Court's decision. Still, some of the most pertinent facts set before the Court have not been clearly summarized.

The medical school of the University of California at Davis has an affirmative action program (called the "task force program") designed to admit more black and other minority students. It sets sixteen places aside for which only members of "educationally and economically disadvantaged minorities" compete. Allan Bakke, white, applied for one of the remaining eighty-four places; he was rejected but, since his test scores were relatively high, the medical school has conceded that it could not prove that he would have been rejected if the sixteen places reserved had been open to him. Bakke sued, arguing that the task force program deprived him of his constitutional rights. The California Supreme Court agreed, and ordered the medical school to admit him. The university appealed to the Supreme Court.

The Davis program for minorities is in certain respects more forthright (some would say cruder) than similar plans now in force in many other American universities and professional schools. Such programs aim to increase the enrollment of black and other minority students by allowing the fact of their race

to count affirmatively as part of the case for admitting them. Some schools set a “target” of a particular number of minority places instead of setting aside a flat number of places. But Davis would not fill the number of places set aside unless there were sixteen minority candidates it considered clearly qualified for medical education. The difference is therefore one of administrative strategy and not of principle.

So the constitutional question raised by *Bakke* is of capital importance for higher education in America, and a large number of universities and schools have entered briefs *amicus curiae* urging the Court to reverse the California decision. They believe that if the decision is affirmed then they will no longer be free to use explicit racial criteria in any part of their admissions programs, and that they will therefore be unable to fulfill what they take to be their responsibilities to the nation.

It is often said that affirmative action programs aim to achieve a racially conscious society divided into racial and ethnic groups, each entitled, as a group, to some proportionable share of resources, careers, or opportunities. That is a perverse description. American society is currently a racially conscious society; this is the inevitable and evident consequence of a history of slavery, repression, and prejudice. Black men and women, boys and girls, are not free to choose for themselves in what roles—or as members of which social groups—others will characterize them. They are black, and no other feature of personality or allegiance or ambition will so thoroughly influence how they will be perceived and treated by others, and the range and character of the lives that will be open to them.

The tiny number of black doctors and professionals is both a consequence and a continuing cause of American racial consciousness, one link in a long and self-fueling chain reaction. Affirmative action programs use racially explicit

criteria because their immediate goal is to increase the number of members of certain races in these professions. But their long-term goal is to *reduce* the degree to which American society is over-all a racially conscious society.

The programs rest on two judgments. The first is a judgment of social theory: that America will continue to be pervaded by racial divisions as long as the most lucrative, satisfying, and important careers remain mainly the prerogative of members of the white race, while others feel themselves systematically excluded from a professional and social elite. The second is a calculation of strategy: that increasing the number of blacks who are at work in the professions will, in the long run, reduce the sense of frustration and injustice and racial self-consciousness in the black community to the point at which blacks may begin to think of themselves as individuals who can succeed like others through talent and initiative. At that future point the consequences of nonracial admissions programs, whatever these consequences might be, could be accepted with no sense of racial barriers or injustice.

It is therefore the worst possible misunderstanding to suppose that affirmative action programs are designed to produce a balkanized America, divided into racial and ethnic subnations. They use strong measures because weaker ones will fail; but their ultimate goal is to lessen not to increase the importance of race in American social and professional life.

According to the 1970 census, only 2.1 percent of US doctors were black. Affirmative action programs aim to provide more black doctors to serve black patients. This is not because it is desirable that blacks treat blacks and whites treat whites, but because blacks, for no fault of their own, are now unlikely to be well served by whites, and because a failure to provide the doctors they trust will exacerbate rather than reduce the resentment that now leads them to trust only their own. Affirmative action tries to provide more blacks as classmates for white

doctors, not because it is desirable that a medical school class reflect the racial makeup of the community as a whole, but because professional association between blacks and whites will decrease the degree to which whites think of blacks as a race rather than as people, and thus the degree to which blacks think of themselves that way. It tries to provide “role models” for future black doctors, not because it is desirable for a black boy or girl to find adult models only among blacks, but because our history has made them so conscious of their race that the success of whites, for now, is likely to mean little or nothing for them.

The history of the campaign against racial injustice since 1954, when the Supreme Court decided *Brown v. Board of Education*, is a history in large part of failure. We have not succeeded in reforming the racial consciousness of our society by racially neutral means. We are therefore obliged to look upon the arguments for affirmative action with sympathy and an open mind. Of course, if Bakke is right that such programs, no matter how effective they may be, violate his constitutional rights then they cannot be permitted to continue. But we must not forbid them in the name of some mindless maxim, like the maxim that it cannot be right to fight fire with fire, or that the end cannot justify the means. If the strategic claims for affirmative action are cogent, they cannot be dismissed simply on the ground that racially explicit tests are distasteful. If such tests are distasteful it can only be for reasons that make the underlying social realities the programs attack more distasteful still.

*The New Republic*, in a recent editorial opposing affirmative action, missed that point. “It is critical to the success of a liberal pluralism,” it said, “that group membership itself is not among the permissible criteria of inclusion and exclusion.” But group membership is in fact, as a matter of social reality rather than formal admission standards, part of what determines inclusion or exclusion for us now. If we must choose between a society that is in fact liberal and an illiberal society that scrupulously avoids formal racial criteria, we can hardly

appeal to the ideals of liberal pluralism to prefer the latter.

Professor Archibald Cox of Harvard Law School, speaking for the University of California in oral argument, told the Supreme Court that this is the choice the United States must make. As things stand, he said, affirmative action programs are the only effective means of increasing the absurdly small number of black doctors. The California Supreme Court, in approving Bakke's claim, had urged the university to pursue that goal by methods that do not explicitly take race into account. But that is unrealistic. We must distinguish, as Cox said, between two interpretations of what the California court's recommendation means. It might mean that the university should aim at the same immediate goal, of increasing the proportion of black and other minority students in the medical school, by an admissions procedure that on the surface is not racially conscious.

That is a recommendation of hypocrisy. If those who administer the admissions standards, however these are phrased, understand that their immediate goal is to increase the number of blacks in the school, then they will use race as a criterion in making the various subjective judgments the explicit criteria will require, because that will be, given the goal, the only right way to make those judgments. The recommendation might mean, on the other hand, that the school should adopt some non-racially conscious goal, like increasing the number of disadvantaged students of all races, and then hope that that goal will produce an increase in the number of blacks as a by-product. But even if that strategy is less hypocritical (which is far from plain), it will almost certainly fail because no different goal, scrupulously administered in a non-racially conscious way, will in fact significantly increase the number of black medical students.

Cox offered powerful evidence for that conclusion, and it is supported by the recent and comprehensive report of the Carnegie Council on Policy Studies in Higher Education. Suppose, for example, that the medical school sets aside

separate places for applicants “disadvantaged” on some racially neutral test, like poverty, allowing only those disadvantaged in that way to compete for these places. If the school selects those from that group who scored best on standard medical school aptitude tests, then it will take almost no blacks, because blacks score relatively low even among the economically disadvantaged. But if the school chooses among the disadvantaged on some basis other than test scores, just so that more blacks will succeed, then it will not be administering the special procedure in a non-racially conscious way.

So Cox was able to put his case in the form of two simple propositions. A racially conscious test for admission, even one that sets aside certain places for qualified minority applicants exclusively, serves goals that are in themselves unobjectionable and even urgent. Such programs are, moreover, the only means that offer any significant promise of achieving these goals. If these programs are halted, then no more than a trickle of black students will enter medical or other professional schools for another generation at least.

If these propositions are sound, then on what ground can it be thought that such programs are either wrong or unconstitutional? We must notice an important distinction between two different sorts of objections that might be made. These programs are intended, as I said, to decrease the importance of race in the United States in the long run. It may be objected, first, that the programs will in fact harm that goal more than they will advance it. There is no way now to prove that that is not so. Cox conceded, in his argument, that there are costs and risks in these programs.

Affirmative action programs seem to encourage, for example, a popular misunderstanding, which is that they assume that racial or ethnic groups are entitled to proportionate shares of opportunities, so that Italian or Polish ethnic minorities are, in theory, as entitled to their proportionate shares as blacks or

Chicanos or American Indians are entitled to the shares the present programs give them. That is a plain mistake: the programs are not based on the idea that those who are aided are entitled to aid, but only on the strategic hypothesis that helping them is now an effective way of attacking a national problem. Some medical schools may well make that judgment, under certain circumstances, about a white ethnic minority. Indeed it seems likely that some medical schools are even now attempting to help white Appalachian applicants, for example, under programs of regional distribution.

So the popular understanding is wrong, but so long as it persists it is a cost of the program because the attitudes it encourages tend to a degree to make people more rather than less conscious of race. There are other possible costs. It is said, for example, that some blacks find affirmative action degrading; they find that it makes them more rather than less conscious of prejudice against their race as such. This attitude is also based on a misperception, I think, but for a small minority of blacks at least it is a genuine cost.

In the view of the many important universities who have such programs, however, the gains will very probably exceed the losses in reducing racial consciousness over-all. This view is hardly so implausible that it is wrong for these universities to seek to acquire the experience that will allow us to judge whether they are right. It would be particularly silly to forbid these experiments if we know that the failure to try will mean, as the evidence shows, that the status quo will almost certainly continue. In any case, this first objection could provide no argument that would justify a decision by the Supreme Court holding the programs unconstitutional. The Court has no business substituting its speculative judgment about the probable consequences of educational policies for the judgment of professional educators.

So the acknowledged uncertainties about the long-term results of such programs

could not justify a Supreme Court decision making them illegal. But there is a second and very different form of objection. It may be argued that even if the programs *are* effective in making our society less a society dominated by race, they are nevertheless unconstitutional because they violate the individual constitutional rights of those, like Allan Bakke, who lose places in consequence. In the oral argument Reynold H. Colvin of San Francisco, who is Bakke's lawyer, made plain that his objection takes this second form. Mr. Justice White asked him whether he accepted that the goals affirmative action programs seek are important goals. Mr. Colvin acknowledged that they were. Suppose, Justice White continued, that affirmative action programs are, as Cox had argued, the only effective means of seeking such goals. Would Mr. Colvin nevertheless maintain that the programs are unconstitutional? Yes, he insisted, they would be, because his client has a constitutional right that the programs be abandoned, no matter what the consequences.

Mr. Colvin was wise to put his objections on this second ground; he was wise to claim that his client has rights that do not depend on any judgment about the likely consequences of affirmative action for society as a whole, because if he makes out that claim then the Court must give him the relief he seeks.

But can he be right? If Allan Bakke has a constitutional right so important that the urgent goals of affirmative action must yield, then this must be because affirmative action violates some fundamental principle of political morality. This is not a case in which what might be called formal or technical law requires a decision one way or the other. There is no language in the Constitution whose plain meaning forbids affirmative action. Only the most naïve theories of statutory construction could argue that such a result is required by the language of any earlier Supreme Court decision or of the Civil Rights Act of 1964 or of any other congressional enactment. If Mr. Colvin is right it must be because Allan Bakke has not simply some technical legal right but an important moral right as

well.

What could that right be? The popular argument frequently made on editorial pages is that Bakke has a right to be judged on his merit. Or that he has a right to be judged as an individual rather than as a member of a social group. Or that he has a right, as much as any black man, not to be sacrificed or excluded from any opportunity because of his race alone. But these catch phrases are deceptive here, because, as reflection demonstrates, the only genuine principle they describe is the principle that no one should suffer from the prejudice or contempt of others. And that principle is not at stake in this case at all. In spite of popular opinion, the idea that the *Bakke* case presents a conflict between a desirable social goal and important individual rights is a piece of intellectual confusion.

Consider, for example, the claim that individuals applying for places in medical school should be judged on merit, and merit alone. If that slogan means that admissions committees should take nothing into account but scores on some particular intelligence test, then it is arbitrary and, in any case, contradicted by the long-standing practice of every medical school. If it means, on the other hand, that a medical school should choose candidates that it supposes will make the most useful doctors, then everything turns on the judgment of what factors make different doctors useful. The Davis medical school assigned to each regular applicant, as well as to each minority applicant, what it called a “benchmark score.” This reflected not only the results of aptitude tests and college grade averages, but a subjective evaluation of the applicant’s chances of functioning as an effective doctor, in view of society’s present needs for medical service. Presumably the qualities deemed important were different from the qualities that a law school or engineering school or business school would seek, just as the intelligence tests a medical school might use would be different from the tests these other schools would find appropriate.

There is no combination of abilities and skills and traits that constitutes “merit” in the abstract; if quick hands count as “merit” in the case of a prospective surgeon, this is because quick hands will enable him to serve the public better and for no other reason. If a black skin will, as a matter of regrettable fact, enable another doctor to do a different medical job better, then that black skin is by the same token “merit” as well. That argument may strike some as dangerous; but only because they confuse its conclusion—that black skin may be a socially useful trait in particular circumstances—with the very different and despicable idea that one race may be inherently more worthy than another.

Consider the second of the catch phrases I have mentioned. It is said that Bakke has a right to be judged as an “individual,” in deciding whether he is to be admitted to medical school and thus to the medical profession, and not as a member of some group that is being judged as a whole. What can that mean? Any admissions procedure must rely on generalizations about groups that are justified only statistically. The regular admissions process at Davis, for example, set a cutoff figure for college grade-point averages. Applicants whose averages fell below that figure were not invited to any interview, and therefore rejected out of hand.

An applicant whose average fell one point below the cutoff might well have had personal qualities of dedication or sympathy that would have been revealed at an interview, and that would have made him or her a better doctor than some applicant whose average rose one point above the line. But the former is excluded from the process on the basis of a decision taken for administrative convenience and grounded in the generalization, unlikely to hold true for every individual, that those with grade averages below the cutoff will not have other qualities sufficiently persuasive. Indeed, even the use of standard Medical College Aptitude Tests (MCAT) as part of the admissions procedure requires judging people as part of groups because it assumes that test scores are a guide to medical

intelligence which is in turn a guide to medical ability. Though this judgment is no doubt true statistically, it hardly holds true for every individual.

Allan Bakke was himself refused admission to two other medical schools, not because of his race but because of his age: these schools thought that a student entering medical school at the age of thirty-three was likely to make less of a contribution to medical care over his career than someone entering at the standard age of twenty-one. Suppose these schools relied, not on any detailed investigation of whether Bakke himself had abilities that would contradict the generalization in his specific case, but on a rule of thumb that allowed only the most cursory look at applicants over (say) the age of thirty. Did these two medical schools violate his right to be judged as an individual rather than as a member of a group?

The Davis medical school permitted whites to apply for the sixteen places reserved for members of “educationally or economically disadvantaged minorities,” a phrase whose meaning might well include white ethnic minorities. In fact several whites have applied, though none has been accepted, and the California Court found that the special committee charged with administering the program had decided, in advance, against admitting any. Suppose that decision had been based on the following administrative theory: it is so unlikely that any white doctor can do as much to counteract racial imbalance in the medical professions as a well-qualified and trained black doctor can do that the committee should for reasons of convenience proceed on the presumption no white doctor could. That presumption is, as a matter of fact, more plausible than the corresponding presumption about medical students over the age of thirty, or even the presumption about applicants whose grade-point averages fall below the cutoff line. If the latter presumptions do not deny the alleged right of individuals to be judged as individuals in an admissions procedure, then neither can the former.

Mr. Colvin, in oral argument, argued the third of the catch phrases I mentioned. He said that his client had a right not to be excluded from medical school because of his race alone, and this as a statement of constitutional right sounds more plausible than claims about the right to be judged on merit or as an individual. It sounds plausible, however, because it suggests the following more complex principle. Every citizen has a constitutional right that he not suffer disadvantage, at least in the competition for any public benefit, because the race or religion or sect or region or other natural or artificial group to which he belongs is the object of prejudice or contempt.

That is a fundamentally important constitutional right, and it is that right that was systematically violated for many years by racist exclusions and anti-Semitic quotas. Color bars and Jewish quotas were not unfair just because they made race or religion relevant or because they fixed on qualities beyond individual control. It is true that blacks or Jews do not choose to be blacks or Jews. But it is also true that those who score low in aptitude or admissions tests do not choose their levels of intelligence. Nor do those denied admission because they are too old, or because they do not come from a part of the country underrepresented in the school, or because they cannot play basketball well, choose not to have the qualities that made the difference.

Race seems different because exclusions based on race have historically been motivated not by some instrumental calculation, as in the case of intelligence or age or regional distribution or athletic ability, but because of contempt for the excluded race or religion as such. Exclusion by race was in itself an insult, because it was generated by and signaled contempt.

Bakke's claim, therefore, must be made more specific than it is. He says he was kept out of medical school because of his race. Does he mean that he was kept out because his race is the object of prejudice or contempt? That suggestion is absurd.

A very high proportion of those who were accepted (and, presumably, of those who run the admissions program) were members of the same race. He therefore means simply that if he had been black he would have been accepted, with no suggestion that this would have been so because blacks are thought more worthy or honorable than whites.

That is true: no doubt he would have been accepted if he were black. But it is also true, and in exactly the same sense, that he would have been accepted if he had been more intelligent, or made a better impression in his interview, or, in the case of other schools, if he had been younger when he decided to become a doctor. Race is not, in *his* case, a different matter from these other factors equally beyond his control. It is not a different matter because in his case race is not distinguished by the special character of public insult. On the contrary the program presupposes that his race is still widely if wrongly thought to be superior to others.

In the past, it made sense to say that an excluded black or Jewish student was being sacrificed because of his race or religion; that meant that his or her exclusion was treated as desirable in itself, not because it contributed to any goal in which he as well as the rest of society might take pride. Allan Bakke is being “sacrificed” because of his race only in a very artificial sense of the word. He is being “sacrificed” in the same artificial sense because of his level of intelligence, since he would have been accepted if he were more clever than he is. In both cases he is being excluded not by prejudice but because of a rational calculation about the socially most beneficial use of limited resources for medical education.

It may now be said that this distinction is too subtle, and that if racial classifications have been and may still be used for malign purposes, then everyone has a flat right that racial classifications not be used at all. This is the familiar appeal to the lazy virtue of simplicity. It supposes that if a line is difficult to draw, or might be difficult to administer if drawn, then there is wisdom in not

making the attempt to draw it. There may be cases in which that is wise, but those would be cases in which nothing of great value would as a consequence be lost. If racially conscious admissions policies now offer the only substantial hope for bringing more qualified black and other minority doctors into the profession, then a great loss is suffered if medical schools are not allowed voluntarily to pursue such programs. We should then be trading away a chance to attack certain and present injustice in order to gain protection we may not need against speculative abuses we have other means to prevent. And such abuses cannot, in any case, be worse than the injustice to which we would then surrender.

We have now considered three familiar slogans, each widely thought to name a constitutional right that enables Allan Bakke to stop programs of affirmative action no matter how effective or necessary these might be. When we inspect these slogans, we find that they can stand for no genuine principle except one. This is the important principle that no one in our society should suffer because he is a member of a group thought less worthy of respect, as a group, than other groups. We have different aspects of that principle in mind when we say that individuals should be judged on merit, that they should be judged as individuals, and that they should not suffer disadvantages because of their race. The spirit of that fundamental principle is the spirit of the goal that affirmative action is intended to serve. The principle furnishes no support for those who find, as Bakke does, that their own interests conflict with that goal.

It is of course regrettable when any citizen's expectations are defeated by new programs serving some more general concern. It is regrettable, for example, when established small businesses fail because new and superior roads are built; in that case people have invested more than Bakke has. And they have more reason to believe their businesses will continue than Bakke had to suppose he could have entered the Davis medical school at thirty-three even without a task force program.

There is, of course, no suggestion in that program that Bakke shares in any collective or individual guilt for racial injustice in America; or that he is any less entitled to concern or respect than any black student accepted in the program. He has been disappointed, and he must have the sympathy due that disappointment, just as any other disappointed applicant—even one with much worse test scores who would not have been accepted in any event—must have sympathy. Each is disappointed because places in medical schools are scarce resources and must be used to provide what the more general society most needs. It is hardly Bakke's fault that racial justice is now a special need—but he has no right to prevent the most effective measures of securing that justice from being used.

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