REALIZING BAKKE'S LEGACY
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BAKKE’S LEGACY

Affirmative Action, Equal Opportunity, and Access to Higher Education

Edited by

Patricia Marin & Catherine L. Horn

STERLING, VIRGINIA
This book is dedicated to
John T. Yun and John T. Clegg
for supporting us unconditionally.

For Ryan, Harper, and Alexander—
to encourage you to make the world a better place.
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Patricia Marin and Catherine L. Horn
When the Supreme Court issued its June 28, 1978, ruling on the Regents of the University of California v. Bakke, Justice Thurgood Marshall, the only African American among the justices, concluded, “I doubt that there is a computer capable of determining the number of persons and institutions that may be affected by the decision in this case” (Greider, 1978, p. A1). Three decades later, just as Marshall intimated, the landscape of postsecondary education could hardly be described absent recognition of Bakke’s touch. Most typically, Bakke is credited with establishing a legal framework upon which to consider race and ethnicity in higher education admissions decisions. To understand Bakke only in that context, however, would be to limit understanding of its full scope. This book brings together social scientists and legal experts to represent a broader picture of the ways in which Bakke has profoundly altered this country’s elementary, secondary, postsecondary, and professional school landscape.

The issues addressed in the chapters of this book include a historical understanding of the case, new discussions and analysis of the impact of Bakke on the 30th anniversary of the decision, and, finally, consideration of what the future holds in light of Bakke and its reaffirmation in recent Supreme Court opinions. Simultaneously including and extending beyond issues of affirmative action, we believe the research in this book expands the public discourse about the future of affirmative action and higher education and contributes to efforts to expand access, equal opportunity, and success in postsecondary education among traditionally underserved students. This
introduction serves several purposes. First, we mark the Bakke decision by remembering the case and considering racial/ethnic diversity specifically in the context of medical school admissions and completions, the professional school under consideration in the original trial. We also examine Bakke’s influence more broadly, including its relationship to the elementary and secondary pipeline, the ways in which it has framed understanding of race/ethnicity and the postsecondary experience, and its reach far beyond the admissions door. Although the 30th anniversary gives us an artificial marker at which to pause and consider this landmark case, the full extent of its influence needs to be systematically acknowledged.

The Bakke Case

In 1974, Allan Bakke, a White applicant to the University of California, Davis, medical school, filed suit against the university after having his medical school application denied for the second year in a row. He contended that the component of the admission policy that reserved 16 of 100 slots for non-White students was in violation of both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. The California Superior Court ruled that UC Davis’s admissions practices were illegal but failed to grant Bakke admission into the medical school, arguing that he had not adequately met the burden of demonstrating he would have been admitted to Davis but for the policy. On appeal, the California Supreme Court affirmed the trial court’s decision about the admissions program, but ordered that UC Davis admit Bakke. The university immediately appealed to the Supreme Court, which agreed to hear oral arguments in the fall of 1977 (Bakke, 1978). In his deciding opinion for a divided Court, Justice Lewis Powell affirmed that the Davis policy was illegal and that Bakke should be admitted. However, he disagreed that race could not be used in an admissions policy. He found that, although race cannot act as a primary determinant of admission under the Fourteenth Amendment and Title VI, “attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education” (Bakke, 1978, p. 311–312). Informally, “In such an admissions program, race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats” (p. 317).
Although authors in this volume discuss the uncertainty surrounding the Bakke decision since it was issued, there is consensus among all that the 2003 Grutter v. Bollinger ruling solidified Justice Powell’s deciding opinion in Bakke. As such, Grutter’s relationship to Bakke is important for several reasons. First, in her majority opinion, Justice Sandra Day O’Connor reestablished the legally compelling interest of the educational benefits of a diverse student body first described in Bakke. In doing so, she gave credence to the rationale that many colleges and universities had been using for 30 years to justify their admissions practices. In upholding the Michigan law school’s admission policy, her decision also supported the practice of using race as a plus factor.

Equally important, O’Connor admonished institutions of higher education about their continued use of race-conscious admissions policies:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. (Grutter, 2003, p. 343)

Using Bakke as a marker, Justice O’Connor’s decision outlined a great challenge for the elementary, secondary, and postsecondary education systems in this country. And although scholars disagree about the extent to which her caution is legally binding, many groups have already begun to treat it as a fait accompli by ending or revising programs and policies absent any direct legal pressure to do so.

**Considering Race in Admissions**

Those who support the use of race-conscious admissions policies do so for many reasons well-captured by Bowen and Bok (1998):

> The relative scarcity of talented [minority] professionals is all too real. It seems clear to a number of us . . . that American society needs the high-achieving [minority] graduates who will provide leadership in every walk of life . . . We agree emphatically with the sentiment expressed by Mamphela
Ramphele, vice chancellor of the University of Cape Town in South Africa, when she said: “Everyone deserves opportunity; no one deserves success.” But we remain persuaded that present racial disparities in outcomes are dismayingly disproportionate. . . . There is everything to be said . . . for addressing the underlying problems in families, neighborhoods, and primary and secondary schools that many have identified so clearly. But this is desperately difficult work, which will, at best, produce results only over a very long period of time. Meanwhile, it is important . . . to do what can be done to make a difference at each educational level, including colleges . . . Turning aside from efforts to help larger numbers of well-qualified [minorities] gain the educational advantages they will need to move steadily and confidently into the mainstream of American life could have extremely serious consequences. (pp. 283–286)

Bowen and Bok (as well as many others) believe that affirmative action allows our society to progress in a way that would not be possible otherwise and, as such, is essential.

Opponents of race-conscious admissions policies often base their criticisms around four key points. Considering race/ethnicity in admissions decisions is arguably an anathema because it

- Makes generalizations about people on the basis of immutable characteristics;
- Creates resentment among many of those who lose out because of this “discrimination”;
- Stigmatizes the so-called beneficiaries of the preferences—both in the eyes of others and in their eyes; and
- Compromises the mission of the university making intellectual ability a “secondary attribute.” (Clegg, 1999)

Although each of these criticisms gives reason for pause, it is the fourth point that seems to resonate most among those who would like to see a fully race-neutral system in place. Entrenched in the idea that intellectual ability is compromised when race/ethnicity is considered is the notion of merit. This argument assumes that individual merit can be accurately measured and that it can often be measured by a single test, such as the SAT. “The SAT exam and the vocabulary of ‘worthiness’ that tends to be used in connection with it create an artificial environment that reinforces the myth that individual
merit and intelligence can only be measured by scores on such tests” (Moses, 1999, p. 272). There is often a belief that tests such as the SAT are infallible predictive measures of success, unaffected by the circumstances surrounding the test-taker’s preparation.

Regardless of position, it is important to note that the current legal, social, and political climate that surrounds discussions of the admission of traditionally underserved minorities to higher education is vastly different from that of 30 years ago when Justice Powell issued his landmark opinion. As Trent (1991) notes, the following changes are especially pronounced. First, the “racial crisis” that used to focus solely on the demands and needs of Blacks has now broadened to encompass Latinos, Native Americans, and women. Further, “the debate regarding higher education and race was occurring in an atmosphere of heightened expectations for equal opportunity and social justice. Today we monitor urban infant mortality rates that exceed those of third world countries” (Trent, 1991, p. 108). Finally, three decades ago the Supreme Court was seen as an ally in the struggle for civil rights. Today’s more conservative Court does not hold that same reputation.

The Medical School Story

In understanding the realization of Bakke’s legacy, it would be remiss of this book not to acknowledge the professional school at the center of the court case—a medical school. Among the more than 42,000 applicants to medical school in 1974, roughly 82% were White compared with Asians, Blacks, and Latinos who comprised 3%, 5%, and 2% of the pool, respectively (Association of American Medical Colleges [AAMC], 2005). Thirty years later, however, the applicant pool represented a different racial/ethnic makeup; in 2004, 62% were White and 20% Asian. Blacks and Latinos each composed 8% of the pool (AAMC, 2005). This change, in many ways, marks an important shift, as admission and, ultimately, completion trends can only be considered in the context of who applies. The 2004 matriculants, for example, were similar in racial/ethnic makeup to the applicant pool from which they were selected (AAMC, 2005). With respect to the result of such shifts, the AAMC notes,

A diverse student body brings a wealth of ideas, helps students challenge their assumptions, and broadens students’ perspectives regarding racial,