

## Chapter 7

# Affirmative Action and the Case of Allan Bakke

If you were an African-American in the 1960's/ you would be three times as likely to live in poverty than if you were white; you would be two times more likely to be unemployed; far less likely to be a doctor, lawyer, or architect, and three times more likely to be a nurses' aid, maid, or bus driver. You'd be five times more likely to be arrested for robbery and three times more likely to be robbed. You would likely be living with just one parent in the center of a city and not enjoying the same quality of services, education, hospital, parks, or recreation, as your suburban white counterpart.

### History Plays a Role

There are of course historic reasons that African-Americans are not as well off as white Americans. Unlike whites and other immigrants, African-Americans did not choose to come to the United States. They were kidnapped from their homes, marched in chains for hundreds of miles to the coast, packed like sardines into slave ships, separated from family, sold at auctions, and forced to work for whites who, at least in theory, had total power over their lives. In the process they lost most attributes of their culture, including their names, language, tribal identification, religion, relatives, clothing, customs, and almost everything that defined their existence. As slaves, they were subject to brutal discipline. They were taught a doctrine of racial inferiority, which was an item of faith among those who enslaved them. After emancipation, African-Americans were made second class citizens, denied the right to vote or hold office, and in most cases, the opportunity to own property. In the segregated South they were provided with a meager education in separate and inferior schools and prevented from using facilities ranging from water fountains and bathrooms to hospitals and city parks provided for whites. They were forced to sit in the back of buses and denied entrance into colleges or universities. They were denied employment in occupations preferred by whites. They were lynched, jailed without trials, and cruelly put to death for the slightest violations of the white man's racial code of justice.

Beginning with World War I, African-Americans began migrating from the segregated South to the North, but their troubles did not end upon entering the "promised land" where they were crowded into center cities, occupying neighborhoods abandoned by whites, and taking lower paying, dead-end jobs. They were generally denied the opportunity of owning their own homes, moving to the suburbs, and attending good schools. It was not until the 1960's when the Civil Rights Act of 1964 and Voting Rights Act of 1965 helped African-Americans make substantial progress, that the walls of segregation began tumbling down. But, it was easier to remove the offending Jim Crow laws from the books than change the racial attitudes of whites or undo the damage that had been done during 300 years of state-sponsored discrimination.

### Birth of Affirmative Action

Recognizing that equality in fact could not be achieved merely by removing the chains of those who had been shackled for centuries, thoughtful Americans began to ask for more than just equal rights. President Kennedy started the ball rolling by coining the phrase 'affirmative action,' and directing companies that did business with the Federal government to take positive steps to assure that they had a 'racially representative' work force. The 1964 Civil Rights Act provided for class action suits against firms that showed a "pattern of discrimination" on the basis of race, national, religion or gender. President Richard Nixon called for companies with Federal contracts to set numerical goals for hiring minorities.

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During the 1970's and 1980's, more and more institutions took steps to assure they would have a more representative work force. Many businesses and schools did this to meet real or anticipated Federal and State guidelines, in response to court orders, or because individuals thought it was time to assure there would be equality in fact as well as in theory. Cities and towns made attempts to hire and promote more racial minorities (Asian, Native Americans, Hispanics, and women included.) Police and fire departments as well as schools and city agencies set goals or made attempts to hire qualified African-Americans. Colleges began taking minority students with lower College Board scores than those of whites with similar or higher grades. Law firms began looking for minority lawyers businesses tried to hire people whom they might have overlooked a few years before; and unions began accepting minorities.

Not surprisingly, the idea of giving minorities, especially African-Americans, Hispanics, and women, a *special* rather than an *equal* opportunity, was opposed by a great number of whites. Many (though certainly not all) whites were ready to admit that discrimination on the basis of race had been wrong and should be stopped, but they were not prepared to take these steps to correct the effects of past discrimination.

As a result, affirmative action (called "reverse discrimination" by those who opposition) has become one of the hottest topics of political debate in America. It has and will continue to play a role in state as well as presidential politics. It has been the subject of numerous talk shows; it is debated in the classroom and law courts; at factory assembly lines as well as police and fire stations; on construction jobs and in almost every type of public forum. But before you join this debate, take a look at some of the statistics on this and the next two page, and then comment on the arguments for affirmative action and whether you think special steps should be taken to make up for the results of past discrimination.

## **Suggested Student Exercises:**

1. Cite examples that show there has been "affirmative action" for whites over much of the last 300 years.
2. Do you think that the statistics on this and the next page can be explained as the examples of past and current discrimination? <sup>22</sup>

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<sup>22</sup><http://images.google.com/images?hl=en&q=Unemployment+by+race&btnG=Search+Images&gbv=2>

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TIFF (Uncompressed) decompressor  
are needed to see this picture.

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## The Bakke Case: A Simulation

The most famous decision involving affirmative action was made by the US Supreme Court in 1978. It involved a 38-year-old ex-marine by the name of Allan Bakke. Bakke had two engineering degrees and had served a seven-month hitch in Vietnam. At age 33, he had applied to 12 medical schools and was turned down by all of them. He sued one of the 12 schools, the University of California at Davis, because it had admitted minorities with medical board scores one-third as high as his. Bakke thought he was a victim of discrimination because of his color. Bakke is white.

Dismayed by the lack of minority students, the faculty at UC Davis had established a special program setting aside places for the admission of minority students who did not meet the otherwise stringent requirements that other students needed to meet. Bakke was not accepted partly because he did not qualify for any of the 16 places reserved for racial minorities and his case against the University threatened to end their attempt to increase the number of minority doctors in the US.

Before you learn the outcome of this famous dispute, use the following information to participate in a mock trial of the case in which Allan Bakke sued the University of California for denying his Civil Rights in the name of *Affirmative Action*.

### Suggested Student Exercises:

1. What do you think of the purposes of establishing the UC Davis Affirmative Action program?

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24 <http://www.rri.wvu.edu/WebBook/Albrecht/table3.jpg>

2. What is the 14th amendment issue in the Bakke case?

3. As your teacher assigns you, prepare to role-play the Bakke case. (At least two students, Bakke and his lawyer can present the case against UC Davis, and the same number can present the opposing side.) Students who do not represent either Bakke or the University will play the role of Supreme Court justices or reporters. After Bakke and Cox make their presentations and answer questions from the Supreme Court, members of the court should spend at least 15 minutes deliberating among themselves before announcing their verdict and reasons for it. Reporters should listen to me deliberations, and be prepared to report on the proceedings.

## Allan Bakke

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are needed to see this picture.

### Allan Bakke

You are 38 years old and the father of two. Your father was a mailman and your mother a teacher. They could not afford to pay for your college education, so you joined the Naval Reserve Officers Training Corps at the University of Minnesota where you majored in engineering and had an A average. Later you served four years in the Marine Corps, including seven months in Vietnam. While in 'Nam', you were so impressed by the work of doctors that you decided to study medicine. Upon returning to the US, you attended evening classes in order to qualify for medical school and you did volunteer work at a local hospital. You applied to 12 different medical schools. Even though you were described by one admissions officer as strongly committed to healing the sick as any candidate he had interviewed, all 12 schools rejected you.<sup>25</sup>

With the encouragement of an ex-admissions officer from UC Davis, you decided to sue this school after learning that minority group members were admitted with far lower scores than you had earned on the medical board exam.

You believe that doctors *must* be highly skilled and dedicated people and that only the top applicants should be accepted to medical school. You think that competence and not color is the most important attribute of a doctor. The 14th amendment, you have learned guarantees everyone the "equal protection under the law/" and you don't think you should be deprived of this protection on the basis of color. You see yourself as a victim of reverse discrimination.

## Archibald Cox

You are Archibald Cox, the former Solicitor General of the US and a **Watergate** prosecutor fired by Nixon. You represent the University of California in defending against Allan Bakke's attempt to end UC Davis's affirmative action program. You have taken the case because you believe affirmative action is a necessary method in the effort to make up for 300 years of racial preferences for whites, and you are keenly aware of the extent and pervasiveness of racial discrimination in the US. Specifically, you see four good reasons for the racial set-asides for minority students:

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[http://images.google.com/imgres?imgurl=http://www.pbs.org/wgbh/amex/eyesontheprize/story/imagenes/22\\_bakke\\_01.jpg&imgrefurl=http://www.pbs.org/wgbh/amex/eyesontheprize/story/img\\_22\\_bakke\\_01.html](http://images.google.com/imgres?imgurl=http://www.pbs.org/wgbh/amex/eyesontheprize/story/imagenes/22_bakke_01.jpg&imgrefurl=http://www.pbs.org/wgbh/amex/eyesontheprize/story/img_22_bakke_01.html)

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- It will increase the number of minorities, particularly African-Americans (at that time about 1 in 50 medical practitioners), who become doctors.
- It will counter the effects of discrimination in society responsible for the shortage of minority doctors.
- It will increase the number of doctors serving in minority communities.
- It will make for a more racially diverse student body at UC Davis.
- It will encourage other African-Americans to work hard in school so they can become professionals and serve their community, be role models for their children and neighbors.

You see no reason why colleges can't discriminate among qualified candidates on the basis of color. Schools for centuries have accepted applicants because they were sons or daughters of alumni, were from other parts of the country, <sup>26</sup>attended prestigious private schools, or were good athletes or musicians. Why couldn't a school accept certain candidates to make sure there would be more minority doctors in the US?

## The Supreme Court

You are a Supreme Court Justice who will be asked to make one of the most important civil rights decisions in 25 years. You are thoroughly acquainted with the law. You know that the 14th amendment guarantee of "equal protection" had for years been subverted by the Plessy decision of 1896 as "separate but equal." You also know that the 'separate but equal' doctrine had been overturned in 1954 in *Brown v. School Board of Topeka, Kansas*. But you are not so sure whether, to get beyond racism, it might first be necessary to take race into account.

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are needed to see this picture.

**Archibold Cox**

Every Supreme Court decision sets a precedent that future court decisions and lawmakers must follow. Thus in making your decision, you will be deciding whether:

- Bakke and others like him (whites with higher admission scores than minorities) be admitted to UC Davis, regardless of the University's attempts to train minority doctors, **or**
- Bakke should not be admitted to UC Davis, and the affirmative act program shall remain, **or**
- Some other solution that goes to neither extreme (a. or b) should be offered.

Let the Simulation Begin !!!!!!!

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26 [http://www.law.harvard.edu/alumni/bulletin/2004/fall/memoriain\\_side.php](http://www.law.harvard.edu/alumni/bulletin/2004/fall/memoriain_side.php)

## Epilogue: The Decision and Two Dissents

### The Bakke Decision: Justice Powell (for the majority of the Court)

*...the purpose of helping certain groups whom the faculty of the Davis Medical School*

*perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, (Bakke) who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered....*

*Ethnic diversity, however, is only one element in a range of factors a university properly may consider in a goal of a heterogeneous student body.*

*The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with what an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.*

*This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a plus on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. ... His qualifications would have been weighed fairly and competitively and he would have no basis to complain.*

### Dissenting Opinion by Justices Burger, Rehnquist, Stewart, and Stevens:

*Race cannot be the basis for excluding anyone from participation in a federally funded program.*

*As succinctly phrased during the Senate debate, under Title VI (Of the Civil Rights Act of 1964) it is not "permissible to say 'yes' to one person, but to say, 'no' to another person, only because of the color of his skin."*

### Dissenting Opinion by Justice Marshall

*I do not agree that the petitioner's (UC of Davis) admissions program violates the Constitution because...! do not believe that anyone can truly look into America's past and still find that a remedy for the effects of the past is impermissible.<sup>27</sup>*

### Final Exercise:

1. State the main point of the decision reached by the Supreme Court, summarize the two dissenting decisions, and explain with which of the three you agree and the reasons why.

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27 quotes from the decision were in New York Times, July 29,1978-40-