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Neoconservatism: The Road to and from Bakke

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From Bakke**

By John E. Flemming and Gerald R. Gill

The Regents of the University of California v. Allan Bakke is just one case among many that is reflective of the neo-conservative trend in America. Before *Bakke*, there was *DeFunis v. Odegaard* (1974), which challenged the special minority admissions program of the University of Washington Law School. Now that *Bakke* has been decided by the Supreme Court, there are a number of similar cases destined to reach the Court. For instance, a Southern white male has already challenged in a lower court (*Weber v. Kaiser Aluminum*) the voluntary affirmative action plan worked out in the aluminum company's collective bargaining agreement. The U.S. Court of Appeals for the Fifth Circuit in New Orleans has indicated that this plan violates the Civil Rights Act of 1964.

In February 1978, a federal district judge ruled (*Detroit Police Officers Association v. Coleman A. Young*) that the affirmative action plan that required the promotion of one Black officer to the rank of sergeant for every white officer promoted was unconstitutional. As of May 1978, there were 27 lawsuits challenging the 1977 Public Works Employment Act, in which 10 percent of the fund was to be set aside for minority businesses.

The central issue in the *Bakke* case and other cases challenging affirmative action plans is this: How will America's limited resources and opportunities be divided among a heterogeneous population? It is obvious that the American pie, i.e. economy, is not expanding sufficiently to alleviate the problem of unemployment and underemployment. Within the present economic structure, only so many people can be doctors, lawyers, educators, etc. Neoconservatives—or those who have "made it" in American society—are vehemently opposed to affirmative action because by its very nature, affirmative

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action threatens the way the American pie has traditionally been sliced.

The Need for Minority Admissions Programs

Unlike other equal opportunity programs, affirmative action programs seriously threaten the status quo. While not the panacea to solve all of America's race-related problems, affirmative action is a mechanism which is designed to make the system fair and compensate Blacks in particular for years of inequality.

The University of California Medical School at Davis is a prime example of why special minority admissions programs are necessary. In using the regular admissions program at Davis, only one Black medical student had been admitted during 1970-1974. In the same period, a total of 26 other Blacks were admitted under the special minority admissions program. The fact that Blacks and other disadvantaged minorities were now being admitted to medical school, and eventually into a prestigious profession, meant that some white males would be denied admission. Hence it was just a matter of time before the program was challenged.

After twice being denied admission to the Davis Medical School, and being rejected by 11 other medical schools, Allan Bakke filed a suit against the university. He alleged that less qualified minorities had been admitted, which amounted to "reverse discrimination" against him, a white male, and that the Davis program amounted to the establishment of a quota system based on race. It was not coincidental that Bakke chose this course of action. The attack on affirmative action, using such code words as "reverse discrimination," had come as early as the 1960s. These attacks created what Dr. Faustine Jones of Howard University calls the "changing mood in America," a climate that gave rise to such cases as *DeFunis* and *Bakke*.

First, it is obvious that medical schools do discriminate in admitting persons over

30; Bakke was 32 when he first applied to medical school. Medical schools have traditionally reserved space for the children of the rich, the powerful, the alumni, and generous contributors. Just this year, some of the most prestigious schools in the nation (University of Chicago Medical School, Boston University, Medical College of Pennsylvania) have been accused of "selling" spaces in exchange for large contributions. In addition, at the University of California-Davis Medical School, the dean is allowed to admit up to five applicants at his own discretion, therefore a number of ways which Bakke could have challenged the selection process. Instead, he chose—with the help of an admissions officer at Davis—the most vulnerable program, the special minority admissions program.

The Road to Bakke

The 1970s witnessed a shift from what appeared to be a commitment to social equality by the American people to what at best can be described as an attitude of benign neglect. Certainly the critics of affirmative action programs have played a major role in developing this new attitude.

The use of terms such as "quotas," "reverse discrimination" and "unqualified minorities" gained public acceptance during the continuous attacks launched against both special minority admissions programs and affirmative action in general by the critics. And media accounts of the Supreme Court's decision in *Bakke* have legitimized these terms in the minds of a large segment of the American public.

Initially, these attacks were spearheaded by some labor unions and government contractors who contended that affirmative action plans in the construction industry imposed "hiring quotas." Although various federal courts, in cases such as *Joyce v. McCrane* (1970), *Contractors Association of Eastern Pennsylvania v. Secretary of Labor* (1971), *Southwestern Illinois Builders Association v. Ogilvie*

(1972), and *Associated General Contractors of Massachusetts, Inc. v. Altshuler* (1973), have rejected the quota argument, the public impression of "goals" as "quotas" was established.

At the same time, labor unions and some government contractors were beginning to attack affirmative action plans in the construction industry—voices were being raised against the newly instituted special minority admissions programs at colleges and universities throughout the country. Joining in these denunciations was the then Vice-President of the United States, Spiro T. Agnew. In a 1970 speech in Des Moines, Iowa, Agnew—certainly not one to mince words—stated:

For each youth unprepared for a college curriculum who is brought in under a quota system, some better prepared student is denied entrance. Admitting the obligation to compensate for past deprivation and discrimination, it just does not make sense to atone by discriminating against and depriving someone else [our emphasis].

The relevance of this particular speech (not the only one in which Agnew castigated special minority admissions programs) lies in his use of words and concepts in 1970—"quota system," "some better prepared student," "discriminating against and depriving someone else"—that were and are used by the supporters of Bakke. But there is a cruel irony in the interrelatedness of Agnew's argument to those voiced later by Bakke supporters. Many of those academicians, who in the early 1970s were denouncing and deriding Agnew's statements, are now among the staunchest supporters of this particular argument.

The arguments of construction workers and of a Vice-President of the United States helped set the tone for the furor over both affirmative action plans in employment and special minority admissions programs. However, it was not until prominent academicians and journalists raised the cry of "quotas," "reverse discrimina-

20 tion" and "unqualified minorities" in both employment and education that these arguments began to take hold of the American imagination. Academicians and journalists, far more articulate than "hard-hats" and far less controversial nationwide than Agnew, provided the aura of "respectability" to the arguments of "quotas," "reverse discrimination" and "unqualified."

The emergence of academic criticism of special minority admissions programs arose shortly after their inception. One of the early attacks was in a 1970 article (University of Pennsylvania *Law Review*) by Professor Lino A. Graglia of the University of Texas, entitled "Special Admission of the 'Culturally Deprived' to Law School." In this article, which was cited in several of the amicus briefs submitted to the Supreme Court in support of *Bakke*, Graglia claimed that special minority admissions programs led to the admission of "unqualified" or "unprepared" students to professional schools. Such programs, he argued, "disserve the cause of Negro equality, impair educational quality, and result in deviation of the schools from their educational function."

These arguments have been reinforced and elaborated upon by the subsequent attacks of academicians opposed to the implementation of affirmative action programs in colleges and universities. Most prominent among these critics are academicians, such as Sidney Hook, professor emeritus of philosophy at New York University and currently a senior research fellow at the Hoover Institution at Stanford University, and Thomas Sowell, a Black economics professor at the University of California, Los Angeles. This twosome, a noted scholar and a self-proclaimed Black conservative, have sparked the opposition to both affirmative action programs in college employment and more recently to special minority admissions programs. Their arguments, particularly Sowell's, have appeared in op-ed columns in many of the nation's leading news-

papers. Moreover, their arguments—again emphasizing Sowell—have been liberally quoted or paraphrased in numerous newspaper editorials and articles, magazine articles, and speeches.

Both have denounced special minority admissions as "quotas" and have expressed support for Bakke. In behalf of the Committee on Academic Nondiscrimination and Integrity, an organization of 500 academicians opposed to the implementation of affirmative action, Hook spearheaded the writing of a letter by 125 college and university professors expressing support for Bakke. Sowell is the only Black who has publicly praised "the resolve and courage of Bakke."

In support of their arguments, both Hook and Sowell contend that special minority admissions programs stigmatize Blacks as "unqualified." Hook has stated that "quotas" are "psychologically demoralizing" to "self-respecting" Blacks. Sowell, in a repeatedly cited attack on quotas, has written: "The message that comes through loud and clear is that minorities are losers who will never have anything unless someone gives it to them." Where Hook and Sowell do differ is in their use of the term "reverse discrimination." Hook maintains that "reverse discrimination" against white males permeates academia. Sowell, perhaps realizing as a Black both the invalidity and maliciousness of the term, has deliberately avoided the use of the term "reverse discrimination."

In spite of some differences in terminology, the critics' arguments and attacks have helped to sway public opinion against special minority admissions programs. In turn, the critics cite public opposition to these programs as evidence of public hostility. This cyclical reinforcement between the critics and the public hardens the reaction against special minority admissions programs and provides more ammunition to the critics. For example, Sowell continually cites the results of a Gallup Poll which held that Blacks as well as whites disapprove "preferential

treatment" in jobs and education. Thus he concludes: "Backlash against quotas is as American as apple pie—or soul food."

White attitudes, as measured by public opinion polls, are hostile to special minority admissions programs. But, Black attitudes, as measured by polls other than Gallup, clearly contradict the statements of Sowell and others who almost gleefully cite Black disapproval of "reverse discrimination," "preferential treatment" or "quotas."

According to a July 1977 Roper Poll, Blacks—by a 47% to 15% margin—supported "quota programs" to increase the number of minority students in colleges and graduate programs. This poll is not an isolated indicator of Black support. According to a *New York Times*/CBS News poll conducted in October 1977, Blacks—by 83% to 16% margin—approved of colleges' and graduate schools' giving "special consideration to the best minority applicants, to help more of them get admitted than otherwise." The same poll reported that Blacks—by a slight plurality 46% to 42%—approved of schools reserving "a certain number of places for qualified minority applicants" at the expense of white applicants.

Excepting Blacks, the Hook and Sowell arguments helped to shape the nature of the overall public response to *Bakke*. How did the Supreme Court respond to their arguments? Kenneth Lamott, in a *New York Times Magazine* article, July 23, 1978, wrote that the Supreme Court "met Mr. Hook halfway, upholding affirmative action but ruling that racial quotas were unconstitutional." While overstating Hook's personal importance, Lamott nevertheless is correct in assessing the impact of the critics' arguments on the Court.

Reactions to the Bakke Decision

Within this climate of neoconservatism, to a large extent created by the critics of affirmative action, the Supreme Court ruled on *The Regents* of the University of

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California v. Bakke, on June 28, 1978. By a five to four margin, the Court upheld the California Supreme Court decision which struck down the special minority admissions program at the Davis Medical School and ordered Allan Bakke admitted. The Court also ruled by a five to four vote that race may be taken into consideration in developing future admissions programs, reversing the California Supreme Court in ruling that race could not be used as a factor in a single admissions process.

The decision was close. On the negative side were the Nixon-Ford appointed Justices John Stevens, William Rehnquist and Chief Justice Warren Burger. The philosophies of these men reflect the neo-conservatism of the Nixon-Ford Administrations. Their opinion, joined by Justice Potter Stewart, appointed to the Court during the Eisenhower Administration, reflected the arguments of those most vocally opposed to affirmative action. In their opinion, the Davis program was found to have been a racial quota—established by Davis without having a history of discrimination against minorities nor a compelling state interest. Having reached this conclusion, the Court found that Bakke had been a victim of "reverse discrimination," even using the code words of the critics.

On the other side, Justice Lewis Powell joined Justices Thurgood Marshall, William Brennan, Byron White, and Harry Blackmun in saying that race could be taken into consideration in employing remedies to end discrimination. Justice Powell stated that where there is no finding of past discrimination and where an affirmative action program for students admissions is justifiable solely in the interest of creating diversity, then race may only be taken into account as a plus among many factors in a single admissions process for all applicants.

The immediate reactions to the decision were varied. A wide range of opposing groups claimed victory for their side. Many of those who supported Bakke were generally pleased with the result. Ray

Robinson, executive director of the Young Americans for Freedom, said that the decision was "an important step in eliminating the practices of reverse discrimination and quotas." And the president of the American Jewish Congress said that his organization was "gratified" at the "elimination" of quota systems and the use of race as the sole criterion for university admission.

Blacks were somewhat less euphoric. Congressman Parren J. Mitchell (D-Md), chairman of the Congressional Black Caucus, said that the Caucus was not pleased by the decision but at the same time it did not think that the decision would bring an end to affirmative action.

The Rev. Jesse Jackson, president of the Chicago-based Operation PUSH, was even less optimistic. He saw the decision within the context of a general move to the right. He raised the issue of whether economic boycotts or sit-ins might be an appropriate means of focusing the nation's attention on the concerns of Black people. Jackson concluded that "the danger of Bakke is that precisely when we need greater protection—that is, in a time of great and growing economic insecurity—Bakke gives us less protection." Jackson pointed out that because Bakke won his suit, it "gives false credence to the contention that he was a victim of 'reverse discrimination.'"

Vernon Jordan, president of the National Urban League, while regretting that the Davis admissions program was struck down, thought that "not only did the Court give its constitutional blessing to the kinds of affirmative action programs in effect in nearly all of our nation's educational and employment institutions, but it clarified the limit of such programs. By setting such boundaries, the Court's action should result in increased use of affirmative action programs." Jordan saw the *Bakke* decision as neither a victory or a defeat, but "a way-station on the road toward further clarification of what kinds of affirmative action shall be permitted."

Following the *Bakke* decision, Joseph

A. Califano, secretary of the Department of Health, Education, and Welfare, and Eleanor Holmes Norton, chairperson of the Equal Employment Opportunity Commission, emphasized that the decision should have little effect on the efforts of the federal government to increase the representation of minorities in the areas of education and employment. The Carter Administration spokespersons indicated that the efforts of HEW and EEOC to provide equal opportunity were consistent with the Court's decision. Both Califano and Norton maintained that the *Bakke* decision did not prohibit the use of numerical goals in affirmative action plans.

In balance, the leading advocates of neoconservatism and opponents of affirmative action have created an atmosphere in which it is acceptable to oppose equal opportunity through the use of such code words as "reverse discrimination," and "quotas," while at the same time, the Supreme Court has left intact the vast majority of affirmative action programs. Justice Powell used Harvard University's special minority admissions program—which considers race a "plus" factor, not a "quota"—as an example of how race could be taken into consideration.

While those institutions genuinely interested in increasing minority representation will be able to do so, the neo-conservative trend continues to create a climate in which other individuals will continue to challenge such programs as long as the economy is unable to provide resources and opportunities for all. Certainly increased educational opportunities, especially for Blacks, are essential if equal opportunity is to be achieved in the employment sector. Affirmative action programs for Blacks will continue to be challenged on all fronts in the future. Blacks will have to vigorously monitor the way affirmative action plans are being implemented as well as judicial challenges to those plans. □