

# Comment:

## SEPARATING RACE AND ADVANTAGE

### Bakke: Don't Overestimate the Impact

by Dave Garrow

The U.S. Supreme Court's much-awaited decision in the case of *Regents of the University of California v. Allan P. Bakke* likely will be announced within the next three months. Many professional schools and other interested parties expect that the decision will effectively determine for the foreseeable future whether members of racial minorities will have access in any meaningful numbers to America's leading professions. This expectation could well be incorrect.

Blacks at present constitute only two percent of America's MDs. That percentage has remained unchanged since 1950. In the last decade traditionally white professional schools of all types, including medical schools such as that of the University of California at Davis, have made their first attempts to see that members of racial minorities are represented in their student bodies. Many observers unsympathetic to the arguments put forward on behalf of Mr. Bakke believe that a Supreme Court decision which in any fashion supports Bakke's claim to admission to Davis will effectively end all such affirmative action programs.

One widespread misconception is that the California Supreme Court, which endorsed Mr. Bakke's arguments, ordered that Davis could not employ a special admissions program for applicants from disadvantaged backgrounds. It did not. What it did do was merely say that Davis, in maintaining such a program, could not operationally define "disadvantaged" solely on the basis of

race, as it appeared to have been doing. Thus, even if the U.S. Supreme Court, in a 'worst case' analysis, endorsed fully the California court's conclusion, special admissions programs would not need to be brought to an end.

#### Symbol and Reality

If such a Supreme Court decision were to come to pass, the country would be flooded with reports and commentaries that the hopes of black Americans and other minorities had been dealt a severe if not crippling blow. Those reports would be partially accurate, insofar as they described the *symbolic* effects of such a decision, rather than the *practical* effects. In symbolic terms *Bakke* has become a matter of the utmost importance, for its outcome will be seen as a major indicator of the way in which traditionally white American institutions, both governmental and educational, will relate to racial minorities in the decades ahead. Any substantive decision in *Bakke* inevitably will be regarded by the popular media as either a 'win' or a 'loss' for

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black Americans, for the case already has been much promoted as "the most important civil rights case in a generation," since *Brown v. Board of Education of Topeka* (1954). By attributing such a crucial role to the case *before the fact* of its final outcome, the news media have assured *Bakke* a symbolic importance which the actual decision may or may not merit.

While the magnitude of the symbolic effect of *Bakke*, no matter which way it is decided, seems all but assured, the practical effect of *Bakke* will in all likelihood be far less great. If, as most legal experts believe, the Court overrules the California decision and in some manner endorses affirmative action programs in general, though not necessarily the manner in which Davis's plan was implemented, the practical impact will be rather limited. Minority admissions will not be injured, and professional schools, with their confidence in their special admissions programs made more secure, may even increase their efforts to increase minority enrollment.

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### Limited Practical Impact

If, on the other hand, the Court in some manner decides in Bakke's favor, the practical impact on professional schools is all but certain to be far more limited than Bakke's most pessimistic opponents fear. A decision striking down the Davis program need not mean an end to special, minority-sensitive admissions programs. Such programs could be continued without any difficulty, so long as racial criteria *alone* did not determine whether an applicant qualified for consideration under a program aimed at ensuring the enrollment of a substantial number of disadvantaged students. Once individuals who were not members of a racial minority, but who nonetheless had been forced to overcome the disadvantages of a poverty-stricken childhood and low-quality primary education, were admitted as part of such a program, along with presumably greater numbers of members of racial minorities who too had been hindered by such early life experiences, the program in question would be quite secure on 'equal protection' grounds: race would not be a criteria for exclusion, as may well have been the case at Davis. Presumably such a revamped special admissions program also would not be open to the occasional member of a racial minority whose prior life history bore more signs of advantage, such as prestigious private schooling, than of disadvantage.

A pro-Bakke outcome that strikes down the exclusive use of race in determining whether an individual qualifies for consideration under a special admissions program thus need not entail the end, or even a significant contraction, of minority-sensitive admissions plans. I say "need not," rather than "will not," because the major danger in any pro-Bakke Supreme Court decision lies not in whatever legal strictures the court may set down but in the opportunity that such an outcome would present to professional schools that are seeking an excuse for decreasing or curtailing their efforts to increase minority enrollment. A pro-Bakke decision, because of the symbolic importance of the case, would furnish more than enough plausible 'cover' for such a retrenchment, even if no such retrenchment was required by the Court's actual holding. So long as members of the professional school community, and their admissions staffs in particular, actively work to maintain or indeed increase their schools' commitment to substantial minority representation in their student bodies, there need be no decline in minorities' access to the professions, no matter what the outcome. □

FIRST CONTACT



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Felifer