The year 2008 marked not only the historic first-time nomination, and subsequent election of the first African American for the Presidency of the United States; it also represented the 30th anniversary of the landmark case of the Regents of the University of California versus Allan Bakke. The 1978 dispute involved a white medical school applicant, Bakke, who sued the university after receiving his second letter of rejection and learning the institution maintained a “special admission program”, which held sixteen out of one hundred seats for underrepresented minority students. Bakke asserted that he was a victim of “reverse discrimination” because his overall test scores were higher than those of the minority students admitted as part of the “special program”, concluding he was denied the opportunity to attend UCD because he was white. What followed was series of twists and turns culminating with Bakke’s admittance into UCD, confusion on the part of universities across the country struggling to determine how the case would affect their missions as institutions of higher education, and a fractured Supreme Court, many would say country, forced to ask very tough questions about what equality really meant.

Thirty years later, debates continue to be filled with raw emotion with the average citizen acting as impassioned advocate for their respective side of the issue. In an attempt to offer a unique framework by which important questions about equality can be analyzed,
social psychologist William Ryan offers two paradigms for the concept of equality and fairness, Fair Shares and Fair Play. According to Ryan, Fair Players, the most enduring viewpoint in America, support meritocracy and are resolute in their belief that every individual should have a right to pursue, but not necessarily attain happiness. Fair Sharers in contrast maintain that resources should be shared to ensure equality of rights to access. When high degrees of success are achieved by some racial minorities in America, it begs the question for Fair Players, is there still a need for affirmative action or are these achievements a testament to the success of the meritocracy? This thesis will apply Ryan’s Fair Share, Fair Play context to the *Bakke* case to examine the values underlying both sides of the argument. In addition, the thesis will examine the outcomes of the *Bakke* case on admissions policies at selective colleges and universities to explore the need and the extent to which the policy is appropriate today.
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Finally, to my amazingly patient and loving family both near and far. Words cannot express the depth of my gratitude for your understanding, encouragement and unwavering faith. I am so glad you did not give up or let me give in. You are truly amazing and I am thankful for you every day.
For Tan
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INTRODUCTION

The mid to late 1960’s was a turbulent time in America’s history fraught with profound questions about our identity as a nation. A perfect storm of sorts was created with impassioned activists in two corners convinced their respective positions of the country’s need for either significant change, or a renewed vow to tradition putting them at odds. The legal system was in the third position agonizing about who we should and could be as a country. Tensions were at a level arguably never before seen in America, even when considering reconstruction and the Civil War. This campaign was one in which seemingly everyone had a voice, and where each voice expressed a position that would not be silenced despite the most horrid of threats and intimidation. The nation was at the proverbial crossroads and the stakes could not be higher. *Brown v. The Board of Education* was one of the first watershed moments of the time beginning a torrent of debates concentrating on one fundamental principal, equality. Equal access, equal opportunity, equal treatment all were concepts that provoked deep deliberation. *Brown v. Board of Education* substantiated the notion that equality in name only was meaningless and that fairness could not be achieved simply by declaring it as fact.

It may have been foreseeable that the battle for civil rights would soon land at the doorsteps of America’s institutions of higher education shortly after the *Brown* decision. Perhaps slightly more surprising however, was the notion that the next most significant case facing the United States Supreme Court involving civil rights violations post *Brown* would be driven by members of the white-male majority. That is not to say that supporters of *Brown* and the eradication of the Jim Crow laws that followed failed to
anticipate the reaction of those who were most fervent in their opposition to the
decisions. On the contrary, claims that such changes to the law would create an
environment that was unfair to white Americans was commonplace, and generally born
from contempt for people of color and a fear that “mixing” cultures would have negative
effects on the lives of white individuals. The predicament in which the Courts next found
themselves involved more than how access for people of color would reshape access for
the country’s majority. It rather exposed the inadequacy of the common explanations
used to describe values such as fairness and equality and placed a microscope over the
intent of the Courts, their decisions with regards to civil rights, and the suggestion that a
society in which individuals are treated uniformly is a goal to which we could, or even
should strive as a country. The Bakke case unearthed, what for many involved, was the
truth behind the seemingly simple ideology of equality and fairness. It prompted tough
questions about whether it was in fact fair to treat everyone equally when in reality
considerable differences in access to resources exist between individuals and may have a
significant impact on the outcomes of one’s effort. When do differences matter? Is there
truth in the suggestion that if everyone is provided an opportunity to compete, equality is
then achieved? When applied to the “age-old footrace of life” metaphor, what makes
race conditions equal and fair? Is an invitation to the race sufficient or should other
factors such as placement on the starting line or prior access to training and experience on
the course make any difference at all? The bitterness that surrounds this particular debate
clouds the real issues and evidence in a thick fog of skewed statistics and hyperbole,
diverting attention from the genuine educational inequities that exist in America.
Social psychologist, William Ryan, offers a theory on the polarization that exists when debating issues relating to equality. His Fair Share and Fair Play theory, when applied to the issue of affirmative action within higher education admission, provides a strong framework from which the perspectives can be clarified, explained, and potentially better understood. This thesis will review the facts of the most pivotal case on affirmative action within higher education admissions programs, the *Bakke* case, under the lens of William Ryan’s theories of equality. The first aim of the paper will be to identify the values and perspectives that served as the underpinnings of first, the *Bakke* case, and then the cases that followed using Ryan’s Fair Share and Fair Play paradigms for equality. This classification, will provide clarity about the common misinterpretations of the Fair Share model of equality. The second goal of this analysis is to bring the debate current by extending the Fair Share and Fair Play perspectives to the present controversies and recent findings on the effectiveness of affirmative action programs within admission at selective institutions. The thesis will conclude by offering suggestions for the future of affirmative action based on the research indicating it is a policy that has not yet fulfilled its mission to provide everyone equal access to the race for higher education.
CHAPTER ONE
AN INVITATION TO THE RACE

Acclaimed clinical and social psychologist, William Ryan’s most notable work is his landmark 1971 book *Blaming the Victim* in which he describes the societal tendency to direct responsibility for the plight of poverty on perceived defects of the poor. Ryan also offered another provocative suggestion in his 1981 book *Equality*. In *Equality*, Ryan dissects the metaphor of a footrace, which is frequently used in American culture when describing the process by which we demonstrate our right to a pursuit of happiness. Ryan starts his analysis by questioning the validity of the footrace analogy itself.

In what way is life like a footrace? To carry prominently in one’s mind the idea that life is like a race with winners and losers is to perceive life most of the time only as a mammoth competition among millions of individuals, in which the best competitors—however one might define “best”—get the most spoils. This image has an obvious appeal to many, particularly those who find themselves in possession of the most resources.¹ Ryan resigns himself to the use of the footrace image despite what he perceives as its shortcomings because of its familiarity and the ease with which he can use it to illustrate his theory. If then life, liberty and the pursuit of happiness are in fact like a race, then Ryan suggests the opinions about what constitutes a fair race fall into two distinct camps or perspectives. The “Fair Play” view “stresses the individual’s right to pursue happiness and obtain resources;… the “Fair Shares” viewpoint, emphasizes the right to access to the resources as a necessary condition for equal rights to life, liberty and happiness.”²

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According to Ryan, the Fair Play view has been dominant in American culture for years and focuses on the meritocratic belief that a society need only possess equality of opportunity not equality of results. “This way of looking at the problem of equality stresses that each person should be equally free from all but the most minimal necessary interference with his right to pursue happiness. It is frequently stressed that all are equally free to pursue, but have no guarantee of attaining, happiness.”

Ryan points to Thomas Jefferson’s intentional replacement of Locke’s phrase life, liberty and property with life, liberty and the pursuit of happiness as evidence of the longevity of the Fair Play perspective.

Given significant differences of interests, of talents, and of personalities, it is assumed that individuals will be variably successful in their pursuits and that society will consequently propel to its surface what Jefferson called a “natural aristocracy of talent,” men who because of their skills, intellect, judgment, character, will assume the leading positions in society that had formerly been occupied by the heredity aristocracy- that is, by men who had simply been born into positions of wealth and power.

Fair Play is the concept with which most Americans are familiar whether it is one to which they subscribe or not. Its foundation is the merit based values to which many Americans subscribe at least in part.

At least since Aristotle, the principle that rewards should accrue to each person in proportion of his worth or merit has seemed to many persons one that warrants intuitive acceptance. The more meritorious person-merit being some combination of ability and constructive effort-deserves a greater reward. From this perspective it is perfectly consistent to suppose that unequal shares could well be fair shares; moreover, within

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3 Ryan, Equality, 8.
4 Ibid., 9.
such a framework, it is very unlikely indeed that equal shares could be fair shares, since individuals are not equally meritorious.\(^5\)

Tones of societal acceptance of the meritocratic perspective were visible in the Puritan work ethic that helped to quite literally build the country, through to the more current concept that America is the “land of opportunity” and the overused bootstrap adage. The idea that one’s lot in life is purely of their own making is the base of this perspective and its staying power as an ideology is unparalleled.

To return to what Ryan deems “The Great Race”, the suggestion is that if everyone is provided with a ticket for admission, the place in which the individual finishes the race is determined by the individual’s abilities and his or her grit and determination. The reality that some are naturally faster runners, lighter in weight, possess more stamina, or have longer legs, while not inconsequential variables, cannot be helped and therefore speak more to the diversity of the species than of some unfair advantage that should be factored into an equation of fairness. Fair Sharers take a closer look at the race and consider all factors necessary to be a true participant in the contest, let alone possess any real chance of winning. Consider the ticket for admission. It is nothing more than promise not to be turned away at the gate, if and when you arrive at the starting line. Presuming you receive a ticket and are provided an address, there is no guarantee you will receive a map to the race site, nor does it provide a ride to the starting line should you live far away or be without a sufficient transportation. What if the ticket is written in a language you do not understand? What if you are visually impaired?

\(^5\) Ibid., 10.
Should these circumstances mean you should be excluded from the contest since it is doubtful you would have any hopes to win? What of other physical challenges such as an inability to stand or walk? Perhaps this is your first race and you have not been informed of the rules of play? What if you are unaware of how much is at stake? Is it an expectation that those individuals simply excuse themselves from the competition or be simply satisfied with not being denied admission? If so, what does that mean when we leave the metaphoric world and return to life, liberty and the pursuit of happiness?

Fair Sharers also examine the conditions under which a participant is seemingly poised to win the race. They contend that the advantages afforded these individuals have more to do with availability to resources, which improve one’s ability to compete rather than some natural endowment of great racing prowess. Take for example the racer who descends from a long line of runners. There is a good chance they acquired a great amount of knowledge from their ancestors who ran before them. The best training methods, the ideal location on the starting line, the smartest pace to run, and what to expect while on the track can all be passed down to the next generation of runners and are all factors that can significantly improve one’s chance of success. Descending from a family of race winners, one presumes a great deal of the winnings have been enjoyed by you and your family. This will undoubtedly provide you with significant advantage and access to the best trainers and running shoes in addition to the intangibles like the freedom of time to practice, the confidence that comes from being born into a successful family and having many if not all of your physical and emotional needs met. It is likely that past winners maintain much of the power and influence in society. Perhaps this
means that someone in your family designed the race route, created the rules, determined
the prizes and decided the time and place the contest would occur. According to Ryan,
pondering these questions leads the Fair Share perspective to concern itself as follows:

…[M]uch more with equality of rights and of access, particularly the
implicit rights to a reasonable share of society’s resources, sufficient to
sustain life at a decent standard of humanity and to preserve liberty and
freedom from compulsion. Rather than focusing on the individuals pursuit
of his own happiness, the advocate of Fair Shares is more committed to
the principle that all members of the society obtain a reasonable portion of
the goods that society produces. From this vantage point, the overzealous
pursuit of private goals on the part of some individuals might even have to
be bridled.  

*The Spoilers*

Ryan acknowledges the endurance of the Fair Play perspective derives from the
evidence of its effectiveness. Fair Play supporters point out there are countless stories of
individuals who, despite what appeared to be insurmountable odds, were triumphant in
their race for the finish line. People have risen from poverty to become successful
business moguls and have overcome personal tragedy to become an inspirational example
of individual potential. Ryan however contends “it is really neither surprising nor
persuasive that the prevailing rules do produce winners, even spectacular ones. It is, in
fact necessary if the claims of equal opportunity and meritocracy are to have any
credibility at all.”

We must believe such success must be within reach or else why even
participate in the race? The victories of some however cloud the reality of just how
imbalanced and biased the race conditions are. The fact that some individuals were able

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6 Ibid., 9.
7 Ibid., 32.
to overcome a delayed start in the race or having to carry extra weight on their backs compared to the majority of racers, does not excuse the unfair treatment they have been forced to endure.

An argument offered by Fair Players against the Fair Share perspective involves the natural diversity of humankind. All men should be treated equal but are in truth beautifully different. “The idea that all men are literally equal is not only unnatural and absurd on the face of it, but actually dangerous. Can any society function effectively if it fails to take steps to identify the most able, to recruit them in to the crucial positions in society, and to reward them appropriately? Is not equality, then, the enemy of social efficiency?”

Ryan points out that there exists in this logic a false correlation between natural abilities and merit. Because an individual performs better on a test of intelligence, is this in some way an indicator that he or she is more deserving of society’s riches? Which personal attributes carry the most weight and how do we measure qualities such as integrity and morality, which cannot be easily appraised on a test?

About this, Ryan states:

I, for one, see no logic and no morality that dictate some inevitable correlation between differences in personal characteristics and inequalities in wealth and power, in living conditions, respect, life chances, or access to cultural amenities.…While it is superficially plausible, there is in fact no demonstration- and perhaps no way of demonstrating- that the most able, virtuous, and intelligent members of society are in fact occupying the leading roles in it.

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8 Ibid., 33.

9 Ibid., 34.
A third criticism offered by Fair Players involves the concept of distributive justice. Fair Players propose the seemingly reasonable suggestion that rewards should be based in large part on the level of contribution. According to Ryan, Fair Players ask “Who will strive to be better or best if the best remain undifferentiated from the worst? Is not equality incompatible with the laws of human motivation and incentive?”  

Ryan again suggests it is a question of definition. How is an individual’s contribution measured and subsequently, how is the appropriate reward then identified? This leads to another frequently cited problem with the Fair Share perspective identified by Fair Players, the inevitable stifling of excellence to a point where mediocrity becomes the standard. To this, Ryan suggests Fair Players are using a false dichotomy that somehow equal opportunity will result in a uniformity of results in an effort to justify an unfair system. There is every reason to believe that providing more individuals with access to the resources necessary to position themselves for success would breed more competition, not mediocrity.

*The Track is Set*

In hindsight, it might be reasonable to accept the stages of the fight for civil rights in the United States as being quite systematic. This assumption would however negate the fierce determination and desperate fervor beneath every hard fought battle for equality that occurred during that period. With each Jim Crow law that was overturned, African Americans and people of color across the country took a step closer to the

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10 Ibid., 33.

11 Ibid., 34.
American dream, or to maintain the theme of this analysis, inched closer to the starting line of the race. Eventually the battle found itself at the base of higher education’s ivory tower. At issue now were the affirmative action programs, which had begun as a response to the atmosphere of social unrest that was palpable at the time. Affirmative action has been described as “a public or private program designed to equalize hiring and admissions opportunities for historically disadvantaged groups by taking into consideration those very characteristics which have been used to deny them equal treatment.”12 The purpose was purported to be some combination of leveling the playing field and righting the wrongs that had been previously committed against underrepresented groups in this society. The leaders of institutions along with the Supreme Court Justices found themselves at the center of the affirmative action debate, and as a result, their motivations and each decision they made were under a tremendous amount of scrutiny. As a reflection of the divided country they represented, there was great dissention within both university communities and the Court as each attempted to identify their place in what was undoubtedly a series of historic decisions for the country. Peter Schmidt, Senior writer at the Chronicle of Higher Education and author of Color and Money (2007) notes how the motivations of institutions of higher education evolved with each new front.

In the Supreme Court’s pivotal 1950 Sweatt v. Painter ruling, calling for the desegregation of the University of Texas Law School, the majority opinion talked of “the interplay of ideas and the exchange of views” found

in classrooms with students from different backgrounds. But when selective colleges adopted race-conscious admissions policies in the late 1960s, their leaders said little about educational benefits. Instead they argued that such policies were needed for two other reasons: to remedy societal discrimination and to send a clear signal—during a time of devastating urban riots—that the “establishment” many black Americans were fighting was in fact open to them.  

The rationale for affirmative action became an important factor as cases challenging university policies began to surface. Returning to the race metaphor, if the end of segregation effectively provided people of color with a ticket to participate in the race, then were affirmative action programs in colleges and universities through their attempts to deliberately integrate institutions, in fact providing these new participants with a head start and were they unfairly now saddling members of the white majority with the weight of past injustices? These questions were brought into the spotlight in 1970 with the Defunis case.

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CHAPTER TWO
ON YOUR MARKS: LET THE CASES BEGIN

Raised in a Sephardic Jewish family, Marco DeFunis pursued his undergraduate degree in his home state at the University of Washington in Seattle. He earned a 3.6 grade point average (out of 4.0), graduated magna cum laude and received a Phi Beta Kappa key. He worked twenty to forty hours per week while pursuing his undergraduate degree at UW. After graduation in 1970, he applied and was accepted to several public and private law schools, but received a rejection from the University of California at Berkley and the University of Washington. At the time of DeFunis’s application, then University of Washington President Odegaard had implemented an affirmative action program which took race into account when making admission decisions. The program, stated Odegaard, was “in pursuit of a state policy to mitigate gross underrepresentation of certain minorities in the law school and in membership of the [Washington State] bar.” The program outlined three main criteria for admission beginning with what the university referred to as the applicants PFYA (predicated first year average). The PFYA was a combination of past academic performance as indicated by the candidate’s undergraduate GPA and the Law School Admissions Test (LSAT); the applicant’s ability

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2 Ibid.

3 Ibid.

4 Ibid., 23.

5 Ibid.
to contribute to both the law school and the community in general; and the ethnic and
social background of the applicant.\textsuperscript{6} A PFYA score of seventy-seven out of a possible
eighty-one was required for automatic admittance into the law school while scores of
74.5 or less were summarily rejected with the exception of two groups, formerly admitted
military veterans; and applicants representing one of four minority groups- African
American, Hispanic American, Native American and Filipino.\textsuperscript{7} The program required
applications from candidates in the identified groups be separated and reviewed by a
special committee comprised of members of the university’s students and faculty of
color.\textsuperscript{8}

The reviewers compared the minority candidates to each other, rather than
to the entire cohort of applicants. The white and non-preferred minority
students who scored below 77 and above 74.5 were re-examined
competitively within that particular applicant pool. The law school also
established a goal of between 15 percent and 20 percent minority student
admittees. This goal was established to achieve a “reasonable
representation” of minority law school students at the UW.\textsuperscript{9}

After receiving his second rejection letter from the University of Washington
School of Law in 1971, Marco DeFunis retained attorney, Josef Diamond, and pursued a
case claiming reverse discrimination as a violation of the Constitution’s Fourteenth
Amendment. During DeFunis’s second attempt at admission, the university had 150

\textsuperscript{6} Ibid., 23.
\textsuperscript{7} Ibid., 24.
\textsuperscript{8} Ibid.
\textsuperscript{9} Ibid.
open seats to fill and 1,600 applicants.\textsuperscript{10} Despite making up only four percent of the applicant pool, forty-four students of color were admitted as part of the special admissions program, thirty-eight of which had a lower PFYA than DeFunis.\textsuperscript{11} Additionally, thirty-six non-minority applicants with PFYA scores lower than that of DeFunis were admitted that year. Twenty-nine white applicants with higher scores than DeFunis were also denied admission, none of whom decided to sue claiming reverse discrimination.\textsuperscript{12}

Diamond asserted two main arguments first at the state level and later at the Supreme Court. He claimed the University of Washington Law School’s affirmative action program inappropriately used race as a determining factor in their decisions for admission, which, according to Diamond, was a clear violation of the Fourteenth Amendment.\textsuperscript{13} The Amendments states, “…No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{14} He further contended that the University of Washington’s School of Law did not have any apparent

\textsuperscript{10} Ibid., 24.
\textsuperscript{11} Ibid., 25.
\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid., 26.
\textsuperscript{14} Cornell University Law School Legal Information Institute, “United States Constitution Amendment XIV,” Cornell University Law School, \url{http://www.law.cornell.edu/constitution/constitution.amendmentxiv.html} [accessed April 24, 2009].
history of racial discrimination against applicants of color, “therefore there was no compelling interest warranting the use of racial goals in the law school admission process.” This, according to Diamond was a violation 1964 Civil Rights Act that prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.

To these charges, Washington state attorney general, Slade Gorton insisted that the University was well within its rights to extend special preferences to applicants of color because there was a compelling state interest in overcoming the consequence of centuries of racial and ethnic discrimination across America. Gorton further argued that the special consideration given by the admission program was as follows:

...[A] constitutionally benign form of discrimination that let formerly excluded groups into law school. There was a compelling interest in diversifying the law school population and the legal profession as well. The Constitution prohibited only invidious discrimination, and the UWSL’s benign discrimination did not rise to that level- it was not arbitrary and capricious.

Civil rights activist, professor, and former Dean of Arts at the University of Vermont, Howard Ball writes, “diversity in higher education was also a democratic value of the first order, and the UWSL admission process gave life to the norm of democratic

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18 Ibid.
diversity.”19 As Ball notes, the crux of the Defunis case involved the extent to which discrimination can be asserted to be benign. Was it possible to discriminate in an attempt to achieve equality? The Washington Superior Court apparently did not think so, finding the university did violate DeFunis’ constitutional rights in denying him admission.

Presiding Judge Lloyd Shorett stated, “the Fourteenth Amendment could no longer be stretched to accommodate the needs of any race… The only safe rule is to treat all races alike.”20

Ryan would argue that such attempts at equal treatment are an untenable suggestion without first investing the resources necessary to address the tremendous disparities that exist in society. In essence, one cannot reasonably expect a man who has been bound to a chair his entire life, never allowed use of his legs, to then sprint to the finish line of the race simply because his chains no longer bind him and he is told to run. Per the ruling of the Courts, Defunis was admitted into the University of Washington’s School of Law in September 1971. Undaunted and convinced the university’s admission policy was not a violation of the Fourteenth Amendment, Gorton brought the case to the Washington State Supreme Court, where Shorett’s ruling was reversed by a vote of six to two.21 The Court found that benign discrimination used to repair the damages created by invidious discrimination was constitutionally valid. Ball notes:

The denial of benefit to DeFunis was not, in and of itself, a violation of the Fourteenth Amendment’s Equal Protection Clause “if the racial

19 Ibid..

20 Ibid.

21 Ibid., 28.
classification is used in a compensatory way to promote integration.” The court majority maintained that racial classification may be used for either or both of the purposes of (1) remedying past national discrimination and (2) promoting the integration of the races.\textsuperscript{22}

The two dissenting judges argued that Diamond was correct in suggesting the Constitution and all laws need to be “color-blind”. They argued, “Racial bigotry will never be ended by exalting the political rights of one group or class over that of another. The circle of inequality cannot be broken by shifting the inequities from one man to his neighbor.”\textsuperscript{23} DeFunis and his lawyer appealed to the U.S. Supreme Court in 1973 asserting the ruling state Supreme Court “substantively misreads and misapplies…prior decisions of this Court and of other courts concerning the use of racial classifications [as well as] distorts the remedial device of affirmative action…. By so distorting the remedy of affirmative action, the decision below threatens to destroy its utility.”\textsuperscript{24} DeFunis’ lawyers maintained:

\begin{quote}
Racial or ethnic preferences in an admissions process void the “equality” concept, and these preferences are unconstitutional. Individual rights cannot flagrantly be sacrificed in the interest of achieving racial balance. Past inequities are not remedied by creating new inequities to be visited upon individuals in the non-minority groups.\textsuperscript{25}
\end{quote}

Gorton’s rebuttal continued to focus on the fundamental question of whether the university was within its rights to consider race as a factor when making admissions decisions in an attempt to be inclusive to an otherwise marginalized group. Their brief

\begin{flushright}
\textsuperscript{22} Ibid., 28. \\
\textsuperscript{23} Ibid. \\
\textsuperscript{24} Ibid., 30. \\
\textsuperscript{25} Ibid., 32.
\end{flushright}
pointed out, “All law classifies and all law discriminates, but only that law which
classifies or discriminates invidiously offends the “equal protection” clause of the
Fourteenth Amendment.”

Each side of the debate had their supporters. Over two dozen amicus briefs were
submitted in favor of Gorton and the university from groups such as the Children’s
Defense Fund, The National Council of Jewish Women, the United Negro College Fund,
the United Farm Workers, and the Japanese American Citizens League. Their common
chant dismissed the notion that a color-blind Constitution was anywhere close to fruition
and demanded consideration for the inequities that had been, and arguably still were so
pervasive in society. Other notable defenders of the UWSL admission policy included
the American Association of Medical Colleges, Harvard University, Massachusetts
Institute of Technology, American Association of Law Schools and the American Bar
Association. The six groups supporting DeFunis were smaller in number but no less
fervent in their commitment to putting a stop to what they deemed a dangerous
precedence of blatant discrimination. They included the American Jewish Congress, the
Advocate Society, the American Federation of Labor and Congress of Industrial
Organizations (AFL-CIO), the Anti-Defamation League and the U.S. Chamber of
Commerce. After hearing both sides’ oral testimony, reviewing dozens of submitted
briefs, and with DeFunis entering his final quarter in law school, the Court was forced to

26 Ibid., 33.
27 Ibid., 34.
28 Ibid., 36.
decide their next step. Justices William Brennan, Thurgood Marshall and Byron White supported the Washington State Supreme Court that the university had not violated DeFunis’ civil rights. Justice Potter Stewart, Warren Burger, Harry Blackmun, William Rehnquist, and Lewis Powell voted that the case was moot because DeFunis was all but graduated from the program. All the Justices undoubtedly knew their respite from this issue would be short lived. The case was announced moot in April 1974. In May, DeFunis graduated from the University of Washington School of Law. In June 1974, Allan Bakke launched his case against the University of California Davis Medical School.

Born in Minnesota in 1940 the son of a schoolteacher mother and a mail man father, it is clear the Bakke family was not a part of the wealthy elite. To help pay his way through college at the University of Minnesota, Allan Paul Bakke joined the ROTC on campus. After earning a degree in Mechanical Engineering with a 3.51 grade point average out of a possible 4.0, Bakke served as an officer in the United States Marine Corps, completed a tour of duty in the Vietnam War and ultimately left the Marines in 1967. After work as a research engineer for organizations such as the National Aeronautics and Space Agency (NASA) and earning a Master’s degree in mechanical engineering, Bakke decided to switch careers to pursue his interest in medicine. Like most eager medical school applicants, Bakke went to lengths to make his candidacy into medical school as competitive as possible, taking evening prerequisite science courses

29 Ibid., 46.
30 Ibid.
and volunteering to work in a local Mountain View hospital emergency room.\footnote{Ibid.} In addition to being intellectually able, Bakke was also quite practical when considering his bid for acceptance into medical school. He understood that at thirty-two years old, some admissions boards might perceive his application as less than highly desirable. Bakke researched the views of numerous admission committees on the subject of applicant age and was informed by the University of California Davis “when an applicant is over thirty, his age is a serious factor which must be considered…. The Committee believes that an older applicant must be unusually highly qualified if he is to be seriously considered.”\footnote{Ibid.} Bakke however was not deterred. In his application for admission to UCD Medical School Bakke wrote, “I have an excellent job in engineering and am well-paid. I don’t wish to change careers for financial gain, but because I truly believe my contribution to society can be much greater as a physician-engineer than in my present field…. More than anything else in the world, I want to study medicine.”\footnote{Ibid.}

At the time Bakke first applied for admission to medical school, the University of California Davis was one of a number of university’s adopting a special admission program in an attempt to diversify the student body. In 1970, of the approximately eight hundred minority students enrolled in America’s medical schools, nearly eighty percent were attending one of two predominantly African American medical schools (Howard University Medical School in Washington DC and Meharry Medical School in

\footnote{Ibid.}
\footnote{Ibid.}
\footnote{Ibid.}
In the four years since it opened its doors in 1966, UCD operated without a special admission program and only three percent of its applicants were of color. Similar to the University of Washington, UCD had concerns about their lack of diversity and developed the program in order to “enhance diversity in the student body and the profession, eliminate historic barriers for medical careers for disadvantaged racial and ethnic minority groups, and increase aspiration for such careers on the part of members of those groups.”

As part of the program, two separate admission processes were created toward this end. Of the one hundred seats available to first year applicants, sixteen were held for applicants who demonstrated an economic and/or educational disadvantage. Qualifying applicants were given the option to be considered as part of the minority group. Applicants in the regular pool (non-minorities and non-disadvantaged minorities) were reviewed by a committee of fifteen UCD faculty and students. This pool had to meet a minimum Grade Point Average of 2.5. A special admission committee was assembled to review those applicants self-identifying as educationally and/or economically disadvantaged. Those applications were reviewed by a special sub-committee comprised of white and minority faculty and minority medical students.

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34 Ibid.
35 Ibid., 49.
36 Ibid.
37 Ibid., 51.
38 Ibid., 51.
39 Ibid., 50.
There was no minimum Grade Point Average for candidates within this pool.\textsuperscript{40} Factors such as who was granted a waiver of the application fee, the extent to which the applicant had to work to pay for their undergraduate education, parent’s occupations, and hardships that led to a leave of absence while an undergraduate student where all considered in determining who belonged in the special program.\textsuperscript{41} Despite 172 white applicants requesting a review as part of the special program, none were selected to be reviewed by the sub-committee.\textsuperscript{42} Applicants from both the regular and special pools who were invited to campus were interviewed by several members of the committee. Each committee member gave the applicants a score of up to one hundred points and the scores were averaged to determine the applicants “benchmark score.”\textsuperscript{43}

Bakke submitted his first application late and received a score of 468 out of a possible 500 points.\textsuperscript{44} At the time his first application was received, the university’s minimum cut off was 470. After writing to the chair of the admission committee, George Lowery, Bakke was granted an opportunity to speak with Lowery’s assistant, Peter Storandt to discuss the rejection of his application and receive advice.\textsuperscript{45}

\textit{Storandt encouraged Bakke to reapply for admission and to seek “early admission.” Furtively, Storandt informed Bakke of Marco DeFunis’s}\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{40} Ball, \textit{The Bakke Case}, 51.
\item \textsuperscript{41} Ibid.
\item \textsuperscript{42} Ibid.
\item \textsuperscript{43} Ibid., 50.
\item \textsuperscript{44} Ibid., 54.
\item \textsuperscript{45} Ibid., 55.
\end{itemize}
efforts to end the preferential admission programs at UWSL and urged the engineer to continue his research and, if he was rejected again, to challenge the special admissions program in court. It was a very serendipitous and symbiotic meeting of two men, almost the same age, concerned about a lack of fairness in the admissions procedures at UCD’s medical school.\footnote{\textit{Ibid.}}

As suggested, Bakke submitted his second application for early admission in August 1973. More than 3,100 non-minority applications were received for the eighty-four open first-year seats.\footnote{\textit{Ibid.}} After his application was reviewed and the committee interviewed him for a second time, Bakke received a score of 549 out of a possible 600 points. He received his second letter of rejection on April 1, 1974. Federal Judge, professor and former law clerk for Justice Lewis Powell, James Harvie Wilkerson notes, “Not only were Bakke’s objective qualifications (undergraduate grades and Medical College Admissions Test scores) higher by far than those admitted under the special program; he also had laudatory letters of recommendation, proven motivation, and an engineering background that several doctors believed would assist him in his medical career.”\footnote{\textit{J. Harvie Wilkerson III, From Brown to Bakke: The Supreme Court and School Integration1954-1978} (London: Oxford University Press, 1979), 254.}

Table 2.1 Average Applicant Test Scores and GPA for 1973-1974 When Bakke Applied to UCD

<table>
<thead>
<tr>
<th></th>
<th>MCAT (Science) %</th>
<th>MCAT (Verbal) %</th>
<th>MCAT (Quantitative) %</th>
<th>General %</th>
<th>GPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regular</td>
<td>83</td>
<td>81</td>
<td>76</td>
<td>69</td>
<td>3.5</td>
</tr>
<tr>
<td>Special</td>
<td>35</td>
<td>46</td>
<td>24</td>
<td>33</td>
<td>2.6</td>
</tr>
<tr>
<td>Bakke</td>
<td>97</td>
<td>96</td>
<td>94</td>
<td>72</td>
<td>3.44</td>
</tr>
</tbody>
</table>

\textit{Source:} Data from Howard Ball, \textit{Bakke Case} [Kansas: University Press of Kansas, 2000], 52.
Wilkerson points to Bakke’s clear frustration in a letter Bakke wrote to George Lowrey, “I am convinced, said he, that a significant fraction [of medical school applicants] is judged by a separate criteria. I am referring to quotas, open or covert, for racial minorities. I realize that the rationale for these quotas is that they attempt to atone for past racial discrimination, but insisting on a new racial bias in favor of minorities is not a just situation.”

This rejection, Wilkerson suggests, was the final element necessary to launch the firestorm that took place in the case of Bakke v. the Board of Regents of the University of California Davis Medical School. On the heels of the DeFunis case and in the heat of the social changes that were occurring across the country, the issue was one which resonated deeply with both those directly involved and the public in general. In From Brown to Bakke, Wilkerson writes:

Thus, Allan Bakke, constructive, capable, driven, resentful, marched into history. If “one man is carrying the ball for all white males,” wrote one reporter, “they could not have picked a more representative specimen.” Silent majority symbol, great white hope, avenging angel of the middle classes, heroic in his very ordinariness, Bakke rode the riptides to the Second Reconstruction. The message was as appealing as it was oversimplified: Down with special preference, up with fair play.

The Trials

Bakke’s lawyer, Reymold H. Colvin was a respected San Francisco litigator since 1941, was an leader within the Jewish community and was president of the American

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50 Ibid.
Jewish Committee for the city.\textsuperscript{51} The university had in its corner their university counsel Donald Reidhaar and later would add more notable Berkley scholar Paul Mishkein and Harvard law professor and former special prosecutor during Watergate, Archibald Cox.\textsuperscript{52} The case was considered so significant former Superior Court Judge F. Leslie Manker was asked to come out of retirement to preside over the case which began in June 1974.\textsuperscript{53} “The burden of proof fell on Colvin and his client. They had to argue that Bakke would have been admitted to the UCD med school had there been no special admissions program in place. They also had to show that the special admissions process was arbitrary, capricious, and fraudulent.”\textsuperscript{54} The two questions at hand were a return to the issues in the \textit{DeFunis} case. Constitutionally, were Bakke’s Fourteenth Amendment rights as part of the Equal Protection clause violated though the program and did he suffer discrimination due to his race as prohibited by Title VI of the Civil Rights Act?

After hearing the case, in November 1974, Judge Manker found the special admission program used by the university to be unconstitutional and in violation of Title VI. In his ruling Manker states:

\begin{quote}
The use of this program did substantially reduce plaintiff’s chances of successful admission to medical school for the reason that, since 16 places… were set aside for this special program [in 1973 and 1974], the plaintiff was in fact competing for one place, not in a class of 100, but in a class of 84, which reduced his chances for admission by 16 %….No race
\end{quote}

\textsuperscript{51} Ball, \textit{The Bakke Case}, 53.


\textsuperscript{53} Ball, \textit{The Bakke Case}, 56.

\textsuperscript{54} Ibid., 57.
or ethnic group should ever be granted privileges or immunities not given to every other race.\(^{55}\)

Manker however, stopped short of ordering Bakke admitted to the medical school because Colivn did not do enough to refute UCD’s argument that Bakke would not have been admitted into the medical school had the special program not been in place.\(^{56}\)

Manker also issued an injunction to prohibit the university from using race as a factor in medical school admissions. Both Reidhaar and Colvin appealed to the California Supreme Court, Reidhaar to overturn Manker’s ruling and Colvin taking issue with Bakke not being ordered into UCD’s medical program.\(^{57}\) Again, mirroring DeFunis’ case, amicus briefs were submitted by the same organizations which aligned themselves behind both the UWSL and DeFunis. Ball refers to the issue in question as outlined by the California Supreme Court as being a question of, “whether a racial classification which is intended to assist minorities, but which also has the effect of depriving those who are not so classified, of benefits they would enjoy but for their race, violated the constitutional rights of the majority.”\(^{58}\) In September 1976, after months of oral testimony with Colvin insisting on a color-blind constitution and Reidhaar adamant that the special admission program was a moral and necessary action, benign in nature and not an assault to Bakke’s rights, the verdict of the notoriously liberal court came down. A vote of six to one and a “forty-eight page majority opinion affirmed Manker’s prior

\(^{55}\) Ball, *The Bakke Case*, 57.

\(^{56}\) Ibid., 58.

\(^{57}\) Ibid.

\(^{58}\) Ibid., 59.
ruling that preferential admissions policies violated the Fourteenth Amendment.\textsuperscript{59}

Specifically the university’s program was in violation of the Equal Protection Clause in that it is designed to apply to any person, “its lofty purpose, to secure equality of treatment to all, is incompatible with the premise that some races may be afforded a higher degree of protection against unequal protection than others.”\textsuperscript{60} Ball states that while a majority of the court “believed that the program was “laudable,” there was no compelling state interest served by the special admissions program. Additionally, the UCD racial quota policy was not the most “narrowly tailored” approach to the substantive problem of diversifying the student cohorts attending America’s medical and law schools.”\textsuperscript{61} In his majority opinion, Stanley Mosk wrote “this was a case of racial discrimination, and it was our feeling that discrimination against a person of any race is just bad. To [decide for UCD would be] to sacrifice principle for the sake of dubious expediency.”\textsuperscript{62} Mosk and all but one of his fellow jurists were not swayed by the fact that the university voluntarily elected to institute this policy to address the prior societal wrongs done to so many. One judge, Mathew O. Tobriner, vehemently disagreed in his fifty-seven page dissenting opinion.

Two centuries of slavery and racial discrimination have left our nation an awful legacy, a largely separated society, in which wealth, educational resources, employment opportunities- indeed all of society’s benefits- remain largely the preserve of the white-Anglo majority. It is anomalous

\textsuperscript{59} Ibid.

\textsuperscript{60} Ibid.

\textsuperscript{61} Ibid.

\textsuperscript{62} Ibid., 60.
that the Fourteenth Amendment that served as the basis for the
requirement that elementary and secondary schools be ‘compelled’ to
integrate would now be turned around to forbid graduate schools from
voluntarily seeking that very objective.\textsuperscript{63}

The California Supreme Court ordered Bakke admitted into the University of California
Davis Medical School. Due to the tremendous potential impact of the verdict on future
programs and policies instituted by the university, the Regents immediately petitioned the
U.S. Supreme Court for a writ of certiorari, or review of the details of the case, thereby
staying the California Supreme Court’s order for Bakke’s admittance.\textsuperscript{64}

After the \textit{DeFunis} debacle, this was the U.S. Supreme Courts opportunity to
demonstrate they were not as impotent as they had come across, and that they could take
decisive action for the country. Not all the jurists however were eager to grant
university’s request for a writ of certiorari. Once again, the Regents presented their
position in their brief for the Court and the fundamental question that had to be answered
with respect to affirmative action policies in higher education.

When only a small fraction of thousands of applicants can be admitted,
does the Fourteenth Amendment’s ‘Equal Protection’ clause forbid a state
university professional school faculty from voluntarily seeking to
counteract the effects of generations of pervasive discrimination against
discrete and insular minorities by establishing a limited special admission
program that increases opportunities for well-qualified members of such
racial and ethnic minorities?\textsuperscript{65}

Colvin pushed the Court to deny certiorari and to allow the California State Supreme
Court decision to stand. In his brief to the Court he explained, “The primary issue in this

\textsuperscript{63} Ball, \textit{The Bakke Case}, 61.

\textsuperscript{64} Ibid.

\textsuperscript{65} Ibid., 64.
case is Allan Bakke’s right to be admitted to the medical school ... as well as the constitutionality of the petitioner’s procedure for selecting students to attend the medical school.”

Colvin and Bakke’s supporters were not alone in hoping the Court would refuse certiorari. Among the amicus briefs submitted to the Court was one compiled by a group of fifteen established civil rights organizations and UCD supporters such as the National Urban League, the National Bar Association, the National Conference of Black Lawyers, and La Raza National Lawyers Association. Ball claims:

> While they supported the UCD medical school affirmative action plan on the merits, their amicus brief reflected concern and trepidation. They feared the impact of an adverse Supreme Court decision in *Bakke*, one that validated the California Supreme Court decision. Such a decision would have an adverse, dramatic, and long-term impact on civil rights and race relations for future decades.

The main problem with the university’s case was the significant lack of supporting evidence provided by the university’s counsel during the state trial. Numerous claims were made on the part of the university supposedly supporting their claim that the admission policy was constitutional and did not violate Bakke’s rights. However, Reidhaar and the team failed to enter into evidence anything substantiating their claims. For example, the Regents claimed there would be significant benefits to African American patients if more African American physicians entered the medical profession. No studies or research was offered to support this claim. Also mentioned

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66 Ibid., 64.
67 Ibid.
68 Ibid., 65.
69 Ibid., 66.
during the state trials was the alleged racial bias existing in the MCAT which many claimed placed applicants of color at a significant disadvantage. Again, no supporting evidence was offered to support the claim. Many supporters of affirmative action were uneasy about the idea that the future of the program could rest on a case that was shaky at best with respect to evidence. Other’s felt the motivations of the university to be far more duplicitous. “A leader of the National Conference of Black Lawyers accused a Davis admissions official of “virtually inviting” Bakke to sue.”

Charles Lawrence, a law professor in San Francisco, believed the case argued by the university’s council was clumsy and was quoted as saying “Many members of California’s minority community believe that the university set the case up to rid itself of a program it never wanted.”

In February 1977, the court granted certiorari with a split vote of five to four. Litigators Archibald Cox and Paul Mishkein joined the university’s legal team during the preparation of the brief to the Court after the writ of certiorari was granted and the oral arguments that followed. Their approach was to demonstrate for the Court the need for programs such as the university’s special admissions policy. They contended that the “legacy of pervasive racial discrimination cannot be undone by mere reliance on formulas of formal equality. Educators have recognized the necessity of employing race-conscious remedies as a means to achieve true- and compelling- educational opportunity.”

They insisted the policy not only did not trample Bakke’s rights, it was in fact a moral


71 Ibid.

72 Ball, The Bakke Case, 69.
imperative, a necessity without realistic alternative. For Colvin and Bakke’s team, the issue was a matter of an individual’s constitutional rights being sacrificed for proposed benefits of the group. They, like many who opposed affirmative action, felt the special admission program was a simple case of one person’s unjust punishment in an attempt to compensate for the misdeeds of others. For both sides, the stakes were high. Everyone involved and those who watched could feel the magnitude of what was about to happen. Egalitarians believed that a verdict in favor of the Regents would be a great step towards making the utopian idea of equality for all a reality. Meritocrats believed such a verdict would reinforce a system based on favoritism and the very discrimination that supporters of affirmative action purport to be fighting. As the arguments began, a commentator wrote, “Bakke is a great case, regardless of what the Supreme Court of the United States does with it, because it is one of the very few (again, very few) cases in constitutional law in which powerful political and social and historical currents congeal at a central point, upon a thin but adequate factual base.” The Los Angeles Times reported, “Never before in its 189-year history had the nation’s highest court attracted so much unsolicited advice in a single controversy as it received in Allan Bakke’s case.

The Bakke case received more amicus briefs to the Supreme Court than any other case before. Bell notes:

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74 Ball, The Bakke Case, 77.

75 Ibid.
A record fifty-eight amicus briefs were filed after the Court granted certiorari in *Bakke*. Forty-two briefs supported the petitioner, while sixteen sided with the respondent, [Bakke]. They represented the views of over 160 organizations and individuals— including a lawyer practicing in Seattle, Washington: Marco DeFunis Jr. Esq., who wrote the brief for a conservative group, the Young Americans for Freedom.\(^{76}\)

Joining the flurry of groups clamoring to have their opinions heard and make their support visible through amicus briefs to the Court was the newly elected Carter administration. Carter built his platform while running for the Presidency on a number of issues that were important to people of color including civil rights and affirmative action. Not everyone in the Federal Government was pleased with Carter’s decision to have the White House come out with an amicus brief in support of the Regents of UCD. “Jimmy Carter’s order to his [Department of Justice] to prepare a *Bakke* amicus brief led to an intense political struggle between the White house staff and the Department of Justice and between personnel in the DOJ itself over just what position the U.S. government would take on the question of affirmative action.”\(^{77}\) Carter appointed U.S. Solicitor General Wade McCree Jr. and Assistant Attorney General Drew Days III, both African American, to draft the White House’s position in support of the special admission program at UCD Medical School. A draft offering lukewarm support of the university’s plan was leaked exposing proposed government support of affirmative action as a policy, but opposition to rigid quotas used to implement the policy, meaning Bakke would need

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\(^{76}\) Ibid.

\(^{77}\) Ibid., 72.
to be admitted into medical school.\textsuperscript{78} Many in the government in support of the Regents felt such a position would do more harm than good for both the campaign for civil rights and for Carter’s footing with his constituents. Carter’s Domestic Chief, Stuart Eizenstat, “saw the proposed government position suggested in the brief as a political disaster, one that would see racial minority groups across the nation break ties with the Democratic president.”\textsuperscript{79} Many felt the amicus brief should come out in full support of the university’s program. In September 1977, after numerous leaks of subsequent drafts and intense pressure from a number of civil rights groups and multiple arms of the government, Carter submitted a significantly revised brief. The final version of the brief still towed the line of support neither fully endorsing the university or Bakke. It “strongly supported affirmative action programs based on race and ethnicity, was opposed to rigid ‘exclusionary quotas,’ but did not provide any detailed argumentation, and believed that there was an inadequate finding of evidentiary date in Bakke.”\textsuperscript{80} It further maintained that, “race may be taken into account to counteract the effects of prior discrimination; minority-sensitive [admissions] decisions are essential to eliminate the effects of discrimination in this country.”\textsuperscript{81}

\begin{footnotesize}
\begin{itemize}
\item[78] Ibid., 74.
\item[79] Ibid., 75.
\item[80] Ibid., 76.
\item[81] Ibid.
\end{itemize}
\end{footnotesize}
*Arguments, Old and New*

The arguments made in the amicus briefs submitted to the Supreme Court and maintained by both legal teams were essentially the same as those offered in the state case with a few notable exceptions. The fundamental claims made on the part of the Regents were revisited in the amicus briefs for the petitioner. They were that the special admissions policy was both constitutional and did not violate Title VI; that there was compelling cause to establish the program; that instruments such as the MCAT were biased against applicants of color; and that a mechanism was necessary to combat the societal and systemic discrimination which had so long existed in this country. New focus was placed on the idea of “benign” discrimination as an acceptable method of providing support and offering inclusion, contrary to invidious discrimination, which is designed to be exclusionary and to do harm. The Rutgers University brief suggested that application of the “color-blind” standard of admission proposed by Bakke’s attorneys was in fact a violation of the Thirteenth Amendment, which they contend, prohibits slavery and protects groups from the “badges of enslavement.”

Continued exclusion of people of color from the country’s professional schools because of the color-blind guideline in effect places the “badge of slavery” upon that group of people. Two attorneys and future Supreme Court Justice Ruth Bader Ginsburg offered another defense of the distinction between benign and invidious discrimination on behalf of the American Civil Liberties Union. The brief declared that because “Allan Bakke had not suffered

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82 Ibid., 83.

83 Ibid.
stigmatic injury,” which was a term used in Brown to describe the psychological and emotional effects of racism suffered by children of color, there was no constitutional violation to Bakke. The American Medical Student Association argued tools such as the MCAT were “inappropriate instruments for admission to medical school. [They] do not predict either success in medical school, or as a physician. [Their use] does insure that minority students are not admitted.” Another novel argument proposed by the Law School Admissions Council (LSAC), claimed:

…Because a wrong is racial, a racial remedy is essential and there is no need to seek a non-racial alternative means, either for the state here or from Congress…. A color-blind requirement would seriously impair the governmental and educational contribution of diversity and the consideration of race or any other “suspect category” as one factor to be taken into account both positively and negatively in the interests of diversity of viewpoints and experiences constitutes neither an unconstitutional preference, nor a quota.

The majority of the briefs submitted in support of Bakke continued to maintain the need to employ color-blind standards in admissions policies and to fight the use of racial quotas. They reasoned that failure to do so is a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution and Title VI of the Civil Rights Act. The American Jewish Committee (AJC) argued that not only was the UCD’s special admission program a clear attempt to restrict the entry of Jewish students into the school, in addition there was no “pressing public necessity” for the policy.

84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid., 84.
social engineering was introduced by The Order of the Sons of Italy’s brief. In it, concerns about what some referred to as creating a proportionate society were raised. They argued that attempts to ensure that everyone is represented in universities and professions is impractical and ill-advised because it undermined the natural order of society by which those most skilled in particular vocations were compelled through skill and merit towards their pursuit. “Once government started down the road of occupational proportionality, where would it stop?” Other opponents of affirmative action suggested that the university’s policy negated the ethnic diversity of individuals within the majority, focusing only on race and ignoring the unique perspectives and hardships overcome by people of, for example, Polish, German or Jewish ancestry.

The Decision

The oral arguments were contentious and many believed the two sides were horribly mismatched. When in front of the Court, Cox was described as being “at his donnish best, fielding questions with confidence, sometimes lecturing the Justices as if they were his Harvard law school students.” To the Justices when speaking of the utility of programs such as UCD’s, Cox said, “For generations, racial discrimination in the U.S. isolated certain minorities [and] condemned them to inferior education…. There is no racially blind method of selection which will enroll today more than a trickle of

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88 Ibid., 85.


90 Ibid., 261.
minority students in the nation’s colleges and professions.” 91 As part of his opening statement, Cox asked that the Justices find in favor of the university’s program which would allow “persons who were held back to be brought up to the starting line, where the opportunity for equality will be meaningful.” 92 Colvin was less poetic in his approach but no less direct. When challenged by Judge Marshall about the rights of the underprivileged in America, Colvin, straightforward in his response said, “They have the right to compete. The right to equal competition.” 93 When pressed by Justice Burger about the validity of the petitioner’s argument that race was a legitimate consideration in their admission decisions, Colvin said, “Race is an improper classification in this system…because the concept of race itself as a classification becomes in our history and in our understanding and unjust and improper basis upon which to judge people.” 94

On June 28, 1978 the decision of the Supreme Court was announced. It was, however, far from a unanimous opinion of the Court. Justice Powell announced the split decision of the Court and in his pre-approved prepared statement declared:

There is no opinion joined in its entirety by five members of the Court…. Perhaps no case in modern memory has received as much media coverage and scholarly commentary. Beginning with more than 60 briefs filed with the Court, we have received the unsolicited advice – through the media and the commentaries- of countless extra-judicial advocates. The case was argued some eight months ago, and as we will speak today with a

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92 Ball, *The Bakke Case*, 95.


94 Ball, *The Bakke Case*, 97.
notable lack of unanimity, it may be fair to say that we needed all of this advice.\textsuperscript{95}

The University’s special admission program with their use of sixteen set-asides was found in violation of Title VI of the Civil Rights Act. As a result, the Court upheld the portion of the California Supreme Court’s judgment requiring that Bakke be admitted into the UCD’s Medical School. The order further stated that UCD’s consideration of race as one of several factors taken into account when making admission decisions was acceptable. The Judges ducked the issue of constitutionality of the university’s special admission program because they noted the Title VI violation was sufficient for them to rule on the case. Three very different written opinions were submitted for the record. Bell notes that aside from Powell, there was the joint opinion offered by Justices Brennan, White, Marshall and Blackmun and the vastly contrary opinion submitted by Stevens, Burger and Rehnquist and Stewart. Ball notes that the Stevens group found the UCD plan “invalid in every respect and that the California Supreme Court opinion should have been affirmed in its entirety…. Differing dramatically from the other five justices [including Powell], the Stevens cohort rejected any use of race as a factor in admissions processes at colleges and universities.”\textsuperscript{96} The summary opinion submitted by Brennan on behalf of his group supported the “view that the judgment of the California Supreme Court should be reversed in all respects- not only insofar as it prohibits the University from establishing race-conscious programs in the future, but also insofar as the judgment

\begin{footnotesize}
\textsuperscript{95} Ibid., 138.
\textsuperscript{96} Ibid., 136.
\end{footnotesize}
orders that the respondent Bakke be admitted to the Davis Medical School.” Ball also points out the impassioned opinion, raw with the realities suffered by African Americans in the U.S., shared by Justice Marshall. “The position of the Negro,” Marshall wrote, “today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.” Blackmun also offered his separate opinion in which he took issue with the suggestion made by Bakke’s team that universities should employ a “race-neutral” system. Blackmun shared his hopes that the need for affirmative action programs would one day end, but contended that day had not yet arrived. Blackman wrote, “…We must first take account of race….And in order to treat some persons equally, we must treat them differently. We cannot- we dare not- let the Equal Protection Clause perpetuate racial supremacy.” Neither side was wholly satisfied with the decision; however a decision was undoubtedly made. Allan Bakke began as a medical student at the University of California Davis in fall 1978 and graduated in 1982. Wilkinson notes “For Bakke at age thirty-eight, the dream came true, but five years late. The dream had also come dear. For the sake of medicine, Bakke had forsaken anonymity.”

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97 Ibid., 137.
98 Ibid., 139.
99 Ibid., 140.
Post Bakke

Although issues involving affirmative action continued to garner attention in the United States following the water-shed Bakke decision, it was not until 1996 that higher education admission policies were again thrust onto center stage. However, between the Bakke case and 1996, the topic of affirmative action in employment, contracts and higher education continued to be a hot-button issue provoking strong reactions on both sides of the debate. California Governor Ronald Reagan, who was passionately opposed to affirmative action, placed the divisive issue at the center of his 1980 campaign. He capitalized on the negative feelings held by the majority of the voting public. When speaking about affirmative action he described it as “a perversion that violates the great proposition, at the heart of Western civilization, that every person is a res sacra, a sacred reality, and as such is entitled to the opportunity of fulfilling those great human potentials with which God has endowed man.”101 As part of his attempt to revive the country’s position as the bright city on a hill, he tapped into the moral outrage felt by many who considered affirmative action to be synonymous with reverse discrimination and preferential treatment. During his stump speeches, Reagan noted, “Guaranteeing equality of treatment is the government’s proper function. We will not retreat on the Nation’s commitment to equal treatment of all citizens. To deny access to higher education when it has been won on the basis of merit is a repudiation of everything America stands for…. [It] is morally wrong, and will not be tolerated.”102

101 Ball, The Bakke Case, 144.

102 Ibid., 147.
Once elected, Reagan quickly cleaned house and surrounded himself with staunch conservatives vehemently opposed to affirmative action. In a controversial move, Reagan fired four supporters of affirmative action on the Commission for Civil Rights (CCR). The move was immediately challenged by numerous civil rights organizations and ultimately Reagan agreed to increase the number of appointees on the CCR and two appointments would be alternately determined by the president and Congress. Through appointees such as conservatives William Bradford Reynolds as Assistant Attorney General Civil Rights Division (CRD) and later Clarence Thomas as chairperson for the Equal Employment Opportunity Commission (EEOC), Reagan built a strong cabinet filled with individuals who were vocal in their condemnation of affirmative action, which set the stage for the next chapter in the fight. Reagan’s successor, George H.W. Bush was another who was open in his dislike for affirmative action programs. Even Democratic incumbent William J. Clinton tread carefully on the issue touting the slogan “mend it, don’t end it” and once elected, ordered a special task force to review federal affirmative action programs. “The report recommended a number of changes, but essentially concluded that most federal affirmative action programs were in compliance with both federal statutes and the federal Constitution.”

The spotlight was once again placed on the question of affirmative action in higher education admission in 1994. Cheryl Hopwood was one of four white plaintiffs who successfully challenged the University of Texas Law School’s admission policy after being rejected from admission. Similar to the previous cases, *Hopwood v.*

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103 Ibid., 163.
University of Texas School of Law vacillated between numerous courts and was ruled on by several adjudicators, all the while focusing and the same argument that had been submitted years before. In a familiar approach, Hopwood and the three other claimants accused the university of violating the rights afforded them by the Fourteenth Amendment of the Constitution. The university took the now recognizable stance that their program, which outlined admission goals of ten percent Hispanic and five percent African American, was a legal compelling means of achieving the admirable aim of diversity within their institution and within the legal profession.\footnote{Ibid., 190.} The federal district court judge agreed that the university’s outlined admission goals were both compelling and constitutional, but took issue with the institution’s policy of screening applicants of color and white applicants separately.\footnote{Ibid.} In another parallel to the Bakke case, the judge stopped short of ordering the plaintiffs admitted into the university. The plaintiffs appealed to the Fifth Circuit court of appeals and were ultimately successful in overturning the district court’s decision in 1996.

What was a stinging blow for advocates of affirmative action was a colossal triumph for opponents of the program. The American Bar Association reported that the decision was a ruling that could jeopardize affirmative action programs at universities across the country.\footnote{Center for Individual Rights, “Ending Racial Double Standards,” Center for Individual Rights, \url{http://www.cir-usa.org/cases/michigan.html}, (accessed April 24, 2009).} The Hopwood decision was soon followed with a myriad of state bans on racially conscious admission policies in America’s institutions of higher
education. The *Hopwood* victory lead to the immediate elimination of all race-conscious admission decisions in public institutions in Texas, Louisiana and Mississippi. In 1997, California soon followed suit by enacting Proposition 209 which expressly prohibited any public state institution from “discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity or national origin.” Ward Connerly, a well-known conservative African American champion of Proposition 209, was also instrumental in persuading the University of California to do away with affirmative action practices on all of their campuses. “Proposition 209 went beyond proscribing preferential admissions. It also ended all assistance programs (outreach, counseling, tutoring, [and] financial aid programs) for students, faculty, and staff who were members of disadvantaged racial, ethnic, or gender groups.” Washington State’s Initiative 200 was nearly identical to California’s Proposition 209 and passed in 1998 eliminating any programs extending “preferential treatment” based on race, ethnicity, sex, or national origin.

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107 Ibid.  
110 Ibid.
By 1998, a dozen states attempted to pass legislation to end affirmative action programs. Offered as a proxy were numerous “top percent” plans, which proponents claimed, would address universities’ diversity goals while not offending the Constitution. In 1999, California instituted a policy by which the top four percent of the state’s high school graduating class was guaranteed admission into any of the University of California campuses. Texas offered the same program for the top ten percent of their graduates and Florida guaranteed admission for the top twenty percent of each of their high schools classes.

The path of affirmative action in this country was turbulent one to say the least. After the 1996 *Hopwood* verdict, which seemingly was a significant step backwards for proponents of the policy, the country faced two controversial cases involving the University of Michigan that would be another important chapter in the story of higher education and affirmative action. In 1997 Jennifer Gratz, a white student who was rejected from the University of Michigan and later went on to attend the University of Michigan at Dearborn, after reading about a potential lawsuit against the university, filed suit claiming a Fourteenth Amendment violation through an unlawful preference for applicants of color. Less than two months later and also represented by the Center for Individual Rights (CIR), Barbara Grutter filed suit against the University of Michigan

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111 Ibid., 168.
112 Ibid., 167.
113 Ibid., 170.
Law School on the same grounds. In a narrative that in many ways mirrors the cases that preceded it, filled with oral arguments and amicus briefs for and against the university’s policy, in 2002 both cases ended up before the Supreme Court. In a letter clarifying the position of the Office of Civil Rights within the U.S. Department of Education, Assistant Secretary for Civil Rights Stephanie Monroe wrote:

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court (hereinafter “the Court”) concluded, “student body diversity is a compelling state interest that can justify the use of race in university admissions.” The Court therefore found lawful the way that the Law School at the University of Michigan had sought to achieve diversity. In contrast, the Court found the use of race in the related case of *Gratz v. Bollinger*, 539 U.S. 244 (2003), to be unlawful. In *Gratz*, which involved the undergraduate college of the University of Michigan, the Court found unlawful the way the undergraduate school had made race “a decisive factor for virtually every minimally qualified underrepresented minority applicant.” *Id.* at 274. The undergraduate school had failed to consider “each applicant’s individualized qualifications, including the contribution each individual’s race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups.”115

Many of the participants fighting to end university affirmative action programs have continued their crusade after the partial victory in the *Gratz* case. However, for some the war cry has changed from opposing affirmative action programs, to opposing racial and gender preferences. Among the most notable meritocrats, those against race-sensitive admission policies, one finds the CIR, Ward Connerly and the organization he founded in 1996 the American Civil Rights Institute (ACRI), and former plaintiff

Jennifer Gratz. Gratz became the Executive Director of the Michigan Civil Rights Initiative, which, with guidance from Ward Connerly, successfully passed Proposition 2 eliminating race preference programs in higher education admission and other state funded institutions in the state. The use of affirmative action in higher education admission is an issue with twists and turns and passionate advocates all claiming to have morality on their side and the country’s best interest at heart. Beyond all the squabbling and after peeling away all the rhetoric, what does the race for higher education admission look like today in America?
CHAPTER THREE
SHARE OR PLAY

Armed with a general sense of the bends and bows of the path of affirmative action in higher education, William Ryan’s race is revisited, reexamined, and applied in the light of the arguments raised in Bakke. Despite the passing of thirty years, innumerable debates, and countless interpretations and reinterpretations of the country’s laws, the fundamental basis for arguments for and against affirmative action have sustained. One of the most referenced architects for the Fair Play line of reasoning is respected sociologist, author and Professor Nathan Glazer. Glazer, described by some as a neo-conservative, is noted as being an authority on race, social policy and immigration. With books such Beyond the Melting Pot (1963) and the transparently titled Affirmative Discrimination (1976), Glazer makes his views plain on the multi-ethnic transformations occurring in the United States.¹ Concerning how many view America’s racial history, Glazer writes:

Many would have it that even the last ten years should be interpreted as a losing battle against this racism, now evident in the fact that colleges and universities resist goals and targets for minority hiring, that preferential admissions to professional schools are fought in the courts, that the attempt to desegregate schools are fought in the North and West has now met a resistance extremely difficult to overcome, that housing for poor and minority groups is excluded from many suburbs. I think this is a selective misreading of American history: that the American polity has instead been defined by a steady expansion of the definition of those who may be included in it to the point where it now includes all humanity; that the United States has become the first great nation that defines itself not in terms of ethnic origin but in terms of adherence to common rules of

Based on the perspectives of Glazer and other Fair Players, Ryan outlines in Equality five chief arguments made by meritocrats opposed to using affirmative action in higher education admissions. The first and most widely used argument early in the debate against affirmative action is that the policy is a form of “preferential treatment” which inevitably results in less qualified individuals gaining an unfair advantage. A second concern involves the belief that using race and ethnicity to treat individuals differently is a hypocrisy that flies in the face of the very antidiscrimination laws that egalitarians fought so tirelessly to institute. The law should be color-blind. A third concern held by meritocrats relates to what is deemed as the impracticality of policy in real world terms. They argue equal representation is not a pragmatic approach; it is ill advised and potentially dangerous to America as a nation. Another flaw in affirmative action policies according to challengers of the programs relates to the way such programs decrease drive and eliminates rewards for hard work. Finally, opponents of affirmative action in university admission programs believe these strategies unfairly punish a portion of society for the past crimes of others. Chapter four will fully consider each argument offered by those opposed to affirmative action against the backdrop of Ryan’s Fair Share and Fair Play theory and footrace illustration. How do these objections offered by Fair Players stand up to the conditions existing today in America’s elite colleges and

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universities? Have the questions raised over thirty years ago substantiated the views of the egalitarians, the meritocrats or both? What of the future of affirmative action in the race for higher education? What lessons can be learned from the debate that has endured for decades? Before examining the arguments and questions they provoke, this chapter will explore and attempt to provide an understanding of how and why this particular race of life came into existence.

In the wake of so much debate about affirmative action and admissions, came the release of several books examining the makeup of America’s most selective colleges and universities. In 2007 Joseph A. Soares, Associate Professor of Sociology at Wake Forest University offered his contribution to the discussion in his book *The Power of Privilege: Yale and America’s Elite Colleges*. Soares provides a glimpse of how the highly competitive race for higher education evolved, specifically at selective colleges and universities in America. Individuals on both sides of the debate can agree there exists a profound connection between race, wealth, privilege and education. Soares attempts to outline the origins of those threads beginning with a student’s preparation for higher education, namely secondary education.

With the dawn of a new century and amid the societal and economic wounds left on the country post the Civil War, those with means fought to maintain some semblance of “normalcy” in a country that was undergoing tremendous transition. Soares notes:

…Boarding schools were built when America’s old-money families sought to consolidate themselves as a cohesive group in contrast to the nouveaux riches thrown up by post-Civil War industrialization.\(^3\)  

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\(^3\) Frederic Cople Jaher, *The Urban Establishment* (Chicago: University of Illinois Press, 1982), 60.
schools were part of a class wall separating old privilege from upstarts…. It was a time in American history when wealthy families were sufficiently affluent to reach beyond local boundaries to those similarly privileged elsewhere through a network of clubs, cultural institutions, schools and colleges. In the process, they gained a sense of themselves as a national upper class.4

Along with the links of academic networks created by the privileged to separate themselves from the others, the others consisting of both people of color and the poor, came a new interest in obtaining scientific evidence of the differences existing between the two groups. Charles Darwin’s survival-of-the-fittest theories influenced the birth of a new science proposed by Darwin’s cousin, Sir Francis Galton.5 Eugenics, as it was called, aimed to infuse selectivity into genetics in order to promote the positive evolution of particular ethnicities.6 Soares notes, “The socially unfit, congregated in “inferior” ethnic groups, were to be restricted and discouraged from reproduction, by sterilization if necessary, and the superior race, frequently referred to in America as the “Nordic race,” were to be given the laws and schools that would allow them to flourish.”7

In the United States, the eugenic message was well received by many members of the White Ango-Saxon Protestant (WASP) establishment. It harmonized with their sense of social and cultural superiority and fit so perfectly with anti-Black and anti-immigrant prejudice that prominent American scientist and politicians took up the cause with religious-like fervor.8


5 Ibid., 20.

6 Ibid.

7 Ibid., 21.

8 Ibid.
Eugenics used a spectrum of genetic intellect to illustrate the differences between the races with the Nordic race at the highest point, people of African descent at the lowest end just before orangutans, and with Mediterranean and Eastern Europeans somewhere in between. These classifications launched the development of tools to measure intelligence, first through craniometry or a science that correlated intelligence to the size of one’s head, to intelligence quotient (IQ) tests. The development of IQ tests, and sciences focused on predicting human intelligence based on genetic factors was used for exclusionary purposes. This led The College Board, an organization founded in 1900 focused on the transition from high school to college, to begin to search for a way to connect the popular IQ science with national college admissions examination, and thereby the Scholastic Aptitude Test (SAT) was born.

Soares notes, “The SAT was to be a tool of scientific social selection. It was logical that if intelligence was inheritable and tied to race, then a scholastic aptitude test for college admissions would work to select for Nordics and against all other ethnic groups.” Soares goes on to point out the ethnic group which caused the most amount of anxiety in the minds of this group of Nordics were Jewish college aged students. So serious was the “Jewish problem” that numerous schemes were designed by university

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9 Ibid., 21.
10 Ibid.
11 Ibid., 23.
12 Ibid., 24.
boards and administrators at the most elite schools like Yale and Columbia. Because Jewish students were believed to be inferior intellectually, IQ tests and the SAT were used in the hopes of keeping the “undesirable” students at bay. As more and more Jewish students scored well on the admission tests, administrators’ faith in the tests began to wane and admission boards had to develop new means for keeping the student body in these selective schools “pure”. As is frequently the case, those “wants” which seem the hardest to attain are all the more desired. As the decades passed, much to the dismay of the wealthy elite it became increasingly difficult to preserve the exclusivity of the higher education clubs with more of the public beginning to long for access to the most selective of institutions. Universities were faced with the dilemma of finding methods to determine intelligence and predict academic success that were better than the SAT in weeding out those they felt were unfit in order to maintain their perceived cultural superiority. Universities were also motivated to ensure students were financially able to continue paying the high-priced tuition which was the university’s primary source of revenue, at a time when the numbers of highly qualified applicants were at an all time high. In the mid 1950’s, Yale found eighty-five percent of their 4,500 applicants were qualified for admittance while Harvard reported ninety-five percent of their applicants were admissible. As admission became more competitive and as costs increased, the stakes of the race became higher. Attending a college or university was not enough.

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13 Ibid., 24.

Soon a school’s rankings along with their perceived cachè began to hold more significance than the degree attained. Institutions were vying for the title of being the best, most selective, and exclusive amongst the already restricted cluster. The landscape on elite university campuses was changing quickly, despite the best efforts of many desperate to uphold the institutions’ privileged and restrictive status. Let the race begin.
CHAPTER FOUR
TODAY’S RACE

Affirmative action in higher education admission rewards candidates who are far less qualified to attend highly selective schools with a seat that should have gone to someone whose qualifications met the university’s high standard. Affirmative action is tantamount to preferential treatment, which unfairly rewards those who have failed to meet a standard. Versions of this argument have long been an important complaint among Fair Players. On the surface, it may appear reasonable to suggest that, all things being equal, when a university sets a standard for admission, that standard should apply to everyone consistently. In addition, meritocrats and others hold tight to the notion that preferential treatment in admissions is inappropriate and should not be sanctioned by university, state or federal policy. The Fair Share short response to these claims is that in fact, all things are far from equal and moreover, preferential treatment has existed as a fully endorsed part of university admission practices since the beginning of higher education. Rather than rest one’s outrage about affirmative action on the concept of preferential treatment, it is critical to look deeper into how such a concept is used in higher education admissions. Preferential treatment for whom? Likewise, it is important to consider the concerns from Fair Players that students benefitting from affirmative action are 1.) gaining access to institutions in which they are unlikely to succeed given their inability to meet the standard admission criteria and 2.) “taking away” opportunities that, had it not been for affirmative action, would have otherwise been given to more qualified candidates.
As previously noted, Fair Sharers contend that after generations of deeply engrained prejudice, it is naive and possibly even cruel to suggest to an applicant who has endured discrimination that they are now welcome to compete alongside racers who have trained everyday towards this very race; as if the freedom to run makes up for years of the most brutal of oppression. Soares noted the origin of many of the country’s most prestigious colleges and universities as being rooted with the expressed purpose of creating a solitary path for the wealthy elite while going to great lengths to excluding the vast majority of applicants. Legacy policies, which afford extra consideration in the admission process for the relatives of alumni, are the oldest form of affirmative action says Shirley Wilcher, Executive Director of American Association of Affirmative Action.\footnote{Shirley J. Wilcher, telephone interview by Tara Duprey, Fredericksburg, VA April 10, 2009.} Institutions have since their inception, made legacies a significant consideration in admission decisions. There is without question a fiduciary component to pleasing a school’s alumni, alumni who often are significant income source for an institution, by affording their son or daughter “special consideration” for admission. However, these widely practiced policies are not the target of the impassioned attacks against preferential treatment similar to those hurled against affirmative action based on race and ethnicity. After the \textit{Gratz} and \textit{Grutter} cases, then President George W. Bush was quoted as saying “African-American students and some Hispanic students and Native American students receive twenty points out of a maximum of 150, not because of any academic achievement or life experience, but solely
because they are African American, Hispanic or Native American."² Some were quick to point to the irony in such a statement given that Bush was admitted into Yale with less than stellar high school grades and SAT scores. He was later admitted into Harvard after earning a C average at Yale, many agree a clear example of legacies at work, as both the son and grandson of alumni.³ Some went so far as to suggest Bush might be the greatest affirmative action success story ever told.⁴

After the 2003 Gratz and Grutter rulings, more attention was given to the extent to which relatives of alumni should be given an advantage in admissions and the degree to which such policies were used was reported in the news. According to a Wall Street Journal report, “Sons and daughters of graduates make up 10% to 15% of students at most Ivy League schools and enjoy sharply higher rates of acceptance.”⁵ At the time of the Grutter and Gratz decision, legacies were three to four times as likely to be admitted as the overall pool of applicants at some selective schools.⁶


³ Ibid.

⁴ Ibid.


⁶ Ibid.
Table 4.1 Percentage of Legacies Admitted to Selective Schools Compared with Overall Pool in 2003

<table>
<thead>
<tr>
<th>Institution</th>
<th>Percentage of Legacies Admitted</th>
<th>Percentage of Overall Pool Admitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harvard</td>
<td>40%</td>
<td>11%</td>
</tr>
<tr>
<td>Princeton</td>
<td>35%</td>
<td>11%</td>
</tr>
<tr>
<td>University of Pennsylvania</td>
<td>41%</td>
<td>21%</td>
</tr>
</tbody>
</table>


Soares notes the long history of legacies in the admission tradition at Yale. Due to the of claims of a double standard and with the marginally increased negative media attention received by admission legacy policies, some state institutions, such as Georgia and California which had barred racial considerations, have been forced to also end legacy policies in admissions. “A court ruling knocked out the University of Georgia’s racial preferences in 2001, and a voter initiative undid those in California in 1996.” In addition to legacy policies, special considerations made for athletes, non-alumni donors, individuals from particular regions of the country are all very real variables in the admission process and are rarely if ever condemned as cases of preferential treatment.

Policies which promote a holistic approach to admission deliberations seem to be some universities’ response to challenges to their admission practices. *The Shape of the River* details the results of a landmark study which looked at the concerns raised by Glazer and other Fair Players related to the effects of affirmative action and higher

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7 Ibid.
education admission. Authors William G. Bowen, former President of Princeton University and Derek Bok, former President of Harvard University and former Dean of Harvard Law School, are uniquely positioned to offer a level of insight not available in any other study before or since. Their research is widely respected by opponents and supporters of affirmative action and is the most comprehensive study of the effects of affirmative action in higher education. Related to how admissions committees should make first year undergraduate student selections, Bowen and Bok suggest four factors play a key role in the decision making process. First, they suggest giving due thought to students who demonstrate promise to excel in their academics, based not only the student’s past track record but also the academic strengths of the institution and the makeup of the student population. Second, they encourage admissions offices to seek to include a rich diversity of experiences, backgrounds and talents. Considering how students will use their educational experience at the particular university to influence and contribute to their professions and to society in general is a third suggestion. Finally, Bowen and Bok caution that doing away with the loyalties and traditions that legacy policies offer would be a mistake and encourage universities to give legacies some consideration in the admissions process.

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9 Ibid.

10 Ibid.

11 Ibid.
While Bowen and Bok suggest a holistic approach to higher education admissions policies, others suggest the solution to the controversy lies in class structure. Soares articulates the class dynamics in play through his description of the creation of prep schools, and elite universities. In *Tearing Down the Gates*, Peter Sacks contends admission into highly selective institutions is more a factor of unfair advantage based on class than is it an issue of intellectual ability, academic achievement or even race.

We often talk about American higher education being a meritocracy, and our society as one in which individuals succeed on the basis of hard work and talent. We are endlessly sunny about these matters to the point of foolishness, it would seem. Many Americans like to believe that once poor children enter the school system, the school system sanctioned and supported by the public, they are placed on an equal footing with all their peers and that their achievement in school will determine their future opportunities with the best and brightest winning the race. We want our schools, colleges and universities to be the great equalizers, to help to erase social and economic inequality, not institutions that facilitate the great sorting of Americans from the day they enter kindergarten. We prefer to ignore the reality that our schools and colleges in fact reproduce, reinforce, and legitimize inequality.\(^\text{12}\)

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Sacks echoes Soares and other Fair Share perspectives in outlining the outrageous disparity in access to the resources needed to contend in the race for higher education. Not only are the lack of resources in many of America’s public primary and secondary schools painfully apparent, access to tutoring, SAT prep courses, or even the benefit of the shared knowledge that comes from being a second or third generation college applicant are all advantages that poor children are not provided. In these ways, the wealthy are furnished with preferential treatment that, Fair Sharers contend, far outweighs any racial or ethnic quota.
Running in the Wrong Race

The other side of the preferential treatment argument suggests that due to affirmative action policies used by some institutions, students who are ill equipped to cope with the rigor of curriculum at highly selective schools doom these students for failure. This theory begs two questions. First, what evidence is considered when ascribing the title of “under qualified” to these particular applicants? Second, with several decades elapsing since the introduction of race-sensitive admission, what does the evidence from those who first were selected to participate in these programs suggest? Were they indeed doomed to failure as many Fair Players imply? To address the first question, it is important to revisit the data used in Bakke, Gratz and the other challenges made to university admission policies. One of the primary issues in these cases was the duel standards used to evaluate applicants with respect to SAT and GPA minimum requirements. These challenges placed a lot of significance in the validity of the standardized tests for predictor of academic success. Fair sharers contend this emphasis on tests has been terribly misdirected. What does the evidence show?

The achievement gap existing between the races is clear and significant even given the strides made by students of color to shrink it. The performance difference between the races is not in dispute. However, the validity of the SAT as a measure of future academic success has been in question since shortly after its introduction as admission instrument. As early as 1933, the test which was designed as an instrument of exclusion for elite universities such as Yale and Princeton, was deemed unreliable by those very universities, who then worked to develop an improved method for both
weeding out undesirables, and forecasting future achievement. Since that time, numerous universities have expressed concerns about the use of standardized tests as a predictor of academic potential. Soares notes that in 2001, the University of California analyzed the achievement of their first year students admitted between 1996 and 1999 and found the SAT I was inadequate as a predictor of college grades. The Educational Testing Service (ETS) was so frightened to lose their largest client in the University of California network of schools, that they agreed in 2005 to do away with the portion of the test that was found to be most contaminated. Replacing the verbal analogies section of the SAT with an essay section appeared like a painless solution. However, data soon surfaced to indicate that African American SAT test takers scored higher on some verbal analogy questions than did their white peers. Jay Rosner, vice president of the Princeton Review found in his research that question selection for the SAT includes a race bias.

This is not because of conscious racism, but because of the logic of question selection… If high-scoring test-takers- who are more likely to be white- tend to answer the question correctly in pre-testing, it’s a worthy SAT question; if not, it’s thrown out. Race/ethnicity are not considered explicitly, but racially disparate scores drive question selection, which in turn reproduces [racially] disparate scores in an internally reinforcing cycle.

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14 Ibid., 156.

15 Ibid.

Soares further notes the impact of and relationship between socioeconomic level and SAT performance citing The College Board’s findings, which indicate “For income groups ranging from less than $10,000 per year to $80,000 per year, each $10,000 increase in a family’s income is worth to its offspring approximately 24 points on the combined SAT.” With the evidence which suggests income effects SAT scores coupled with the numerous ways the validity of the SAT has been called into question since its inception, an argument against affirmative action based primarily on SAT scores as support seems weak at best.

Concerning the suggestion that students admitted into highly selective universities through race-sensitive programs were doomed to fail, The Shape of the River offers compelling evidence indicating these students not only rose to the occasion and were successful, but also were found to perform the best when admitted to elite schools when compared to less selective schools. Bok and Bowen do not refute the clear evidence of the gap in performance between many applicants of color and white and Asian applicants. Instead, they take a closer look at the data to analyze what lies beneath the layers of generalities that have led to the belief that those admitted through affirmative action policies are unqualified. Their research was based in large part on a database built by The Andrew W. Mellon Foundation from 1994-1997 referred to as College and Beyond (C & B). C & B contains data from more than 80,000 undergraduate students who attended a mix of twenty eight selective liberal arts colleges and research universities in

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18 William G. Bowen and Derek Bok, The Shape of the River, Preface lv.
the fall of 1951, 1976 and 1989. Bok and Bowen focus their attention for their SAT analysis on five institutions which included three private universities and two coed liberal arts colleges as a general representation of the C & B schools. Upon review of the SAT scores of the 1989 cohort, the researchers found while a disparity did exist between white and black applicants, it was clear the black applicants SAT scores were nevertheless highly qualified.

Of the black applicants, over ninety percent scored above the national average for all black test-takers on both the verbal and math SATs, considered separately. The large majority of these black applicants handily outscored not only the average black test-taker, but also the average white test-taker. More than seventy-five percent of the black applicants had higher math SAT scores than the national average for white test-takers, and seventy-three percent had higher verbal SAT scores.

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19 Ibid., Preface lvi.
20 Ibid., 17.
21 Ibid., 18.
22 Ibid., 18.
Regarding graduation rates, Bok and Bowen note the 1989 black matriculates’ rate was “high by any standard: seventy-five percent of these students graduated from the college they first entered within six years of matriculation.”\textsuperscript{23} They further estimate an additional four percent graduated after transferring to another college bringing the overall graduation rate to seventy-nine percent.\textsuperscript{24}

\textsuperscript{23} Ibid., 55.

\textsuperscript{24} Ibid., 56.
It appears the evidence would suggest a majority of students of color who attend selective colleges and universities as a result of race-sensitive admission programs go on to graduate at a rate close to their white and Asian peers. With respect to admission into medical school after graduation, the researchers found that “underrepresented minority students (black, Hispanic and Native American)” entering in 1988 graduated within six years at a rate of eighty-seven percent compared with ninety-three percent of their white peers. Bok and Bowen agree that while improvements are needed to increase the academic success of more students of color and close the gap between them and their

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25 Ibid., 57.
Asian and white peers, suggestions that these students are incapable of succeeding or are in some way unfit to attend highly selective schools are unfounded.

To the question of the long-term fate of the students admitted through race-sensitive affirmative action programs, critics do not simply point to the divide between SAT scores of the applicants. Offered as evidence of the policy’s failure, critics point to what they say are the significant number of “under qualified” applicants, who after being admitted to academic programs which are beyond their capabilities, fail to graduate and or reach any measure of professional success. Moreover, the claim is made that these beneficiaries become victims of ridicule and judgments due to the stigma that comes from their unearned privileges, resulting possibly in lifelong esteem challenges. Bok and Bowen specifically note Dinesh D’Souza’s 1991 book *Illiberal Education* in which he contends “American universities are quite willing to sacrifice the future happiness of many young blacks and Hispanics to achieve diversity, proportional representation, and what they consider to be multicultural progress….Would not these students be much better off… where they might settle in more easily [and] compete against evenly-matched peers?”26 Another such theory which has gained attention recently is that of UCLA professor Richard Sander. A general past supporter of racially-sensitive admission policies, Sander ponders the cost/benefit of such programs on black students admitted to law schools in his 2004 article in the Stanford Law Review. Sander identifies himself as someone who “favors race-conscious strategies in principle, if they can be pragmatically

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justified.” He goes on to note, “If the costs to minorities substantially exceed the benefits, then it seems obvious that existing preference programs should be substantially modified or abandoned.” Sander attempts to take an empirical analysis of the difference in success achieved by white law students compared to black students admitted through affirmative action programs. Sander claims:

A student who gains special admission to a more elite school on partly nonacademic grounds is likely to struggle more, whether that student is a beneficiary of a racial preference, an athlete, or a “legacy” admit. If the struggling leads to lower grades and less learning, then a variety of bad outcomes may result: higher attrition rates, lower pass rates on the bar, problems in the job market. The question is how large these effects are, and whether their consequences outweigh the benefits of greater prestige.

While Sander acknowledges the contribution of studies like Bok and Bowen in *The Shape of the River*, he contends the research does not go far enough to ask if the costs outweighed the benefits for these students admitted to elite schools. He focuses his attention on the GPA earned by white and black student groups, the pass/fail rates on the bar exam and later professional advancement. Sander claims black students admitted to law schools through affirmative action programs are among the worst performers in the class in which they are admitted, fail the bar exam at higher rates than their white peers,

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28 Ibid.

29 Ibid.
and generally achieve less professionally. Sander used data compiled by Law School Admission Council, the makers of the Law School Admission Test (LSAT), gathered as part of its Bar Passage Study (LSAC-BPS) between 1991-1997. In looking at the class grade distribution of a class of first-year students segmented into tenths, the LSAC-BPS results indicate black students comprised more than half of the lowest segments of the grade distribution.

Table 4.2 Distribution of First-Year GPAs at “Elite” Schools Spring 1992, By Race & Class

<table>
<thead>
<tr>
<th>Decile</th>
<th>Proportion of Students in Each Group Whose First-Year GPAs Place Them in Each Decile</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Black</td>
</tr>
<tr>
<td>1st (Lowest)</td>
<td>51.6%</td>
</tr>
<tr>
<td>2nd</td>
<td>19.8%</td>
</tr>
<tr>
<td>3rd</td>
<td>11.1%</td>
</tr>
<tr>
<td>4th</td>
<td>4.0%</td>
</tr>
<tr>
<td>5th</td>
<td>5.6%</td>
</tr>
<tr>
<td>6th</td>
<td>1.6%</td>
</tr>
<tr>
<td>7th</td>
<td>1.6%</td>
</tr>
<tr>
<td>8th</td>
<td>2.4%</td>
</tr>
<tr>
<td>9th</td>
<td>0.8%</td>
</tr>
<tr>
<td>10th (Highest)</td>
<td>1.6%</td>
</tr>
<tr>
<td>Students in Sample</td>
<td>126</td>
</tr>
</tbody>
</table>


Sander further speaks of the LSAC-BPS data indicating higher attrition rates amongst black students compared to white. While acknowledging that elite schools appear to have the lowest attrition, Sander suggests that the overall consistency for black students to

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31 Ibid., 414.

32 Ibid.
have higher attrition rates as indicated by the percentages in Table 4.3, illustrate the problem resulting from race-conscious admissions in law school.\(^\text{33}\)

Table 4.3 Proportion of Matriculating Students Not Graduating by Law School Group

<table>
<thead>
<tr>
<th>Law School Group</th>
<th>Proportion of Matriculants in Each Group Not Graduating from Law School Within Five Years</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Whites</td>
<td>Blacks</td>
</tr>
<tr>
<td>Group 1: Most Elite Schools</td>
<td>3.3%</td>
<td>4.7%</td>
</tr>
<tr>
<td>Group 2: Other “National” Schools</td>
<td>5.4%</td>
<td>12.1%</td>
</tr>
<tr>
<td>Group 3: Midrange Public Schools</td>
<td>8.6%</td>
<td>19.7%</td>
</tr>
<tr>
<td>Group 4: Midrange Private Schools</td>
<td>9.1%</td>
<td>22.5%</td>
</tr>
<tr>
<td>Group 5: Low-Range Private Schools</td>
<td>11.7%</td>
<td>34.0%</td>
</tr>
<tr>
<td>Group 6: Historically Minority Schools</td>
<td>8.2%</td>
<td>21.8%</td>
</tr>
<tr>
<td>Total for All Law Schools</td>
<td>8.2%</td>
<td>19.3%</td>
</tr>
</tbody>
</table>

\(^3\text{3}\) Ib\-d., 437.

Finally Sander offers support for his claim that pass and failure rates for the bar exam call into question the efficacy of race-sensitive admission programs for law schools. Sander notes:

As with attrition rates, the black-white gap in bar passage rates largely seems driven by two by-products of affirmative action. The first is… blacks having lower passage rates because of low GPAs, which in turn are a function of racial preferences. The second is a by-product of the cascade effect: with blacks consistently pulled up the prestige ladder by
preferences, low-tier schools must choose between having no blacks at all or admitting blacks with very low numbers. Most of these schools follow the latter course, with the result being that a large number of blacks enter law school with very low academic credentials.34

Table 4.4 Bar Passage Rates in the United States for Whites and Blacks, 1991-1996

<table>
<thead>
<tr>
<th>Index Range</th>
<th>Proportion of Bar-Takers Failing on the First Attempt (for the Entire United States)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Whites</td>
</tr>
<tr>
<td>400-460</td>
<td>52%</td>
</tr>
<tr>
<td>460-520</td>
<td>34%</td>
</tr>
<tr>
<td>520-580</td>
<td>26%</td>
</tr>
<tr>
<td>580-640</td>
<td>19%</td>
</tr>
<tr>
<td>640-700</td>
<td>13%</td>
</tr>
<tr>
<td>700-760</td>
<td>9%</td>
</tr>
<tr>
<td>760-820</td>
<td>5%</td>
</tr>
<tr>
<td>Bar-Takers in Sample</td>
<td>19,112</td>
</tr>
</tbody>
</table>


Sander concludes that the evidence suggests that affirmative action programs used in law school admission wrongly encourage many students of color, specifically black students, to attend schools at which they are not academically prepared to succeed. He further deduces that the mismatch occurs because had these students attended a less prestigious law school, they would have had an increased likelihood of success academically and professionally. Sander goes so far as to claim that his study makes clear that affirmative action is working against black law students to such an extent that should such programs be scaled back, the result would be nearly an eight percent increase

34 Ibid., 447.
Supporters of Sander’s work claim that affirmative action proponents criticize his work because they are afraid to face the truth about the policy’s ineffectiveness. The California State Bar Association’s refusal to provide Sander with the access to confidential Bar exam taker data to further his research is offered as evidence of Fair Sharers’ trepidation. They claim the State Bar Association is motivated to keep Sander’s findings under wraps because of the fear of what it could expose about the actual results of affirmative action. Critics of Sander’s interpretation of the LSAC-BPS data are quick to point to the fractional analysis and inappropriate use of “controls” which they suggest lead to flawed findings. A group of researchers brokedown Sander’s findings and found the because of his flawed methods, removal of affirmative action would could well result in a decline in African American attorneys by upwards of forty percent, rather than the eight percent increase Sander predicted. Harvard law school professor David Wilkins contents that Sander’s predictions of how many black students would maintain an interest in attending law school should affirmative action programs be


diminished are extremely optimistic. About Sander’s mismatch theory Wilkins further argues:

[Sander] misses almost entirely the importance of going to an elite school that goes beyond what one’s grades are. They meet people, they see opportunities, they imagine possibilities that they would not have known of had they been confined to the schools that they would go to under [Sander’s] proposal. The fact of the matter is that when we look at the students over time who have been hired by large law firms, they come overwhelmingly from the top schools. We all know that grades have a diminishing effect over time in what people’s opportunities are, whereas where one goes to school has an escalating effect in terms of those opportunities.

When pondering the question of costs and benefits for the beneficiaries of affirmative action, perhaps the most compelling aspect of *The River*, and the data demonstrably absent in the Sander study, are the individual accounts, reflections and survey results offered by the very subjects of the debate, the beneficiaries themselves. Sander, perhaps not unlike many researchers, frames his data in such a way to offer the most support for his mismatch theory, while ignoring the unmistakable truth it reveals. While he acknowledged that his own finding indicated the portion of black students who failed to graduate was lowest (4.7 percent) for those students admitted in the most elite law schools, he failed to acknowledge the truth associated with that statistic; 95.3 percent of the black students admitted to elite schools in his study graduated within five years. Considering Sander’s data on failure to pass the bar exam, while it is true that twenty-

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38 Ibid.
four percent of black students in the highest two index ranges failed the exam in comparison to fourteen percent of white students, it is also then true that seventy-six percent of black students within that cohort passed the bar the first time it was attempted. This kind of confirmation bias resurfaces in other attempts by Fair Players to dismiss the positive effects of affirmative action. While Sander’s data may confirm there is a difference in performance between white and black students, it does not support the conclusion that black students are unsuccessful in elite law schools. The question of why the disparity exists between the races is, however, a good one. Upon examination, one would undoubtedly find evidence supporting the theory of Fair Sharers, that those students performing at the highest levels irrespective of race have a disproportionate amount of access to the most resources to position themselves for academic success, which thereby provides them with an advantage. When not omitting race from the analysis, it is clear that the majority of those with access to the most resources are wealthy and white.

Sander also excludes from his analysis survey data from the beneficiaries of affirmative action to support his claim. In the *The River*, Bok and Bowen seek to interpret objectively the results of affirmative action programs in higher education by reviewing the survey data and allowing it to drive their conclusions. Through this examination, they determine that while not without challenges and disappointments, those surveyed were overall very positive about the opportunity afforded them through affirmative action policies. Bok and Bowen offer data on topics ranging from the amount satisfaction with the amount of time spent studying or participating in extracurricular
activities while a student, to the level of satisfaction with subsequent career and family
lives of C & B graduates. Across the board, they discovered black students were not only
overwhelmingly satisfied with their college experience, the satisfaction rates were very
close to the satisfaction results of white students in the survey.

Figure 4.4 Percentage of Graduates “Very Satisfied with College, by Class Rank and Race, 1989 Entering
Cohort

Source: Data adapted from William G. Bowen and Derek Bok, The Shape of the River (Princeton:
Princeton University Press, 1998), Figure 7.3.

Bok and Bowen wrote the River in an attempt to address the concerns of some that race-
conscious admission practices causes more harm than good. Through their research they
conclude:

This assertion withers in the light of the evidence. Far from being
stigmatized and harmed, minority students admitted to selective colleges
under race-sensitive polices have, overall, performed very well.
Moreover, the more selective the college they entered, the more likely
they were to graduate and earn advanced degrees, the happier they said
they were with their college experience, and the more successful they have
been in their careers (judged by their earnings). These important findings
hold for students at the lower end of the SAT distribution (among those
who matriculated at these schools) as well as for students at the higher end. In short, the findings reported in the River have essentially disposed of the “harm-the-beneficiary” line of argument.\(^{39}\)

**Running Blind**

The second Fair Play argument which Ryan addresses is the frequently cited notion that policies should be color-blind. In the *Bakke* decision, Supreme Court Judge Harry Blackmun noted we must “first take account of race” before attempting to employ color-blind standards. Fair Players took exception to such a suggestion when it was first offered, over thirty years later; they have grown increasingly impatient with the claim that individuals should be treated differently due to race. Certainly, observing the many strides made by women and people of color in the United States, it would appear the playing field has indeed been leveled according to Fair Players. The first ranking of American Human Development compiled by Sarah Burd-Sharps, Kristen Lewis and Eduardo Borges Martins suggests otherwise. Their research indicates discrimination based on race and gender is still a very real factor in America infecting issues ranging from education, employment, wealth, housing, crime, and health in profound ways.\(^{40}\) Ryan asks, “How does one enforce the principle of color-blindness without employing color consciousness?”\(^{41}\) What Ryan, Blackmun and other Fair Sharers are suggesting is the importance of acknowledging the differences in the treatment of and resources available to the races. Such a thought process in no way undermines the inherent value


of each race. Rather, it focuses attention on the goal of equality by acknowledging we are not yet all treated equally. An attempt by Fair Players to suggest that we are all beginning the race on the same starting line, with all the same basic resources such as working legs, running shoes, and opportunity to practice for example, simply because no one has been forbidden from the starting line is an indolent perspective. Marian Wright Edelman noted in her brief in support of the University of Washington School of Law during the Definis case “Color-blindness has come to represent the long-term goal. It is now well understood, however, that our society cannot be completely color-blind society in the long term.”42

Undoubtedly, significant progress has been made with regards to gender and race relations in the United States, on that Fair Players and Fair Sharers can agree. Where the divergence appears is in the right course of action in light of such advancement. Some Fair Players want to believe that individuals are consistently judged by the content of their character and not by what is perceived or presumed by their membership as part of a group, despite the overwhelming evidence of bigotry available to the contrary. Perhaps the more common Fair Play outlook is one that believes as long as we continue to acknowledge our differences, they will continue to matter. To this suggestion, Ryan and Fair Sharers respond, as long as there are differences, it does matter. This response does not suggest individual talents, aptitudes or individual effort should be disregarded. Nor does it suggest that every disparity should be accounted for in an endless and futile

42 Ibid., 35.
balancing act or mathematical formula. It instead asks that we acknowledge the impact of privilege on one’s chances of winning the race and work to create an environment where the gap between groups and the disparity in resources is not so vast. This requires that attention is paid to the intangible advantages that those with the most often take for granted, such as the impact of family history and the basic collective unconscious which occurs from generation after generation of privilege. Conversely, there exists a powerful psyche held by those who struggle to get to the starting line while observing those with the advantages miles ahead of them that is also passed down through the generations and has a tremendous effect on their view of the competition and themselves. More than a ticket to the race, a new pair of sneakers, and an hour to warm up doled out to each participant, these invisible advantages and disadvantages are viewed by Fair Sharers to be even more influential because they can easily be forgotten, or worse, deliberately ignored. About the realities of race in America and admission policies in higher education Bok and Bowen note:

Race is an important factor in its own right, given this nation’s history and evidence presented in many studies of the continuing effects of discrimination and prejudice. Wishing it were otherwise does not make it otherwise. It would seem to us to be ironic indeed- and wrong- if admissions officers were permitted to consider all other factors that help them identify individuals of high potential who have had to overcome obstacles, but were proscribed from looking at an applicant’s race.43

Equal Finish

Another problem Fair Player’s frequently raise about the Fair Share perspective is the notion that the goal of the paradigm is equality of results and equality of representation to an absurd degree. In the race illustration, Ryan jokingly describes the image as one in which all the racers cross the line simultaneously, holding hands and perhaps singing Kumbaya. This is however, a false depiction of what Fair Sharers propose. Nathan Glazer notes “the only remedy in effect that will ensure an even distribution of the races in the schools in large cities is school assignment on the basis of race and compulsory transportation of children to the schools to which they are assigned.”

Ryan counters by claiming:

…[No advocates of affirmative action] propose such a principle of representation, requiring that all institutions be more or less exactly “representative” of the total community form with they draw their membership. In this sense, “representation” as a principle is simply one more imaginary demon invented in the febrile imaginations of the antiegalitarians. It is an absurdity that no one has seriously proposed and that no one would undertake to justify.

This extreme view of the Fair Share perspective is effective at causing concern from the public. The misreading of this principle paints the Fair Share view as nonsensical and more than idealistic, potentially damaging, to society. It positions Fair Sharer’ goals of equal access at odds with individual achievement and personal triumph which is a complete mischaracterization of what the philosophy attempts to encourage. The goal of affirmative action according to Fair Sharers is to allow those who have been excluded

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from participation in the competition an opportunity to join the race. Its aim is to make up for the advantages enjoyed by those in a position of privilege and does not accept the suggestion that such glaring advantages or intense burdens are simply the luck of the draw or one’s lot in life. Certainly a society which desires to be the “land of opportunity” would do all it could to make sure the best prospects in life were not reserved for those with the most, leaving those not born into the same privilege at the base of what frequently appears to be an insurmountable hill.

The anxiety about the Fair Share theory of equality leading to individual accomplishments being diminished leads to another concern about affirmative action in higher education. It is the belief that such policies being born from an egalitarian perspective, negate merit which would lead to decreased drive. What is the motivation for working hard and pulling one up by one’s bootstraps if others whose effort may by some measure be “less” than yours, reap the same rewards? Bok and Bowen pondered the same question in their research and found overwhelmingly that this was not the case for the beneficiaries of affirmative action they studied. They note there is no evidence they can find that affirmative action programs lessen students’ incentives to strive to do well. In fact, as already noted, their research indicates just the opposite. The vast majority of beneficiaries go on to successfully graduate from undergraduate and many go on to pursue professional degrees. Since instituting affirmative action programs, the number of people of color in the highest paid professions has catapulted. Diminishing

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drive does not appear to be a byproduct of affirmative action programs in higher education.

The question of drive brings to light another important matter however. Asking how “merit” is rewarded begs the question, how is merit determined? How is one’s merit quantified? Is merit measured by the amount of effort expended? If effort is the measure, would not those least privileged in our society who manage, despite the most deplorable of conditions, to find themselves in a position to apply for college, be the winner of the merit race? Or is merit a factor determined by those with the “best” performance? If so, “best” compared to what or to whom? Earning a 1600 SAT is an outstanding feat without question. Does the achievement take on a different light if the test-taker has spent months drilling the questions with a hired tutor, or while attending an expensive prep course and taking practice tests? Probably not- the test taker earned through his or her own efforts and outstanding score, no one should or could take that away. What about a score of 1300 from a student without access to a single prep book, let alone prep classes, who works every day to help support his or her family and attends a school with few resources in a neighborhood with high crime? This student overcame significant odds and earned a strong score despite tremendous obstacles. Which score is more laudable?

Much of the discussion about merit focuses on SAT scores and grades. Bok and Bowen note:

Grades and test scores are a reflection not only of effort but of intelligence, which in turn derives from a number of factors, such as inherited ability, family circumstances, and early upbringing, that have
nothing to do with how many hours students have labored over their homework. Test scores may also be affected by the quality of teaching that applicants have received or even by knowing the best strategies for taking standardized tests, as coaching schools regularly remind students and their parents. For these reasons, it is quite likely that many applicants with good but not outstanding scores and B+ averages in high school will have worked more diligently than many other applicants with superior academic records.  

If the correct measure of merit is test scores and grades as Fair Player seem to suggest, then why utilize an admission board at all? Why not assign students to schools based on a composite score determined by some combination of their GPA and test scores? There would be no need to debate who is admitted because such decisions would be made objectively based on an indisputable formula. Clearly such a proposal would be outrageous. Admissions offices in colleges and universities are charged with determining the merit of a candidate beyond his or her grades and test scores. If considering the fact that a student plays the obo, loves to run marathons, or is one of ten children can all be considered as part of the student’s personal experience that would be brought to the university if admitted, how can a person’s race, which frequently has had significant impact in his or her experience, not be considered equally relevant?

An Undue Burden

The final issue raised by Fair Players and addressed by Ryan is the concern that affirmative action programs assign an unfair burden on individuals due to their affiliation as part of the group that is believed to be privileged. Nathan Glazer states, “Nothing is so

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47 Ibid., 277.
powerful in the modern world as the perception of unfairness.” He goes on to note, “The gravest political consequence [of affirmative action] is undoubtedly the increasing resentment and hostility between groups that is fueled by special benefits for some. The statistical basis for redress makes one great error: All “whites” are consigned to the same category, deserving of no special consideration.” If it was true that affirmative denied all “whites” from any sort of special consideration, it would be indeed a great injustice. The evidence clearly demonstrates however that this is not true. White women have long been considered to be the greatest beneficiary of affirmative action programs. Affirmative action programs are designed to support underrepresented populations, which within higher education has come to include, first generation college students and students with a low socio-economic status, again many of whom are white. These examples do not begin to address the preferential treatment afforded the wealthy, the vast majority of whom were white, discussed in earlier chapters. Statements like Glazer’s provoke strong emotions and present the Fair Share perspective as an all or nothing proposition. In truth, affirmative action programs are intended to be dynamic and inclusive and according to Fair Sharers, work to keep anyone from being marginalized.

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49 Ibid., 200.

CONCLUSION

Many Americans would agree that the country has come a long way from the days of slavery, segregation and overt discrimination. Most Americans would further contend the country has yet to reach a point where discrimination and bigotry no longer exists. This assertion, after the layers of rhetoric and misinformation are removed, suggests proactive mechanisms are necessary to account for the effects of institutionalized bias that exists in America’s educational system. Using William Ryan’s Fair Play and Fair Share theories of equality, it is clear that some Fair Players rely on oversimplified moral platforms to create a false choice between creating equal access and equal results. At the same time, exaggerations of the goals of Fair Share perspectives generate views of supporters of affirmative action in higher education admission as advocating for discrimination against white students. The use of affirmative action by selective colleges and universities is necessary because, as the evidence indicates, access to the resources necessary to ensure a basic level of educational achievement are disproportionately held by the wealthy elite, who are by and large white. Simultaneously, a significant portion of people of color in America are left without a modicum of access to the tools necessary to actively participate in the race for quality education.

Race-sensitive admission programs as part of a holistic approach to determining merit should be maintained. In addition, continued consideration should be made for college applicants with the least amount of access, the lowest SES applicants, irrespective of race, however these initiatives should not be seen as a replacement for race-sensitive admission policies. In a related issue, perhaps the most amount of effort towards the goal
of eliminating the need for affirmative action lies in the desperate state of public schools systems in America. The lack of resources and the absence of high quality education in the K-12 system must be addressed relentlessly and with vigor. The failure in the country’s school system is arguably our nation’s greatest shame. Those opposed to affirmative action, moreover, anyone claiming to care at all about equality, should demonstrate their commitment by making real efforts to providing equal access to quality schools for America’s youngest pupils.

In America, race, gender and class can each play a significant role in the doors that are opened for an individual. Taking account of one does not invalidate the impact of the others. Additional research is needed to provide a balanced examination of the real effects of affirmative action in admission policies as well as the impact to both beneficiaries and those who are not directly aided through such policies. Finally, honest discourse free of the political and social grandstanding that has played such a considerable role to date is required in order to bring America to a place where affirmative action will no longer be needed and to provide everyone with unfeigned access to run in the race.
BIBLIOGRAPHY


