Affirmative action in higher education: A legal analysis of the use of race as a factor in college admissions after Bakke

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AFFIRMATIVE ACTION IN HIGHER EDUCATION: A LEGAL
ANALYSIS OF THE USE OF RACE AS A FACTOR IN
COLLEGE ADMISSIONS AFTER BAKKE

by

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ABSTRACT

Affirmative Action in Higher Education: A Legal Analysis of the Use Of Race as a Factor in College Admissions After Bakke

by

N.J. Pettit

Dr. Gerald C. Kops, Examination Committee Chair
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The purpose of this dissertation was to examine the legal status of affirmative action in higher education admission policies with regard to the use of race as a factor. This study answered these three questions:

What is the current status of the Regents of the University of California v. Bakke decision as a basis for assessing higher education admission policies? What legal benchmarks have emerged since the Bakke decision which may impact the development of university admission policies? What policies may achieve diversity in higher education admissions without incurring legal risks by using race and ethnicity in the admissions policies?

The significance of this study was found in examining the law cases concerned with affirmative action using race as a factor in higher education admissions policies. This study attempted to make it easier for educators to understand affirmative action and
to be a resource guide with which higher education administrators may make informed decisions on the legal aspects of admissions policies.

This dissertation used an analytical, qualitative research design. As a legal/historical analysis, it included search, selection and criticism of the sources, presentation of the facts and generalizations, and use of inductive case law analysis. Law cases were examined for their usage of Bakke as a precedent as to whether the opinions in Bakke were followed or criticized.

The majority of the cases examined followed Bakke as a precedent. However, because of the legal risks taken when using race as a factor in college admissions, other avenues of promoting diversity in the student body were also explored.
ACKNOWLEDGEMENTS

I would like to express my sincere appreciation to Dr. Gerald Kops, the chair of my doctoral committee at the University of Las Vegas, Nevada for his guidance, support and the constant good humor he provided me in assisting with this dissertation. With his vast knowledge in both education and in law, his help was vital in accomplishing this project.

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CHAPTER I

INTRODUCTION

Many Americans are uncomfortable about the use of race as a factor in admitting students to selective colleges and professional schools (Bowen & Bok, 1998, p. xxiii). Feinberg (1996) asserted that many people believed that affirmative action is a violation of the constitutional right to equal protection. Controversy was provoked by the practice of giving spaces in competitive educational programs to ethnic students with academic records weaker than those of whites who were not admitted (Thernstrom & Thernstrom, 1997, p. 412).

Thernstrom & Thernstrom (1997) also pointed out that race became a qualification for admissions when affirmative action plans were adopted by universities. 'Affirmative action' in the selection of students initially meant greater outreach, making a bigger effort to seek out talent in places that the recruiters had never visited before... This was commendable, but the unfortunate fact was that, given the poor education most black students had received the most imaginative and intensive searches turned up very few diamonds in the rough. It soon became apparent that the most highly selective and competitive schools could not enroll a significant concentration of African-American students without admitting most of
them under a different and lower academic standard (Themstrom & Themstrom, 1997, p. 394).

The practice of affirmative action has been "hard to square" with a moral code of judging people on their own individual merits instead of using group characteristics, according to Themstrom & Themstrom (1997). Bowen & Bok (1998) pointed out that critics have attacked affirmative action on several grounds. Maintaining it is wrong for universities to exclude white applicants while accepting minority candidates with lower scores, it is also asserted that admissions officers sometimes accept minority applicants that are not as disadvantaged as some applicants that are rejected (Bowen & Bok, 1998, p. xxiii).

What Is Affirmative Action?

Past discrimination was one of the primary issues in the struggle to implement affirmative action (Simmons, 1982, p.31). Affirmative action, according to Simmons, was designed to serve a larger purpose than just breaking down the barriers and forcing compliance. If effective, affirmative action was designed to "go out of business" by making such actions unnecessary once minorities achieved their "rightful places in society" (p. 38).

According to Feinberg (1996), affirmative action began with Title VII of the Civil Rights Act of 1964, which prohibited discrimination on the basis of race and sex. O'Neill (1985) suggested that the conviction that a color-blind policy would overcome the effects of racial discrimination had "animated the civil rights movement at its beginning" (p. 54).
The Civil Rights Act was later augmented by a number of executive orders that regulated federal contracts and set goals and timetables for hiring minorities (Feinberg, 1996, pp. 363-364).

Simmons (1982) defined affirmative action as "a term describing a series of presidential executive orders, rules, and procedures, designed to protect minorities such as blacks, Puerto Ricans, Mexican-Americans, and American Indians from discrimination in employment, housing, and education (p. vii). He believed that affirmative action programs were the "vehicles" designed to expedite the concept of affirmative action.

Hirschman (1997) noted that the Civil Rights Act was the first "significant federal legislation to pass that directly addressed race issues in educational institutions where segregation had been deeply rooted" (p. 2). She pointed out that although some educational institutions were segregated by state laws, others were segregated primarily because of custom, tradition, and settlement patterns. "Many of the institutions did not recruit African-Americans or refused to admit them" (Hirschman, 1997, p. 2).

In response to the Civil Rights Act, some colleges and universities became proactive and voluntarily created affirmative action programs to "increase minority student participation through developing recruitment plans and setting numerical goals" (Hirschman, 1997, p. 3). Roark (1977) pointed out that following the civil rights movement of the 1960's, many professional schools created special admission programs to take into account the academic disadvantages resulting from past discrimination against minority groups (p. 3).

By the late sixties, O'Neill observed, it had become clear that racially neutral programs of nondiscrimination might be insufficient to overcome the "effects of prior and
continuing discrimination (1985, p. 55). Feinberg believed that university admissions was not an “immediate target” of affirmative action, but became one through litigation and administrative interpretation of existing laws. Hirschman (1997) asserted that affirmative action programs were initially race neutral and were primarily designed to eliminate the barriers that had prevented African-Americans from seeking higher education (p. 3).

Many affirmative action programs soon became no longer race neutral:

They had become race-preference programs that could be separated into two general categories: (1) minority-exclusive programs which required that a student belong to a specific minority category to qualify for participation and (2) minority-preferred or considered programs which gave a student extra attention if the student belonged to a minority category but did not exclude nonminorities (Hirschman, 1997, p. 3).

Ravenell (1978) pointed out that affirmative action could be generally defined as programs of preference for minority group members, above and beyond programs simply seeking to expand the pool of available applicants (p. 128). Sexton (1979) believed that affirmative action programs were necessary in higher education admissions. He stated:

An affirmative action component in an admissions program does not open the doors of our professional and graduate schools to unqualified applicants, but its absence would effectively close those doors to many minority applicants who are fully qualified, thereby perpetuating the effects of racial discrimination (p. 323). Feinberg recognized many different features of the actual exercise of affirmative action policy in higher education. He believed it ranged from the “relatively uncontroversial” concern to seek out women and minority candidates to apply for
employment to the more “controversial” programs that sought to select or hire minorities or women as a way to increase their numbers within the student body or faculty (1996, p. 364).

Affirmative action is a practice that profoundly affects education at all levels. It helps determine the racial and gender composition of faculties and it has an influence on the mixture of students in specific schools and on what these students are taught. It is an important factor in the determination of successful candidates to colleges and professional schools as a harassment-free workplace (Feinberg, 1996, p. 363).

Feinberg also pointed out that these efforts sometimes included separate performance standards for women and minorities or lowering admissions standards for the purpose of granting college admittance to applicants of color or women. Lipson (1996) defined the term affirmative action in this manner:

I use the term ‘affirmative action' to denote deliberate policies or strategies that are employed to enhance a diversity in a given sphere, by giving special consideration to members of specific populations, in determining the distribution of employment, education, political office, or other opportunities (p. 12).

Bowen & Bok (1998) asserted that almost all leading colleges and professional schools believed that they had “a role to play in educating minority students” (pp. 6-7). University officials often initiated active programs to recruit minority applicants and took race into account in the admissions process. They accepted qualified black students even if they had lower grades and test scores than most of white students.
Some universities even indicated that they were doing this out of a desire to rectify past injustices. However:

Most college and university leaders adopted these polices for two other reasons, both closely related to the traditional aims of their institutions. To begin with, they sought to enrich the education of all their students by including race as another element in assembling a diverse student body of varying talents, backgrounds, and perspectives. In addition, perceiving a widely recognized need for more members of minority groups in business, government, and the professions, they acted on the conviction that minority students would have a special opportunity to become leaders in all walks of life (Bowen, 1998, p. 7).

The purpose of affirmative action is to reduce discrimination and increase the number of minorities and women in relevant positions (Feinberg, 1996, p. 364). Affirmative action also seeks, according to Feinberg, to remove "impediments" caused by discrimination and to enable members of these groups to advance as they might have done otherwise (p. 364).

Peterson (1994) surmised that affirmative action refers to a set of policies under which many individual procedures fall. Affirmative action programs are "explicitly justified on the premise that they will repair past distributive injustice and equalize groups across race and gender" (p. 96). Feinberg (1996) stated that "the ultimate purpose of affirmative act is to reestablish the elements of fair competition that are embedded in the ideal of equality of opportunity" (p. 364).

Hirschman (1997) pointed out that although affirmative action programs were originally designed to increase minority student participation, the different types of
affirmative action programs presented legal issues. She observed that some college and university administrators recognized the continued legislative and judicial efforts to address racial issues and have "stepped up" their efforts to change institutional behavior and increase minority participation through different types of affirmative action programs (p. 7).

McClellan (1979) asserted that a more advanced affirmative action concept had evolved in higher education. It included voluntary preferential treatment for women and ethnic minority group members to overcome the effects of discrimination and racism, but significantly, this concept functioned without the necessity of proving past discriminations in a court room (p.15).

In the early 1970s, federal officials had incorporated reports on student enrollment into affirmative action plans which seemed to make race-conscious admission policies not only permissible but mandatory (Bowen & Bok, 1998). Bowen & Bok (1998) reported that some university administrators worried that race-sensitive admissions policies might run afoul of Title VI of the Civil Rights Act. This Act states that, "No person shall, on the grounds of race, color, or national origin,... be subjected to discrimination under any program or activity receiving Federal financial assistance" (Constitution of the United States).

Regents of the University of California v. Bakke

In 1978, the United States Supreme Court was asked to decide the case of Bakke, a white male, who was denied admissions to the Medical School of the University of California at Davis (Regents of University of California v. Bakke, 1978). The school had
two admissions policies, one for whites and one for minorities. Bakke was the first case to challenge the constitutionality of an affirmative action program (Altschiller, 1991, p.75).

Sexton (1979) observed that by the time the Bakke case had reached the United States Supreme Court, the controversy had “crystallized around two federal claims”.

The federal constitutional claim arose under the equal protection clause of the Fourteenth Amendment which states: ‘(N)or shall any State…deny to any person within its jurisdiction the equal protection of the laws.’ The statutory claim was based on section 601 of the Civil Rights Act of 1964, which provides: ‘No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance’ (p. 315).

Fields (1977) reported that black leaders said the “outcome of the Bakke case could be the most significant decision for the civil rights movement since the Supreme Court ordered school desegregation” (p. 3). In 1977, the Carnegie Council on the Policy Studies in Higher Education affirmed that both the “public and the educational interests can be served by race-conscious considerations in the admissions process”. The Council urged the Supreme Court, in the Bakke case, to allow universities to consider the racial background of qualified applicants in their admissions policies (Fields, 1977, p. 3).

Simmons (1982) spoke of the climate prior to the Bakke decision:

The climate, during the months before the decision was handed down, was one of chaotic debate, political maneuvering, and universal frustration (p.1)
Ravenell (1978) warned that an affirmance of Bakke would leave professional schools without a reasonable alternative method of maintaining minority enrollments at present levels for educational purposes (p. 170).

The Supreme Court reached a decision in Bakke on June 28, 1978. Bowen & Bok (1998) reported that the Court was "sharply divided". Four justices found that the system of racial quotas used by the medical school was discriminatory, and hence violated 'the plain language' of Title VI. Four justices upheld the admissions procedure as a necessary device to overcome the effects of past discrimination (p. 8).

The Bakke decision held that race can be a legitimate consideration in placement of students, although no quotas can be assigned (McClellan, 1979). Bowen & Bok (1998) stated that the deciding opinion was written by Justice Lewis Powell, who found that "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake" (Regents of University of California v. Bakke, 1978). He further condemned the use of rigid quotas in admitting minority students and found that "efforts to overcome societal discrimination" did not justify policies that disadvantaged particular individuals (Bowen & Bok, 1998, p. 8).

O’Neill (1985) observed that the question of affirmative action raised in Bakke divided Americans in unaccustomed ways. He thought that Bakke challenged conventional understandings of law, politics and equality (p. 20).

After Bakke

On the authority of Justice Powell’s opinion in Bakke, Bowen & Bok (1998) found that "virtually all selective colleges and professional schools continued to consider
race in admitting students" (p. 8). Especially in the latter half of the 1980’s, when the
economic circumstances of colleges and universities improved, Bown & Bok found a
"resurgence in recruitment" to enroll talented minority students (p. 9). However, there
was another problem.

At the same time, competition for places at the most selective colleges and
universities was intensifying; black students were now competing not only with
rising numbers of extremely well-qualified white candidates but also with much
larger numbers of well-prepared Asian Americans and Hispanics (Bowen & Bok,

Fisher (1979) believed that the opinions in Bakke would continue to give
institutions the discretionary power to construct and implement an admission policy
(p. 269).

The Bakke case presents the dilemma for the nation of how to make equal the
opportunities for all its people by helping to correct the racial injustice of the past
without discriminating against the rights of the individuals today (Fisher, 1979,
p.264).

The exact implications of Bakke were unclear and must be left for future legal
cases, stated Fisher (1979, p. 270). Tribe (1979) contended that the Court upheld the
kind of affirmative action plan used by most American universities and did not allow
only the unusually mechanical approaches, such as the one at Davis (p. 864). Furniss
(1979) believed that the Supreme Court’s decision supported and encouraged the efforts
of the most selective colleges and universities to increase the number of minority
professionals in American society (p. 137).
O’Neill (1985) stated that Bakke caused many to rethink the legitimacy of programs of “positive discrimination” which sought to aid and not hinder minority achievement, as well as policies calling for affirmative action and those championing equal opportunity (p. 4).

Bowen & Bok (1998) contended that for almost two decades, the Bakke case seemed to have settled the issue of affirmative action from a legal standpoint (p. 13). But despite the “widespread recognition of the value of diversity”, Bowen & Bok believed that large segments of the public continued to object to using race as a factor in the college admissions process.

Lawsuits have been filed in several states to challenge the race sensitive-admissions policies of public universities. Clearly the time is ripe for a careful accounting of how race-sensitive admissions policies have been applied during their thirty year history, and what their consequences have been (Bowen & Bok, 1998, p. 14).

Recent Developments

In November of 1996, fifty-four percent of the California voters supported Proposition 209 that forbade state and local agencies from granting preferences based on race or gender classifications in any government program (Hirschman, 1997). This proposition may require the revision of many of the affirmative action programs being used by California colleges and universities. The Ninth U.S. Circuit of Appeals then upheld Proposition 209 on April 8, 1997 which “opened the way for the state to
dismantle programs that favor women and minorities in state hiring and education” (Egelko, 1997).

The Fifth Circuit of the United States Court of Appeals determined in 1996 that the University of Texas School of Law admission program had discriminated in favor of minority applicants by giving substantial racial preferences in its admissions program. It also determined that this program violated the equal protection clause of the Fourteenth Amendment (Hopwood, et al. v. State of Texas, et al., 1996). The Court of Appeals found that considering race or ethnicity for the purpose of achieving a diverse student body is not a compelling interest. The Supreme Court denied certiorari on this case. (Hopwood, et al. v. State of Texas, et al., 1996).

Statement of the Problem

The legal precedent value of Regents of California v. Bakke appears unclear. Admission practices in higher education using race as a factor are still being challenged. Is the Bakke decision still the precedent to be followed by admission personnel? What legal decisions regarding affirmative action in higher education admission policies can be helpful today for college administrators?

Bowen & Bok (1998) pointed out that the Fifth Circuit decision in the case Howood v. Texas, the Court could have invalidated the law school’s admission policy on the ground that it did not meet the Bakke test. A majority of the judges, though, chose instead to declare that “Bakke no longer represented the view of the Supreme Court” (p. 14).
At about the same time, the Regents of the University of California issued a ruling of their own, announcing that the nine universities in the state system would no longer be permitted to take race into account in admitting students (Bowen & Bok, 1998, p. 14).

Hirschman (1997) saw a real problem facing colleges and universities concerning affirmative action:

In view of the challenges to the legality of affirmative action, an important issue facing many college and university administrators is how to recruit and admit qualified individuals in a nondiscriminatory way while maintaining an environment that supports genuine diversity on campus (p. 4).

Purpose of the Study

According to McMillan & Schumacher (1997), the purpose of a study of educational law is to become knowledgeable about 'what the law actually is' as it applies to education (p. 490). The purpose of this dissertation was to determine the legal status of affirmative action of admissions policies using race as a factor in higher education. This was achieved by analyzing legal decisions from Bakke and other legal cases that both followed and cited Bakke in their opinions.

Fisher (1997) stated that because of the significance of the Bakke decision for all institutions of American higher education, it was important that educators and educational policymakers understand the Supreme Court's decision (p. 264). According to Bowen & Bok (1998), by the year 2030, approximately 40 percent of all Americans are projected to be members of minority groups (pp. 11-12). Van Tyle (1996) asserted
that since the Bakke decision, experts have “puzzled over what schools could and could not do in the name of diversity” (p. 29).

Research Questions

1. What is the current status of the Regents of the University of California v. Bakke decision as a basis for assessing higher education admissions policies using race as a factor?

2. What legal benchmarks have emerged since the Bakke decision which impact on university admissions policy development?

3. What policies may achieve diversity in higher education admissions without incurring legal risks by using ethnicity and race in the admissions process?

Definition of Terms

For the purpose of this study, the following definitions were used:

Affirmative action programs: Positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discriminations. Factors to be considered are race, color, sex, creed and age (Black’s Law Dictionary, 1991, p. 38).

Amicus Curia: Friend of the court; a person with strong interest or views on the subject matter of an action, but not a party to the action, may petition the court to file a brief (Black’s Law Dictionary, 1991, p. 54).
Appellate Court: A court having jurisdiction of appeal and review of decisions of lower courts; a court to which causes are removable by appeal, certiorari, error or report (Black’s Law Dictionary, 1991, p. 64).

Bifurcation: The trial of the liability issue in a personal injury or wrongful death case separate from and prior to trial of the damages question (Black’s Law Dictionary, 1991, p. 112).


Cascading: A phenomenon known in the affirmative action world when students not accepted into a selective university enrolls instead at a less selective college (Traub, 1999, p. 46).

Certiorari: A writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities (Black’s Law Dictionary, 1991, p. 156).

Common Law: As distinguished from statutory law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from the usages and customs. In general, it is a body of law that develops and derives through judicial decisions (Black’s Law Dictionary, 1991, p. 189).
Cross-claim: A pleading may state as a cross-claim any claim by one party against a co-party arising out of the occurrence that is the subject matter either of the original action or of a counter claim therein or relating to any property that is the subject matter of the original action (Black's Law Dictionary, 1991, p. 262).

Declaratory judgment: Remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights (Black's Law Dictionary, 1991, p. 283).

Defendant: The person defending or denying; the party against whom relief or recovery is sought in an action or suit (Black's Law Dictionary, 1991, p. 290).

Dicta: Opinions of a judge which do not embody the resolution or determination of the specific case before the court (Black's Law Dictionary, 1991, p. 313).


Finding tools: A means to locate primary sources in researching legal history. These include citators, annotations, legal encyclopedias, and Lexis, a computer-based legal research system (Cohen & Olson, 1996, p. 5-6).

Harvard Plan: In choosing applicants that are not admissible just academically, but have other strong qualities, an admissions committee pays attention to distribution among many types and categories of students. Race or ethnic background can be deemed a plus, but does not insulate the individual from comparison with all other candidates for available seats. There are not set target quotas (Regents of University of California v. Bakke, 1978, 316-317).
Implied: This word is used in law in contrast to “express”; i.e. where the intention in regard to the subject matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties (Black’s Law Dictionary, 1991, p. 517).

Injunction: A court order prohibiting someone from doing some specific act or commanding someone to undo some wrong or injury (Black’s Law Dictionary, 1991, p. 540).

Mandamus: A writ issuing from a court of superior jurisdiction, commanding an inferior tribunal, board, corporation or person to perform a particular act or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived (Black’s Law Dictionary, 1991, p. 662).

Obiter Dictum: An observation or remark by a judge in pronouncing an opinion upon a case, concerning some rule, principle or application of law, that is not necessarily or essential to the case being discussed (Black’s Law Dictionary, 1991, p. 313).

Plaintiff: A person who brings an action; the party who complains or sues in a civil action and is so named on the record; a person who seeks remedial relief for an injury to rights (Black’s Law Dictionary, 1991, p. 796).

Precedent: An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law (Black’s Law Dictionary, 1991, p. 814).

Preferential admissions policies: Giving an advantage in competition for places in educational institutions to members of particular groups (Nickel, 1977, p. 324).
Primary sources of law: Recorded rules which will be enforced by the state. These can be found in constitutions, decisions of appellate courts, statutes passed by legislatures, executive decrees, and in regulations and rulings of administrative agencies. (Cohen & Olson, 1996, p. 3).

Private rights: Those rights which appertain to a particular individual or individuals, and relate either to the person, or to personal or real property (Black's Law Dictionary, 1991, p. 920).

Pro se action: Appearing for oneself, as in the case of a person who does not retain a lawyer and appears for himself in court (Black's Law Dictionary, 1991, p. 849).

Protected class: Under Title VII of the Civil Rights Act of 1964, one of the groups the law sought to protect, including groups based on race, sex, national origin, and religion (Black's Law Dictionary, 1991, p. 850).

Remand: The act of an appellate court when it sends a case back to the trial court and orders the trial court to conduct limited new hearings or an entirely new trial, or to take some other further action (Black's Law Dictionary, 1991, p. 896).

Right of action: The right to bring suit; a legal right to maintain an action, growing out of a given transaction or state of facts and based thereon. Such rights pertain to remedy and relief through judicial procedure. Right of injured one to secure redress for violation of his rights (Black's Law Dictionary, 1991, p. 920).

Secondary materials: Works which are not primary authority, but which discuss and analyze legal doctrine. These include law reviews, treatises, restatements and practice manuals. Used to help analyze a problem and provide references to both primary sources and other secondary materials (Cohen & Olson, 1996, p. 6).
Sotto voce: In a low, soft voice so as not to be overheard (Random House Webster’s College Dictionary, 1992, p. 1278).

Standing to sue doctrine: That the party has sufficient stake in an otherwise judicial controversy to obtain judicial resolution of that controversy (Black’s Law Dictionary, 1991, p. 978).

Stare Decisis: When a court has applied a set of rules to a set of facts, that legal rule will apply whenever the same set of facts is again presented to the court (Wren & Wren, 1983, p. 80).

Statute: A formal written enactment of a legislative body, whether federal, state, city, or county (Black’s Law Dictionary, 1991, p. 981).

Strict scrutiny test: Under this test for determining if there has been a denial of equal protection, burden is on the government to establish necessity of the statutory classification. Measure which is found to affect adversely a fundamental right will be subject to “strict scrutiny” test which requires state to establish that it has compelling interest in justifying the law and that distinctions created by law are necessary to further some governmental purpose (Black’s Law Dictionary, 1991, p. 992)

Summary judgement: Procedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to material fact or inferences to be drawn from undisputed facts, or if only question of law is involved (Black’s Law Dictionary, 1991, p. 1001).

Suspect classifications: A court will employ the “strict scrutiny” standard under the Equal Protection Clause in determining the legitimacy of classifications that are based on a trait which itself seems to contravene established constitutional principles so that
any purposeful use of the classification may be deemed “suspect”. Examples include race, sex, national origin and alienage (Black's Law Dictionary, 1991, p. 1009).

Title VI of the Civil Rights Act of 1964: Provided affirmative action remedies such as preferential hiring and quotas for those who were victimized by discrimination (McClellan, 1991, p. 15).

Research Design

The research design for this legal/historical analysis will included search, selection and criticism of sources, presentation of facts and generalizations, and inductive case law analysis (McMillan & Schumacher, 1997). As an analytical, qualitative research design, this study reviewed pertinent law decisions including the Bakke decision in 1978 and the Hopwood decision in 1996. Sources used included case law, law reviews, newspaper articles, books, LEXIS-NEXIS, law digests, court cases, and ERIC reports (Wren & Wren, 1983).

Significance of Study

Bowen & Bok (1998) pointed out in their book that colleges and universities are torn in their admissions policies regarding affirmative action. Many Americans are uncomfortable about the use of race as a factor in admitting students to selective colleges and professional schools (Bowen & Bok, 1998, p. xxiii). This study examined the law cases concerned with affirmative action in higher education admissions policies and attempted to make it easier for educators to understand affirmative action. Since
preferential admissions has been and remains a deeply divisive issue in American society (McClellan, 1979), this study will be a resource for admissions policy development.

According to Cohen & Olson (1996), legal research is the process of finding the laws that govern most of our life activities and the materials which explain or analyze these laws. Research is essential to determine both the impact of past actions and the implications of contemplated actions (p. 1). Research will both explain past legal actions and assist in future planning. This study should also provide higher education administrators with a resource guide with which they may make informed decisions on the legal aspects of admissions policies.

Limitations of Study

Because this study will be concerned with legal decisions over a period of approximately twenty years, the reasoning behind these law cases may change as society changes and no effort will be expended to examine the societal influences in these cases. Also, affirmative action is not only a legal issue, but an emotional one as well. Care was taken to examine both sides of the issue, with both sides being represented and cited in the study. However, these issues were cited to provide a basis for analysis only (McClellan, 1979).

This dissertation examined only the legal cases concerned with affirmative action in higher education admissions. Legal decisions regarding scholarships and financial aid were not included. These legal areas encompass enough material to require dedicated research to those topics alone. Also, the legal cases chosen were shepardized on NEXIS-LEXIS and were limited to those included in that computer research bank.
In addition, this study may be limited by being essentially descriptive and analytical rather than statistical (Davis, 1978). Another limitation may be the writer of this dissertation. According to Borg & Gall (1989), a threat to external validity in a qualitative study is the experimenter effect. This is the degree to which the biases or the expectations of the observer have led to distortions of the data (p. 404).

Summary

This chapter begins with an introduction to the legal implications of the use of race as a factor in admitting students to selective colleges and professional schools. The definition of affirmative action, explored in the works of several scholars and the precedent of the Regents of University of California v. Bakke, was introduced in Chapter One. Also included was a brief review by several legal analysts concerning the importance of the Bakke case as well as a short description of recent legal challenges to affirmative action.

The purpose of this study was to determine the legal status of affirmative action of admissions policies in higher education using race as a factor. This dissertation analyzed the legal decisions of Bakke, Hopwood and other chosen cases that cite Bakke in their opinions to achieve this purpose.

There were several questions considered during the research of this dissertation. What is the current status of the Regents of University of California v. Bakke as a legal basis for assessing higher education admissions policies? What legal benchmarks have emerged since the Bakke decision which impact on university admissions policy
development? What policies may achieve diversity in higher education admissions without incurring legal risks by using ethnic and gender in the admissions process?

An analytical, qualitative research design was used in this legal/historical study. This included search, selection and criticism of sources; the presentations of facts and generalizations; and inductive case law analysis. Pertinent law decisions were reviewed, using law reviews, case law, newspaper articles, law digests and court cases.

The significance of this dissertation was in its analysis of law cases concerned with affirmative action in higher education policies and in the attempt to make it easier for educators to understand the legal implications of affirmative action. This study also will provide a resource for admissions policy development.

A limitation of this dissertation may be the length of the time period to be examined. Legal decisions over a period of twenty years may change as society changes. Also, affirmative action can be both a legal and an emotional issue. Only the legal issue was explored. This study may also be limited by being essentially descriptive and analytical rather than statistical. The writer can also be a limitation as a threat to external validity based on the personal biases and expectations which may lead to the distortion of the data.

Definitions of legal terms used in this study are included in Chapter One to assist the reader in understanding the legal analysis of case law.

The review of literature, in Chapter Two, provided a historical view of the Bakke case. This included the decision and the legal implications as discussed by legal scholars. Chapter Two also addressed the friends-of-the-court briefs filed in the Bakke case and
some of the affirmative action history prior to Bakke, including the DeFunis v. Oddegaard decision.

Chapter Three described the components of legal research, including precedent of case law. This dissertation is a qualitative study, accessing legal documents and the discussion by the legal community both before and after the court decisions.

Chapter Four reviewed judicial precedents and scholarly analysis after Bakke that pertain to affirmative action in higher education admission policies. The current status of Bakke as a legal precedent was explored and assessed, as well as the legal doctrines used to determine if an affirmative action program is within the legal guidelines. Other methods to assist in diversity in higher education, in addition to affirmative action, were examined.

Chapter Five presents conclusions and recommendations that emerge from the legal analysis. These include suggestions for those in higher education responsible for developing admissions policies. Recommendations for further research are also presented.
CHAPTER II

REVIEW OF LITERATURE

This review of literature included a legal analysis of the Regents of the University of California v. Bakke decision, decided by the Supreme Court on June 28, 1978.

According to McClellan (1979), Bakke marked the first instance in which the Supreme Court actually faced the issue of affirmative action in university programs head on. The Bakke case has been news since its inception in 1974 and makes it worthwhile to review the facts in the case very early in this dissertation.

O’Neill (1985) found the Bakke case to be “one of the most celebrated court cases of the seventies” (p.6).

Hailed by the media as a case equal in importance to Brown v. Board of Education, Bakke provoked a national debate over the legal, social, and ethical justifications for preferential treatment of racially disadvantaged groups. It posed in concrete form a vital issue: What type of equality ought the nation pursue, and in what manner? (O’Neill, 1985, p. 6).

McClellan (1979) believed that the Bakke case provided a background analysis of the nature of the problem raised by affirmative action programs generally (p. 5). Davis (1978) stated that the Bakke case, although technically only concerned with the University of California at Davis special admissions program, also raised questions
about a whole range of education, employment, and other preferential treatment programs that sought to minimize and eventually end the inequality of opportunity suffered by ethnic minorities (p. 6).

Historical Background of Affirmative Action

The Civil Rights Act of 1964, which barred racial discrimination in public accommodations, discriminatory practices of most businesses and in any program or activity receiving federal assistance, was meant to provide minorities the “strongest boost to ...rights since Reconstruction (Gimlin & Stencel, 1978, p. 11). According to Themstrom & Themstrom (1998), the statute has now become “such a fixed part of the American legislative landscape, it is hard to remember how radical a break with the past it represented” (p. 150).

After the Act was passed, it “became apparent that the processes of discrimination were much more subtle and complex than originally envisioned” (Gimlin & Stencel, 1978, p. 159). With the realization that college admissions tests, as well as other admission policies, could perpetuate the effects of past discrimination, an affirmative action approach was developed to allow preferential admission policies for some students (Gimlin & Stencel, 1978, p. 159).

Sexton (1979) called Title VI of the Civil Rights Act “part of the sweeping package of remedial measures passed by Congress in 1964 to eliminate racial discrimination” (p. 316). But he pointed out that, similar to the Equal Protection Clause, the precise nature of the discrimination prohibited was not made clear. “Varying
interpretations of the legislative history of the act produced different understandings of Title VI” (p. 316).

Theoretically, Congress could have legislated a more sweeping restriction on the use of racial classifications than that contained in the Fourteenth Amendment; in other words, it could have mandated color blindness even if the equal protection clause permitted the benign use of racial criteria (Sexton, 1979, p. 316).

Gimlin and Stencil (1978) also note that the fair-employment section of the Civil Rights Act of 1964 did not originally cover educational institutions, but the oversight was corrected with the Equal Employment Act of 1972 (p. 161). With this Act, colleges and universities were pressured to increase the number of minorities and women accepted as students, especially in graduate and professional schools (Gimlin & Stencil, 1978). Many schools adopted preferential admissions policies favoring these groups (Gimlin & Stencil, 1978).

Simmons (1982) noted that affirmative action began as a series of executive orders to implement equal opportunity for blacks. Executive orders issued by presidents in the 1950’s and 1960’s “established the concept of antidiscrimination measures to guarantee fair treatment of blacks by government contractors” (p. 37). Higher education administrators used the notion of voluntary preferential treatment for minorities and women to fight discrimination (Simmons, 1982).

Executive orders issued by Presidents Roosevelt, Kennedy, and Johnson were designed to protect minorities from further discrimination and more importantly, to ameliorate the effects of past discrimination. These orders had to
be strengthened when they met with resistance and noncompliance (Simmons, 1982, p. 37).

Few issues have been as divisive as have these preferential admissions policies or affirmative action policies, especially when numerical goals are used to increase minority group opportunities in admissions to college and professional schools (Daly, 1985). Bolick (1988) believed that “racial preferences tacitly validated the racist notion that equal opportunity was not sufficient for black progress” (p. 63).

Proportional representation in higher education utilized legal constraints to equate underrepresentation with discrimination (Bolick, 1988, p. 63). Themstrom & Themstrom (1997) found that as the civil rights movement reached a climax and the issue of race moved to center stage in the 1960’s, black college enrollments “took off like a rocket” (p. 390).

With the Supreme Court’s rulings on Bakke (1978), the decision of the Fifth Circuit Court in the Hopwood case (1996), and the passing of California’s Proposition 209 (1996), the need for affirmative action in higher education was being questioned (de Uriarte, 1997). The issue of “reverse discrimination”, in which a person who is not a minority race may be disadvantaged by preference given by official action to others on the basis of race, had become an issue of controversy (De Funis v. Odegaard, 1974). Washington (1997) observed that the “incessant assault on affirmative action served to perpetuate the exclusionary practices that made affirmative action practices necessary in the first place” (p. 17B).

The Equal Protection Clause of the Fourteenth Amendment was the constitutional provision most relevant to the issue of reverse discrimination (Rossum, 1980). O’Neill
(1985) stressed that the commitment to the ideal of individual equality was not given constitutional status until the adoption of the Fourteenth Amendment’s “equal protection clause” (p. 50).

The Fourteenth Amendment stated that “no state shall deny to any person within its jurisdiction the equal protection of the law” (Constitution of the United States, Fourteenth Amendment). In Brown v. Board of Education (1954), the Supreme Court held that public education must be equally available to all, no matter what the race (Rossum, 1980, p. 4).

DeFunis v. Odegard

An earlier higher education affirmative action admission case reached the Supreme Court prior to Bakke. McClellan (1979) believed that DeFunis v. Odegard was “probably the most famous case involving reverse discrimination except for the Bakke case (p. 64). In DeFunis v. Odegaard, the plaintiff claimed that the admissions process at the law school at the University of Washington violated his Fourteenth Amendment rights. Marco De Funis claimed that nonwhite applicants that scored lower than white applicants on the law school admissions test were admitted while white students needed a higher score to get admitted (DeFunis v. Odegaard, 1974).

DeFunis asked in his suit that the school’s admission policies be declared to be racially discriminatory and that he be admitted to the school. He was admitted to the law school by court order and was in his final quarter while his case was pending (DeFunis v. Odegaard, 1974).
McClellan (1979) noted that the University of Washington did not challenge the allegation and indeed, admitted that it had employed a racial classification for admission purposes. However, the university defended this practice as a means of compensating for previous racial inequities.

The law school contended that racial classification for admission purposes was not unconstitutional, but was in fact, representative of the kind of affirmative action which the Supreme Court required. There was considerable evidence in support of such a contention at the time the DeFunis case arose (McClellan, 1979, p. 65).

The Supreme Court did accept the DeFunis case and heard it argued. But, in a 5-4 decision, the Supreme Court ruled that the case was moot:

But mootness in the present case depends not at all upon a ‘voluntary cessation’ of the admissions practices that were the subject of this litigation. It depends, instead, upon the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled (DeFunis v. Odegaard, 1974, p. 319).

However, in a dissenting opinion, Justice Douglas declared that any system based on racial classification must be subjected to close scrutiny under the Equal Protection Clause (DeFunis v. Odegaard, 1974, p. 342). Justice Douglas, stated Ravenell (1978), was the only justice to “reach the merits” of the case (p. 133). Justice Douglas wrote:

The Equal Protection Clause commands the elimination of racial barriers,
not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington Law School cannot be to produce Black lawyers for Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans and not to place First Amendment barriers against anyone (DeFunis v. Odegaard, 1974, p. 342).

Justice Brennan also dissented with the court’s decision, with Justices Douglas, White and Marshall concurring in the dissent:

Moreover, in endeavoring to dispose of this case as moot, the Court clearly diserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six amicus curie briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts, and ultimately again to this Court (DeFunis v. Odegaard, 1974, p. 351).

The case was declared moot because DeFunis had already been admitted to the University of Law School and was already registered for his final quarter at the time the decision in the DeFunis case was handed down (DeFunis v. Odegaard, 1974). McClellan (1979) stated:

A fact of importance in the DeFunis case is that the Constitution of the United States requires that the courts are obligated to decide all controversies which are actively involved in live issues. This duty is imposed on the courts by Article III
of the Constitution. In ruling on the DeFunis case, the Supreme Court stated that an actual controversy must exist at the time of review as well as the time the legal action begins (p. 67).

McClellan (1979) noted that the rationale followed by the Court in the DeFunis case was that because DeFunis' opportunity to complete law school was assured, there was no actual controversy at the time the case was reviewed by the Court (pp. 67-68). To refuse to face this issue again in Bakke's case would have left the Supreme Court open to charges of shirking its' responsibility (McClellan, 1979, p. 69).

Historic Background of the Bakke Case

In 1968, the medical school at the University of California at Davis registered a total of fifty students, with none of these being black, Hispanic or American Indian (Eastland & Bennett, 1979). Even though the faculty did not consider itself or the admissions process to be biased against minorities, the low percentage of these individuals in classes gave them reason to implement an affirmative action plan (Eastland & Bennett, 1979, p. 3). This plan was instituted in 1969 and specified a special admissions program where minority applicants would be considered separately from other applicants.

According to Eastland & Bennett (1979), this plan allowed different, and in effect, lower academic standards for minority applicants. O'Neill (1985) pointed out that the Davis faculty "was no doubt responding to the same civil rights activity that led to the formation of similar programs at one hundred other medical schools throughout the nation" (p. 26).
Eastland & Bennett asserted that Davis did this voluntarily, without
government "coercion or suasion" (p. 3). The intent was to compensate the victims of
unjust societal discrimination (O'Neill, 1985, p. 26). This affirmative action plan did
increase the number of minority students admitted to Davis (Eastland & Bennett, 1979).

Allan Bakke applied to Davis in the fall of 1972 and although he had achieved an
excellent grade point average as an undergraduate and scored distinguished marks on the
Medical College Admissions Test, he was not accepted (Eastland & Bennett, 1979).
Bakke learned of the special admissions program and believed himself to be a victim of
reverse discrimination (Eastland & Bennett, 1979).

Bakke challenged this legality of admission policies under Title VI of the Civil
Rights Act and this case reached the Supreme Court in 1978 in the Regents of University
of California v. Bakke case (Bowen & Bok, 1998). Bakke, a white student, claimed he
had been wrongfully excluded from the Medical School of the University of California,
Davis to make room for minority applicants with inferior academic records (Regents of

The Davis faculty had devised two admission programs for the hundred students
admitted for each class. One was the regular admission procedure and the other was a
special admission program. The regular admissions program required candidates to have
a grade point average above 2.5 on a 4.0 scale.

Following this criteria, the procedure then required an interview process which
was rated by a committee, a high science course grade point, passing Medical College
Admission Test scores, letters of recommendation, extracurricular activities and other
biographical data, all totaled for a benchmark score. Eighty-four of the one hundred
positions were evaluated by the regular admission policy and students were made offers of application based on this evaluation (Regents of University of California v. Bakke, 1978, pp. 2735-2736).

A separate committee, mostly comprised of members from ethnic minority groups, evaluated applicants for the special admissions group. Special candidates did not have to meet the 2.5 grade point average and were not ranked with the applicants of the regular admissions group.

Instead, candidates using the 1973 and 1974 application forms were asked if they wished to be considered as economically and / or educationally disadvantaged and also as members of a “minority group” which included Blacks, Chicanos, Asians and American Indian (Regents of the University of California v. Bakke, 1978, p.2736).

The special admissions committee interviewed candidates from this pool and gave the applicants a benchmark score. The top choices were referred to the regular admissions committee, which had the authority to reject special candidates for failure to meet course requirements or for any other specific deficiency.

The special committee would continue to recommend applicants to the regular committee until sixteen applicants had been selected. Sixty-three ethnic minority students were admitted to Davis under the special admissions program and forty-four under the regular program within a four-year period. Although many disadvantaged whites applied under the special admissions program, none were admitted. (Regents of University of California v. Bakke, 1978, p.2736).

Bakke had applied to Davis in 1973 and 1974 and was considered only under the regular admissions policy. In 1973, Bakke was rejected because he had a score of 468 out
of a possible 500 and no regular applicant was accepted that year with a score lower than 470. Four special admissions positions remained unfilled.

Bakke applied early for the 1974 admissions process and was rejected again with a score of 549 out of a possible 600. Bakke’s name was not placed on the special admissions applicant list for either year and in both years, applicants with significantly lower scores than his were accepted (Regents of University of California v. Bakke, 1978, p.2736).

Superior Court of California Decision

After this second rejection, Bakke filed action in the Superior Court of California for mandatory, injunctive, and declaratory relief in order to compel his admission to Davis. He alleged that the special admissions program operated to “exclude him on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and Section 601 of Title VI of the Civil Rights Act of 1964” (Regents of University of California v. Bakke, 1978, p 2742).

Davis cross-claimed for the declaration that the Davis special admissions program was lawful (Regents of University of California v. Bakke, 1978, p 2742). The fundamental issue raised in the Bakke case was how, if at all, race should be relevant to admissions decision (McClellan, 1979).

Because the special program rated ethnic minority applicants only against one another and sixteen places in the class of one hundred were reserved for them, the trial court held that the special program operated as a racial quota. The program was found to violate the Federal and State Constitutions and Title VI because race was taken into
account in making the admission decisions. (Regents of University of California v. Bakke, 1978, p. 2742). However, Bakke’s admission was not ordered by the court because there was no proof he would have been admitted even if the special program had not been in place.

Bakke’s suit in this lower court had attracted little attention (O’Neill, 1985). But, O’Neill observed, “the lower court’s declaratory judgement against the Davis program and the California Supreme Court’s decision to hear the appeal established the credibility of Bakke’s challenge” (p. 40).

California Supreme Court Decision

Both Bakke and Davis appealed this decision to the California Supreme Court. Bakke appealed the decision denying him admission. Davis appealed the decision that its special admission program was unlawful and the order keeping it from considering race in the processing of applications in the future (Regents of University of California v. Bakke, 1978, p. 2742).

O’Neill (1985) contended that when the California Supreme Court accepted Bakke’s challenge of the Davis program, the justices “recognized the ramifications of the suit”:

As one of the most respected state supreme courts in the nation and one routinely at the forefront of judicial innovation, the California court knew that the nation would look to it to establish a persuasive and acceptable policy on the question of preference programs (O’Neill, 1985, p. 41).
Applying a strict-scrutiny standard, the Supreme Court of California found that the special admissions program at Davis was not the “least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients” (Regents of University of California v. Bakke, 1978, p. 2742).

The Supreme Court of California held that Davis’ special admissions program violated the Equal Protection Clause, but did not address the state or federal statutory grounds. Since Bakke established that the university had discriminated against him because of his race, the burden of proof shifted to the University (Regents of the University of California v. Bakke, 1978, p. 2743).

The University had to demonstrate that, absent the special admissions program, Bakke would not have been admitted. The Court then initially ordered a remand to determine if Bakke would have been admitted to either the 1973 or 1974 entering class in absence of the special admissions policy (Regents of the University of California v. Bakke, 1978, p. 2743).

However, in its petition for rehearing, the University conceded its inability to carry that burden of proof. The Supreme Court of California then amended its opinion to direct the trial court to enter judgement ordering Bakke’s admission to Davis’ Medical School (Regents of the University of California v. Bakke, 1978, p. 2743).

The school then sought certiorari from the United States Supreme Court (Regents of the University of California v. Bakke, 1978, p. 2733).
Amicus Curiae Briefs

An amicus brief, as described by O’Neill (1985), is a legal document enlisted in “support of a legal argument within the legal process and is a policy statement intended for the courtroom (p. 7). O’Neill (1985) stated in his book, Bakke & the Politics of Equality, that the “Bakke case attracted one of the largest set of amici curiae in the history of the Supreme Court” (p. 3).

O’Neill (1985) insisted that if the trial verdict had alerted the attentive legal community to Bakke’s importance, “the announcement of the California Supreme Court’s decision brought the case to serious national attention” (p. 46). Never, according to O’Neill, had a state’s Supreme Court voided a university affirmative action program. “The declaration that quota-based affirmative action was unconstitutional was especially shocking coming from one of the most prestigious state supreme courts and from the most populous state” (O’Neill, 1985, p. 46).

Amici Influence on U.S. Supreme Court

Several amici had suggested to the United States Supreme Court that Bakke lacked standing in the suit, even though the University had not objected to his standing (Regents of the University of California v. Bakke, 1978, p. 2733). The United States Supreme Court was forced to consider this issue of standing because it related to that court’s jurisdiction under the Constitution (Regents of the University of California v. Bakke, 1978, p. 2733).
The constitutional element of standing is the plaintiff’s demonstration of injury to himself that is likely to be redressed by a favorable decision of his/her claim. The United States Supreme Court found that Bakke had standing even though he could not show that he would have been admitted to the medical school absence the special admissions program. Because he was not allowed to compete for all of the admittance slots because of his race, the Court found he had standing to challenge the school’s special admissions program (Regents of the University of California v. Bakke, 1978, pp. 2733-2734).

Diverse Amici Briefs Submitted for Bakke

One hundred seventeen organizations alone or collaboratively submitted fifty-one ‘friends-of-the-court’ briefs, ensuring a broader expression of arguments, evidence, social interests, and concerns than the adversary process of two-party conflict normally allows. Organizations as diverse in their purpose and memberships as the American Civil Liberties Union, the Chamber of Commerce of the United States, the Council of Supervisors and Administrators of the City of New York, and the American Coalition of Citizens with Disabilities pressed for judicial endorsement of policies they preferred on the issue of equality (O’Neill, 1985, pp.3-4).

O’Neill also argued although the amici briefs sought to be more than “intellectual challenges to or justifications of affirmative action”, they represented the resolution of and not the debate within, an organization (p. 7).

Fisher (1979) pointed out that the amicus curiae brief of the American Association of University Professors supported the consideration of diversity as a factor in selecting a student:
An institution may validly conclude that the quality of the educational experience for all students is enhanced by considering as one factor in the admission process the racial diversity of the class selected (p. 267).

The Members of the Congressional Black Caucus, Members of the Congress of the United States, advocated affirmative action in their amicus brief to the Supreme Court. “Affirmative action programs are remedies designed to correct fundamental constitutional wrongs, which if permitted to persist threaten the very future existence of the nation”, they urged in their brief (O’Neill, 1985, p. 33).

The United States Justice Department decided to “walk a legal tightrope” and supported neither Bakke nor the University of California (Fields, 1977). According to Fields, the Justice Department attempted to draw a line between programs it said set illegal racial quotas and what it termed constitutionally accepted efforts to consider race as one of many valid factors in admission decisions (p. 1). Members of the Congressional Black Caucus reacted with anger when it became known that a draft arguing that setting aside a specific number of places for members of minority groups, as was done at Davis, should be considered unconstitutional (Fields, 1977).

Organizations Divided Over Bakke

“Like the nation, many of the amici organizations participating in Bakke were internally divided” (O’Neill, 1985, p. 4). The National Association for the Advancement of Colored People (NAACP) debated whether the needs of the black community would be best served by endorsing race-conscious preference programs or whether such programs would threaten to reestablish the discredited notion of individual
distinctions based on race (O’Neill, 1985, p. 4). The NAACP did submit a friend of the court brief supporting the University of California (Fields, 1977).

The issue of reverse discrimination split members of the country’s usual civil-rights coalition (Fields, 1977).

Groups such as the Anti-Defamation League of the B’nai B’rith and the American Jewish Congress, often allied with labor and black organizations in the past are arguing that such programs as the Davis medical school’s would undermine ‘the cherished American principle of judging people on the basis of their individual worth and capacity rather than on the basis of their race (Fields, 1977, p. 3).

O’Neill (1985) observed that the American Jewish Congress struggled over the mistrust of quotas, born from the restrictive ceilings placed on Jews in the early twentieth century, and the need to find effective ways of establishing racial justice (p. 4). The AMC did decide to file in support of Bakke (Field, 1977).

The American Civil Liberties Union was torn over Bakke’s right to racially neutral treatment by the state or the qualified minority member’s right to a remedy for past and societal discrimination (O’Neill, 1985, p. 4). However, the ACLU submitted a brief supporting the concept of a two-track admissions process, noting that the special admission program was an effective device securing the “individual equality necessary to enjoyment of individual liberty in a democratic society” (O’Neill, 1985, p. 113). O’Neill also pointed out that the ACLU found the “program entirely compatible with the equal protection requirements of the Fourteenth Amendment” (1985, p. 113).
Personal Interests

Fields (1977) noted that representatives of the National Conference of Black Lawyers, in a friend-of-the-court brief, criticized the University of California for not presenting more evidence of past discrimination to “shore up it’s case for the need for special programs for minority groups” (p. 4). A brief filed by the Association of American Medical Schools urged that without special admissions programs it was not “unrealistic to assume that minority enrollments could return to the distressing low levels of the early 1960’s” (Fields, 1977, p. 4).

Some friends of the court briefs were written to protect personal interests. The University of Washington and the National Fund for Minority Engineering students sought to defend their own affirmative action challenges (O’Neill, 1985). O’Neill (1985) observed that other groups, such as the Fraternal Order of Police or the American Subcontractors Association, wanted to protect their members from affirmative action challenges (p. 63).

The National Association of Affirmative Action Officers urged the Court to send the case back to the lower court for rehearing in their friend-of-the-court brief (Fields, 1977). The Equal Employment Advisory Council asked that the Court set “guidelines for determining to what extent race or sex-conscious employment decisions were constitutional” (Fields, 1977, p. 4).

The National Association of Minority Contractors, composed of black contractors and subcontractors, responded to the “historic exclusion of nonwhites from that industry” by campaigning for affirmative action legislation (O’Neill, 1985, p. 67). It’s brief
endorsed the Davis program because "it saw its members’ interests as directly and obviously affected and partly because those interests were in harmony" (O’Neill, 1985, p. 68). O’Neill believed this group’s decision to participate in Bakke was "facilitated by the conjunction of economic interests with social aspirations for the family" (1985, p. 69).

Professional schools and other selective educational institutions should be allowed to consider the racial background of qualified applicants in their admissions procedures, the Carnegie Council on Policy Studies in Higher Education asserted in their amici brief (Fields, 1977). The Council “weighed in with its analysis of the educational, rather than the legal, issues raised by the Allan Bakke case” (Fields, 1977, p. 3).

Race not only may be considered, but should be considered in the final selection when an applicant’s racial identity reflects prior adverse circumstances, a promise to contribute to the educational experiences of other students or to the diversity of services to be provided to society (Fields, 1977, p. 4).

The Council on Legal Education Opportunity (CLEO) participated in Bakke because it feared challenges to its own special admissions program if Bakke were upheld, with an interest that was more organizational than individual (O’Neill, 1985). According to O’Neill, CLEO was organized in the sixties by the American Bar Association, the Association of American Law Schools, the National Bar Association and the Law School Admission Council with the purpose of encouraging economically and educationally disadvantaged students to enter law school.

The Anti-Defamation League asserted that equal protection was intended to forbid all race-conscious public programs (O’Neill, 1985). They took the side of Bakke in this
decision. A day before the arguments were to begin, the United States Commission on Civil Rights issued a statement strongly supporting the use of race in affirmative action programs (Fields, 1977, p. 5).

Forum For Education

O’Neill (1985) asserted that amicus curiae briefs can impact legislation and are a promising forum for education. He also believed that amici briefs helped the courts to overcome some cognitive limitations of the legal process (p. 253).

Through the use of the amici process, organizations and individuals can learn about the facts and arguments which reflect the broader social significance of issues otherwise narrowed by the contest between two specific interests. The amicus process promises to facilitate the legal process’s role as a major forum for national education. But did it do so in Bakke? The answer is, not often (O’Neill, 1985, p. 254).

United States Supreme Court

In the specific sense, the question which the Supreme Court had to answer in the Bakke case was whether Allan Bakke, a white man, had been improperly denied admission to the Medical School of the University of California at Davis (McClellan, 1991, p. 12). The Supreme Court began hearing oral arguments in the case of Regents of the University of California v. Allan Bakke, respondent, on October 12, 1977 (Regents of University of California v. Bakke, 1978, p. 2733).

The University did not deny in their brief that decisions based on race or ethnic origin by faculties and administrations are reviewable under the Fourteenth Amendment. Bakke did not argue that all racial and ethnic classifications are invalid (Regents of University of California v. Bakke, 1978, p. 2746).

The University argued that the lower court erred in applying strict scrutiny to the case, asserting that it should be reserved for classifications that disadvantage “discrete and insular minorities” (Regents of University of California v. Bakke, 1978, p. 2746). Bakke, on the other hand, contended that his Fourteenth Amendment rights had been violated and that the special admissions program promoted racial quotas (Regents of University of California v. Bakke, 1978, p. 2746).

O’Neill (1985) reported that Bakke’s attorneys charged in their brief to the United States Supreme Court:

Are we to become involved in the testing of legal rights according to blood lines? To do so would require abandoning the ‘commitment to a society protective of individual achievement’ and replacing it ‘with a system of rights based upon racial or ethnic group membership. Discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of a democratic society (p. 39).
United States Supreme Court Decision

On June 28, 1978, Justice Lewis Powell began his delivery of the Supreme Court’s judgement by stating:

We speak today with a notable lack of unanimity. I will try to explain how we divided. It may not be self-evident (O’Neill, 1985, p. 57).

The United States Supreme Court affirmed in part and reversed in part the lower court’s decision. There were six separate decisions by the Supreme Court, but a majority of Justices, in a 5-4 split, were in agreement that:

... (1) the special admissions program was illegal, but (2) race may be one of a number of factors considered by the school in passing on applications, and (3) since the school could not show that the white applicant would not have been admitted even in the absence of the special admissions program, the applicant was entitled to be admitted (Regents of University of California v. Bakke, 1978, p. 2733).

The Bakke decision, was in fact two decisions, because the nine Justices formed clusters of two groups. Justice Lewis F. Powell, Jr. went with both groups and this made it possible for two majorities. Therefore, there was not a unified vote from the bench:

The judgement...is affirmed insofar as it orders respondent’s admission to Davis and invalidates petitioner’s special admissions program, but is reversed insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions (Regents of University of California v. Bakke, 1978, p. 2737).

Sexton (1979) surmised that the Bakke decision was really two 5-4
decisions, with Justice Powell the only justice participating in both majorities:

(Powell) was part of one group, consisting of Chief Justice Warren E. Burger and Justices Potter Stewart, William H. Rehnquist, and John Paul Stevens, which invalidated the Davis special admissions program and ordered Allan Bakke admitted. He (Powell) was also a member of the second group, composed of Justices William J. Brennan, Byron R. White, Thurgood Marshall, and Harry A. Blackmun, which held that race may be a consideration in a constitutionally acceptable admissions program (Sexton, 1979, p. 316).

Opinion of Justice Powell

Justice Powell concluded in his decision that Bakke should be allowed to attend Davis; the University’s special admissions program was invalid; and that the University could take race into account as a factor in future admissions decisions (Regents of University of California v. Bakke, 1978, p. 2737).

Powell accepted Brennan’s argument that Title VI restated the meaning of the Equal Protection Clause, but held that since the Davis program did not accept individuals such as Bakke solely on the basis of their race, the program was unconstitutional (Regents of University of California v. Bakke, 1978, p.2738).

Sexton (1979) reported that “the split between the Brennan and the Stevens group left it to Justice Powell to cast the deciding vote (p. 318). Powell began his opinion by relating the anti-discrimination principle of Title VI to that in the equal protection clause. In his view, the legislative history reveals that Title VI incorporated the standard of the

Sexton (1979) observed that for Justice Powell, if the Davis program was acceptable under the Fourteenth Amendment, then it would be acceptable under Title VI. Justice Powell's analysis of the constitutional issues were very different than Justice Brennan's opinion (Sexton, 1979).

The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal (Regents of University of California v. Bakke, 1978, p. 2748).

However, the University argued that the lower court erred in applying strict scrutiny to the special admissions program because white males, like Bakke, are not a "discrete and insular minority" which required extraordinary protection (Regents of University of California v. Bakke, 1978, p. 2748). Justice Powell denied that the Court held that discreteness and insularity constituted necessary precautions to a holding that a particular classification is invidious. Justice Powell held that:

Racial and ethnicity distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination (Regents of University of California v. Bakke, 1978, p. 2748)

Justice Powell did not argue that the Fourteenth Amendment prohibited any differential treatment by race, but he did surmise that any program, such as the one at Davis that employed racial classifications, should be tested against a standard of strict scrutiny:
As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers Brennan, White, Marshall, and Blackmun that the portion of the judgement that would proscribe all consideration of race must be reversed. But I disagree with much that is said in their opinion. They would require as justification for a program such as the petitioner’s, only two findings (I) that there has been some form of discrimination against the preferred minority group by “society at large” (it being conceded that the petitioner had no history of discrimination) and (ii) that “there is reason to believe” that the disparate impact sought to be rectified by the program is the product of discrimination (Regents of University of California v. Bakke, 1978, p. 2751, n. 36).

According to Sexton (1979), strict scrutiny is satisfied only when the state can “assert a compelling governmental objective which can be accomplished by using the challenged racial classification” (p. 318). In considering Davis’ four objectives to justify its special admissions program, Justice Powell rejected the first objective, that of reducing the historic deficit of minorities in medical school and the medical profession as racially invalid (Regents of University of California v. Bakke, 1978, pp. 2756-2758).

The second proposed justification, countering the disabling effects of past discrimination, came closer to the mark, according to Justice Powell, since racial criteria would be used only to redress an identified wrong. Justice Powell thought that remedial action was proper only when there had been a judicial, legislative or administrative finding of a violation by the institution. Since there had been no formal finding of
discrimination by the Davis medical school, Justice Powell would not accept the second proposed justification (Regents of University of California v. Bakke, 1978, pp. 2756-2758).

The third justification, to increase the number of practicing physicians in underserved minority communities, was rejected by Justice Powell:

It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal (Regents of University of California v. Bakke, 1978, p. 2758).

Davis' fourth potential justification was to obtain the educational benefits associated with an ethically diverse student body, proved most persuasive to Judge Powell:

This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, thought not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgements as to education includes the selection of its student body (Regents of University of California v. Bakke, 1978, p. 2759).

Sexton (1979) asserted that Justice Powell believed that Davis' right to seek a diverse student body "invoked the First Amendment as a constitutional right countervailing the equal protection claim advanced by Allan Bakke" (p. 319). Justice Powell noted:
Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body (Regents of University of California v. Bakke, 1978, p. 2759).

Ethnicity diversity was only one element in a range of factors that Justice Powell believed a university could consider in attaining the goal of a heterogeneous student body (Regents of University of California v. Bakke, 1978, p. 2759). But, as Sexton (1979) pointed out, Justice Powell did not believe the Davis special admission program was necessary to provide diversity.

Justice Powell used Harvard College as a model for an admissions plan that considered race as only a factor in forming a diverse student body and still providing a sufficient number of minority students.

In recent years, Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students…In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year (Regents of University of California v. Bakke, 1978, p. 2761-2762).

For Justice Powell, race could be a factor in an admissions program, but not the
decisive factor. Thus, the Davis program was in violation of the equal protection clause, and Allan Bakke should have been admitted (Regents of University of California v. Bakke, 1978, p. 2763).

Sexton believed that the Powell decision insisted on two things. These two things were “that each applicant be compared to all other applicants, and that each applicant be treated individually” (p. 334).

Justice Powell appeared to be most comfortable with a plan that awarded an unqualified plus for minority status. In his decision, Justice Powell conceded that:

…the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted (Regents of University of California v. Bakke, 1978, p. 2765).

**Opinion of Justices Brennan, White, Marshall and Blackmun**

Justice Brennan, in an opinion joined by Justices White, Marshall, and Blackmun, found that Title VI and the equal protection clause were coextensive and that the Equal Protection Clause prohibited only those racial classifications that violated the Fourteenth Amendment if employed by its states and its agents. Justice Powell also argued that Title VI and the Equal Protection Clause are coextensive bringing the total of five votes for Judge Brennan’s interpretation (Regents of University of California v. Bakke, 1978, p. 2737).
This opinion also stated that racial classifications call for strict judicial scrutiny, but they believed that the purpose of "overcoming substantial, chronic minority underrepresentation in the medical profession" was sufficiently important to justify the petitioner's remedial use of race (Regents of University of California v. Bakke, 1978, p. 2737).

Justice Brennan concluded that racial classifications are not invalid per se, but that an "overriding statutory purpose" could be found that would justify classifications. To determine the proper level of judicial scrutiny to be applied to racial classifications, Justice Brennan argued that there was no fundamental right involved and whites, as a group, do not possess signs of legitimacy of suspect classifications. Therefore strict scrutiny was inappropriate (Regents of University of California v. Bakke, 1978, p. 2782).

Instead, to justify such a classification as an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the burden of a benign program. Thus, our review under the Fourteenth Amendment should be strict -- not 'strict in theory and fatal in fact', because it is stigma that causes fatality -- but strict and searching nonetheless (Regents of University of California v. Bakke, 1978, p. 2784).

Sexton (1979) pointed out that on the other hand, Justice Brennan rejected the use of the minimal scrutiny standard:

There are, (Brennan) said, dangers of abuse in even the most benign programs of racial classification; first the affirmative-action programs can reinforce stereotypes and thereby stigmatize minorities as incapable of succeeding on their
own; and second, any program that places an individual (even a member of a
majority group) at a disadvantage because of an immutable characteristic such as
race risks compromising that individual's Fourteenth Amendment rights (Sexton,
1979, p. 317).

The dangers that Justice Brennan mentioned above led him to urge that a special
level of scrutiny, analogous to the intermediate scrutiny in gender discrimination cases,
be applied to benign racial classifications (Regents of University of California v. Bakke,

Sexton (1979) concluded that on this basis, Justice Brennan and the three justices
who concurred with him, found that if a state institution (or for purposes of Title VI, any
institution receiving federal financial aid) detected that its actions would have an
"unequal racial impact" resulting in its own or society's past discrimination acts, it could
adopt race-conscious remedial programs. This was as long as stigma did not result and as
long as the use of racial criteria was reasonable in the light of the plan's objectives
(Sexton, 1979, p. 318).

Justice Brennan and the other concurring justices believed that the Davis faculty
reasonably perceived that their regular admissions program would result in the
underrepresentation of minority students at the school and that this disparity was the
result of past discrimination (Regents of University of California v. Bakke, 1978,
pp. 2784-2785).

They also found that Davis' special admissions program did not violate the
Constitution:
"...simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants (Regents of University of California v. Bakke, 1978, pp. 2784-2785).

Opinion of Justices Stevens, Warren, Stewart and Rehnquist

Writing for himself, the Chief Justice, and Justices Stewart and Rehnquist, Justice Stevens believed that under an analysis of the legislative history, Title VI proscribed the use of racial classifications and therefore prohibited a program like the one at Davis. Using the statutory theory alone, Stevens was willing to invalidate the special program (Regents of University of California v. Bakke, 1978, p. 2810).

However, we need not decide the congruence – or lack of congruence – of the controlling statute and the Constitution since the meaning of Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program (Regents of University of California v. Bakke, 1978, p. 2810).

Justice Stevens emphasized that because the Davis program - the only one before the Court - was in his view illegal, it was unnecessary to decide whether it, or any alternative admissions program, was constitutional under the equal protection clause. As a result, he and the three justices for whom he wrote did not address the constitutional issue at all. Whether any or all of them believed that the Constitution prohibited the benign use of racial classifications in an admissions program was an open question (Sexton, 1979, pp. 316-317).
O’Neill (1985) agreed that these Justices declined to address the Equal Protection issue, preferring to relay on the “plain language” of Title VI to the 1964 Civil Rights Act and “its broad prohibition against the exclusion of any individual” from a public benefit on racial grounds (p. 57). Further, O’Neill contended that Stevens invoked this “perfectly clear” statute to order Bakke’s admittance and by doing so, “rejected the argument that only stigmatizing racial exclusions were forbidden by the law” (p. 57).

Justices Stevens, Stewart, Rehnquist and Chief Justice Burger also reached this conclusion in regards to the Bakke case:

It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate (Regents of University of California v. Bakke, 1978, p. 2809).

**Strict Scrutiny**

Starting with Bakke, and with consistency since then, the courts have recognized two justifications for affirmative action programs that are suitably compelling to satisfy the first prong of the two part “strict scrutiny” test (Kurtz & White, 1997). Kurtz & White further noted that a program that relies on race-based preferences is illegal unless the institution can demonstrate that the program serves a compelling governmental interest and that the program is narrowly tailored to further that compelling interest (p. 6).

The first part of the two-part ‘strict scrutiny’ test – articulating the ‘compelling institutional interest’ served by affirmative action – focuses on the lofty objectives of affirmative action. The second part – whether the program is ‘narrowly
tailored’ – focuses on the nitty-gritty details of specific affirmative action programs (Kurtz & White, 1997, p. 12).

O’Neill (1985) contended that the “justification for invoking the strict test is to protect individuals from public insult because of their involuntary membership in racial groups” (p. 38). Sexton also noted that when the government classified persons according to “suspect” criteria or invaded “fundamental” interests, its actions are to be “strictly scrutinized” and such action could only survive if it is the sole practicable means to a compelling state interest (1979, p.315).

Pointing out that in cases where strict scrutiny is not appropriate, Sexton claimed government activity could be judged on a different and more passive standard, that of “minimum rationality”, whereby the state’s action could survive if it reasonably serves a legitimate purpose (1979, pp. 315-316). Sexton also believed that often the “capacity of a given classification to survive the attack depended upon whether the courts applied the exacting standard of strict scrutiny” (p. 316). He pointed out that courts began asking if any classification by race was inherently a suspect classification which would warrant strict scrutiny.

Legal Implications of Bakke

The Supreme Court, in the Bakke decision, provided no definitive rules (McClellan, 1979). The ruling of the Court actually involved six separate opinions and leaves many questions regarding the legality of racial classifications unresolved (McClellan, 1979, p. 106).
In the aftermath of the Bakke decision, a joint committee of the American Council on Education and the Association of American Law Schools released a report (Fields, 1978). In this report, published in September 1978, the analysts determined that “there was no opinion of the court” (p. 1).

Moreover, four members of the Court did not address the issue of the permissible use of race under the Constitution, while four others believed that the Constitution would permit more extensive use of race than did Justice Powell (Fields, 1978, p. 12).

The report pointed out that not one Justice stated that race may never be taken into account in the admissions process. No Justice concurred in the Powell discussion of permissible and impermissible purposes for considering race in admissions decisions. And the report surmised that under the circumstances, it was not at all clear what would be the result if the Court faced a slightly different admission plan or a similar plan under different circumstances (Fields, 1978, p. 12).

The Warren Court had developed a two-tiered approach to the equal protection clause, after observing that state action adversely affecting “discrete and insular minorities” should be subjected to a more exacting judicial scrutiny (Sexton, 1979, p. 315). Under the Equal Protection Clause, any governmental classification by race was susceptible to attack (Sexton, 1979).

Fisher (1979) stressed that two basic points of the decision were agreed upon by all of the justices. First, agreement that the equal protection clause applied only to a state action and the relation of a private institution to the state through funding or otherwise may be such that its action is considered state action. Thus, the equal protection clause
was held applicable (p. 265). The Constitution and Title VI imposed identical restraints upon race-conscious admission policies and this was agreed upon by all of the Justices.

But, the Bakke decision held that preferential treatment cannot be afforded to ethnic minorities over any other racial group. According to McClellan (1979), this may have signaled a retreat from the Brown decision to some people; some people may have felt the Supreme Court had come full cycle (p. 7). "The Bakke decision placed the Supreme Court’s stamp of approval on affirmative action programs, although racial quotas are forbidden" (McClellan, 1979, p.91).

O’Neill (1985) pointed out that supporters of both sides criticized Powell’s attempt at judicious diplomacy (p. 59). They also “deplored” his efforts to “soothe the nation” and argued that the Supreme Court does not have this function. The Supreme Court is to determine what is just and right according to the Constitution and the laws of the land (O’Neill, 1985, p.59).

The decision, according to Thernstrom & Thernstrom (1997), was a personal victory for Allan Bakke because he was allowed to go to medical school. However, not for the “color-blind principle” on which Bakke’s lawsuit was based (Thernstrom & Thernstrom, 1997, p. 414). According to McClellan (1979) the Bakke decision did not answer a critical question to those in higher education: Is there any way to accomplish the goals of integration and equal opportunity while completely ignoring racial factors? (p.20).

McClellan (1979) insisted that the ultimate decision as to the constitutionality of special admissions programs was not laid down in the Bakke case:
The Bakke decision held that race can be a legitimate consideration in acceptance and assignment of students, although no quotas may be assigned. Race may be a consideration even though no specific proof of previous racial discrimination exists, according to the Court's ruling in Bakke. State-run schools may consider an applicant's race in making admissions choices so long as the applicant's race is not the sole factor (McClellan, 1979, p. 93).

Sexton (1979) argued that Bakke's claim under the equal protection clause could only be resolved by confronting two positions. He observed that the answer to the question of strict scrutiny depended upon the purpose of as a technique of judicial review. It could be used as a safeguard against racial classifications per se or as a safeguard to protect minorities unable to use the political process to help themselves.

Advocates of the former view argue that the Constitution is, and must remain, color-blind. Proponents of the latter position assert that, given the long history of discrimination against racial minorities in this country (discrimination the Fourteenth Amendment was adopted to redress), it would be cruel irony if color-conscious remedies, whereby the majority voluntarily chooses to burden itself, were deemed suspect (Sexton, 1979, p. 316).

Simmons (1982) asserted that Bakke focused attention of quotas, not the survivability of special programs to increase minority enrollments. He further noted that Bakke exacerbated the race problem and left educators confused about the efficacy of affirmative action (Simmons, 1982, p. viii). Further, Bakke did little to settle America's race problems in higher education but cause more problems by changing the rules in interpreting legislation meant to protect minorities (Simmons, 1982).
By raising questions about special admissions, but leaving them unanswered by offering vague solutions, the Court opened doors for further attacks on affirmative action programs in higher education (Simmons, 1982, p. 1).

Sexton also found that in Regents of University of California v. Bakke, the role of the judiciary in educational policy making was examined:

Federal courts have generally recognized that universities should be allowed considerable discretion in conducting their educational affairs. In part, this realization stems from the tradition of respecting the principles of academic freedom, in part from the recognition that judges have little expertise in deciding matters of educational policy (Sexton, 1979, p. 320).

Sexton asserted that the Bakke case was an instance of educational policy making by the courts. He argued that Bakke challenges those charged with shaping admissions policy to develop innovative special admissions programs that “simultaneously meet societal and educational needs and still remain with constitutional parameters” (p. 322).

O’Neill (1985) believed the Bakke case forced a choice between “unacceptable alternatives”.

That endorsement of ‘race-conscious through benign’ programs would further legitimate race as a test for the apportionment of benefits and burdens in American society, or that rejection of affirmative action programs on a ‘color-blind’ principle would condemn blacks to a continuing status as an underclass (p. 4).

Because of Bakke, O’Neill surmised, the nation had to develop new principles or radically recast old ones (1985, p. 4).
Sexton (1979) concluded that the significance of the Bakke decision for admissions programs lay in the three aspects of Justice Powell’s opinion for the court. It states that benign racial preferences are legal under some circumstances; it defers to university officials in making admissions decisions, while presuming good faith in educational purpose; and it confines itself to a narrow statement of what is impermissible in school admissions policy (Sexton, 1979, pp. 338-339).

Sexton also stated that Powell’s opinion declared only those plans that relied on rigid racial quotas in a way that prevented consideration of individual applicants as illegal. Therefore, he asserted that the Bakke decision should be viewed as “neither a legal command to dismantle affirmative action programs nor as an excuse to do so” (p. 339).

Indeed, Sexton continued, the decision gave the go-ahead for “carefully conceived and sensitively administered racial preferences”. Perhaps the most exciting result of the Bakke legislation is the challenge and the invitation to creative educational policy making that it entails (Sexton, 1979, p. 339).

Fisher (1979) believed that the Supreme Court handed down a very narrow decision in Bakke, which left institutions a “great deal of room” to create admission policies that considered several criteria in the admission process (p. 265). She asserted that the Court chose not to resolve a number of issues relating to the publication of admission policies and criteria, gender conscious admission programs, due process in admissions and other admission criteria including family influence and wealth, children of alumni or legislators (Fisher, 1979, p. 265).
Furniss (1979) contended that the *Bakke* decision followed a dozen years of national efforts to increase the presence of persons of racial minorities in decision-making positions in American society (p. 138). Simmons (1982) surmised that *Bakke* proved any affirmative action program based on a quota system for admission or employment of any minority group would be severely criticized and face legal action (p. 10). “The rationality of *Bakke* and its supporters shows a general disinterest in the progress of minorities in higher education” (Simmons, 1982, p. 27).

O’Neill (1985) cautioned that Justice Powell’s opinion in *Bakke* may be a better predictor of what will happen than what ought to happen. “The more probable resolution to the issue of affirmative action may be one founded in compromise, in some sort of pragmatic adjustment between the contending views” (O’Neill, 1985, p. 261).

**Summary**

The *Bakke* decision by the United States Supreme Court was reached after more than a decade of policies encouraging affirmative action in higher education. Efforts by the courts and legislature to increase the presence of racial minorities in colleges and universities had culminated in special admissions programs to assist those with disadvantages, including ethnicity, to be accepted into universities in larger numbers.

Decided over two decades ago, the *Bakke* decision is still the final word from the Supreme Court in assessing higher education policies. Educators and legal scholars have long argued whether *Bakke* is still good law some twenty-odd years after the decision of the Supreme Court.
Since this case was decided in 1978, it has been cited numerous times in lower court cases, been scrutinized by legal scholars, and has encouraged the development of a variety of affirmative action programs aimed to increase the enrollment of minority and ethnic students at colleges and universities. Legal decisions which followed Bakke are also important to provide a rich history that describes the path of affirmative action in higher education admissions policies.

As the Bakke decision was explored in the lower courts, higher education admission personnel worked to achieve diversity in their admissions policies within the confines of the legal guidelines espoused in the Supreme Court decision. These policies continue to be explored and challenged, both in the educational setting and in the courts.

In order to scrutinize the legal and educational challenges with regard to affirmative action, and to document the continued reliance on the Bakke decision, Chapter Three focuses on the methodology to be used this legal analysis. Of special interest are the tools used to document the history of affirmative action from Bakke through Hopwood and beyond.
CHAPTER III

RESEARCH METHODOLOGY

The purpose of this study was to determine the legal status of affirmative action of admission policies in higher education and to analyze legal decisions of Bakke through Hopwood. Through this research, it may make it easier for educators to understand the legal principles and affirmative action policies involved in higher education admission procedures.

Qualitative Research Design

An inductive analysis design means that categories and patterns emerge from the data rather than being imposed prior to data collection (McMillan & Schumacher, 1997). Qualitative research that is termed analytical includes the investigation of legal and policy concepts through an analysis of documents. "Legal analysis focuses on selected law and court decisions to provide a better understanding of the ‘law’ and legal issues" (p.43-44).

In this dissertation, court cases and decisions concerning affirmative action of a period of approximately twenty years were examined, with a comparison between the decisions reached in Bakke and Hopwood, nearly two decades apart. Both cases were
described by the legal principles and the legal philosophy of the courts at the time of the decisions (McMillan & Schumaker, 1997).

This research design is a case study, similar to that used in most law schools. According to McMillan & Schumacher (1997), the law is never static and an analysis of relevant court cases is necessary to derive the legal principles and understand the law at that point in time. Each court case is analyzed by examining each case by looking at the facts, the questions asked in the case, the decision and the rationale behind the decision and the implications of this decision upon the educational system (McMillan & Schumacher).

Two “landmark” decisions in the educational arena concerning affirmative action in the admissions policies are Bakke (1978) and Hopwood (1996). This research process involved identifying the legal principles induced from the analysis of these cases. It included not only the legal court decisions, but any applicable laws and statutes as well as commentary from other sources such as books, newspaper articles, and law reviews.

Legal Research Methodology

Legal research is “the process of finding the laws that govern most of our life activities and the materials which explain or analyze these laws (Cohen & Olson, 1996, p. 1). To determine the impact of both past actions and the implications of contemplated actions, Cohen & Olson (1996) believed that research is essential in legal issues. Legal research is also very important to academic pursuits in universities, Cohen & Olson (1996) stated, because the law is a “central part of our history” (p. 2).
Wren & Wren (1983, p. 29) recognized that legal research did not “occur in a factual vacuum”. They asserted that the purpose of researching law is to ascertain the legal consequences of a specific set of actual or potential facts. Wren & Wren (1983) also contended that “it is always the facts of any given situation that suggest -indeed, dictate-the issues of law that need to be researched” (p. 29).

Cohen & Olson (1996) indicated that legal research involved the use of a variety of printed and electronic sources.

Electronic sources may include LEXIS-NEXIS, which is a “high-end, expensive database” (McKim, 1996, p. 168). According to McKim, the NEXIS part of the database is “what you would probably use if you accessed this database in a library” (1996, p. 168). McKim further stated that LEXIS was a database of actual legal information, used by law offices and law students for research. LEXIS-NEXIS enables a researcher to search libraries of information, using a search language that provides “full Boolean search features” for refining queries (McKim, 1996, p. 169). LEXIS-NEXIS is available to UNLV students and will be used in this research.

Printed sources can include court decisions, statutes, administrative documents, scholarly commentaries, and practical manuals (Cohen & Olson, 1996, p. 2). Cohen & Olson (1996) also warned that legal sources might differ in their relative authority.

Some are binding; some are only persuasive in varying degrees; and some are only useful tools for find other material. These variations require that researchers evaluate the sources they study (p. 3).
Continuing on, Cohen & Olson (1996) suggested that a legal researcher be familiar with three “broad” categories of legal literature. These included primary sources, finding tools and secondary materials (p.3).

Primary sources of law, as pointed out by Cohen & Olson (1996) included those recorded rules that will be enforced by the state. These rules are found in constitutions, in decisions of appellate courts, in statutes passed by legislatures, in executive decrees, and in regulations and rulings of administrative agencies (p. 3). One major category of primary sources, suggested Cohen & Olson (1996) were judicial decisions (p. 3).

The United States is a “common law” country, its law is expressed in an evolving body of doctrine determined by judges on the basis of cases which they must decide, rather than on a group of abstract principles. As established rules are tested and adapted to meet new situations, the common law grows and changes over time (Cohen & Olson, 1996, p. 3).

Wren & Wren (1983) contended that a legal researcher sees three branches of government that make law, including the legislature, the administrative agencies and the judiciary (p. 3). According to Wren & Wren (1983, p. 3), each of these branches makes a different kind of law. Statutory law is created by legislatures passing bills, which then becomes law when signed by the executive. Administrative law, created by agencies, consists of rules and decisions issued by these agencies. And finally, the judiciary makes common law, which is sometimes informally referred to as judge-made laws, which Wren & Wren stated, are found in court decisions (1983, p. 3).
Common Law/Case Law

According to Cohen & Olson (1996), the United States judicial system consists of hierarchies of courts, which include trial courts, appellate courts and a court of last resort, usually the Supreme Court of the jurisdiction (pp. 3-4). This judicial system incorporates the processes of appellate review, where higher courts review the decisions of lower courts and of judicial review, where the courts determine the validity of legislative and executive actions (Cohen & Olson, 1996, p. 4).

Wren & Wren (1983) also agreed that there are usually several levels within the court system, each of which "performs a specific function" (p. 7). Pointing out that the federal courts have three levels, as do many state courts, Wren & Wren (1983) referred to these as a trial level, an intermediate appellate level, and a final appellate level.

At the federal level, these trial courts are called United States District Courts and each state has within its boundaries at least one federal judicial district, with some states having several (Wren & Wren, 1983, p. 7). According to Wren & Wren (1983), the number of districts in a state is primarily determined by population and also the geographic size of the state (p. 7).

The intermediate appellate courts at the federal level are known as the United States Courts of Appeals. Each federal Court of Appeals covers a geographic part of the United States called a "circuit", with thirteen federal Courts of Appeals in existence (Wren & Wren, 1983, p. 7). To appeal a district court decision, a party to a lawsuit will normally appeal to the U.S. Court of Appeals covering that district (Wren & Wren, 1983).
The very final appellate court in the federal court system is the Supreme Court of the United States (p. 8).

Court decisions are reported in many different venues. Wren & Wren (1983, p. 16), compiled lists of sources for legal research on each level of courts. For the United States Supreme Court, they suggested U.S. Reports and the Supreme Court Reporter. The Federal Reporter, Second Series, the Federal Reporter and Federal Cases are all described as excellent sources for the U.S. Court of Appeals. The U.S. District Courts cases are reported in the Federal Supplement, Federal Reporter, Second Series, Federal Reporter, Federal Cases, and Federal Rules Decisions. State Courts decisions may be found in State and Regional reporters.

In this dissertation, the primary sources for legal research were court cases concerning the use of affirmative action in higher education admissions policies. Secondary sources included legal periodicals, such as law reviews, that analyzed and interpreted case laws. Also used as secondary sources were a legal dictionary to assist in the definitions of legal terms and previous dissertations on file to present other views on the legal topic.

The finding tools used by this researcher to locate primary and secondary sources included Shepard's Citations and LEXIS – NEXIS which were used to provide precedents and citations of Regents of the University of California v. Bakke (1978). Computer searches to locate law reviews and dissertations pertaining to the legal search were also utilized.
The Doctrine of Precedent

Judicial decisions are called case law and are one of the most important sources of legal authority in common law system (Cohen & Olson, 1993). Even statutes, according to Cohen & Olson (1993), must be read in conjunction with cases which construe and apply their provisions (p. 16).

The doctrine of precedent, stated Cohen & Olson (p. 17) sought to ensure that people in “like circumstances are treated alike”.

Courts follow this doctrine (of precedent) so that people can study earlier disputes, evaluate the legal impact of planned conduct, and modify their behavior to conform to existing rules (Cohen & Olson, 1993, p. 17).

Wren & Wren (1983) also observed this need for internal evaluation of judicial decisions and stated:

This court-created doctrine (of precedent) says, essentially, that when a court has applied a rule of law to a set of facts, that legal rule will apply whenever the same set of facts is again presented to the court. In effect, cases with facts identical to those of a case already decided will presumably yield the same result as the earlier case (p. 80).

Wren & Wren (1983) continued along this same thought and stated that the doctrine of precedent promoted the even-handed administration of justice, ensured certainty and established guidelines for those individuals planning future conduct. Further, they observed that this doctrine allowed parties to know in advance how particular legal disputes may be resolved if they commenced action (p. 80).
Wren & Wren contended that the more similarities one could find between one's problems and those of a decided case, the "more likely that the decided case would determine your problem's outcome" (p.80).

Shepardizing

For the doctrine of precedent to operate effectively, one must be able to find cases which control or influence a court's decision making (Cohen & Olson, 1996). In order to determine applicable law, lawyers must have some means of locating 'cases on point', that is, earlier decisions factually and legally relevant to a dispute at hand. They must then determine whether these decisions are valid law and have not been reversed, overruled, or otherwise discredited (Cohen & Olson, 1996, p. 49).

Judicial decisions are published in chronological order and not by topic, and are not generally updated after first publication. Because of this, other resources are needed to find decisions and to verify their current status (Cohen & Olson, 1996).

According to Wren & Wren (1983), the final step in doing legal research is updating the law (p. 95). This is to make sure that the legal rules being used have not changed and are still valid law (Wren & Wren, 1983).

Shepardizing is the most widely used method of updating the law. It involves tracing the subsequent treatment of cases, statutes, and some other legal authorities by using reference works called Shepard's Citations (Wren & Wren, 1983, p. 96).
Shepard's Citations is used by legal researchers to ascertain a known authority's current status (Wren & Wren, 1983). It allows a researcher to trace the development of a legal doctrine from the time a known case was decided forward to the present (Cohen & Olson, 1996, p. 70). Cohen & Olson (1996) suggested that citation indexes, which indicate later citations to a given document, are now widely used in scholarly research (p. 70).

Shepardizing, according to Cohen & Olson, accomplishes three major purposes. The first purpose is to trace a case's judicial history by providing parallel citations for the decision and references to other proceedings in the same case. Second, it may be used to verify the current status of a case to determine whether it is still good law or if it has been overruled, limited or otherwise diminished. And last, research may lead to other citing cases, as well as periodical articles, attorney general opinions, ALR annotations, and other resources (1996, p. 71).

Shepard's Citations publishes citators for the Supreme Court, the lower federal courts, every state, the District of Colombia, Puerto Rico, and each region of the National Reporter System (Cohen & Olson, 1996, p. 71). For the purpose of shepardizing, the known material or case is known as the cited authority (Wren & Wren, 1983). There are numerous sets of Shepard's Citations, only one of which will work for any given authority of the case being shepardized (Wren & Wren, 1983).

Cohen & Olson (1996) also pointed out that Shepard's Citations is also available online through WESTLAW and LEXIS. These are electronic versions of citations and can have several advantages over the print counterparts (Cohen & Olson, 1996). Citing
entries are compiled into one listing, eliminating the need to search through multiple volumes and pamphlets.

Case treatments and names of publications can be spelled out rather than abbreviated because page space is not a concern. The researcher can have a computer search for specific treatments or head note numbers rather than scanning a list. And the online versions allow the researcher to go directly from a Shepard's display directly to the text of citing cases (Cohen & Olso, 1996, p. 78).

This researcher used both the Shepard's Citations found in the law library and the online electronic LEXIS to shepardize the Bakke decision. To use the LEXIS shepardizing program, the case law number is typed for the computer program to shepardize. In this case, Regents of University of California v. Bakke, (1978) is the Supreme Court case number, 98 S.Ct. 2733. The number 98 refers to the volume of the Supreme Court Reporter the case is published in and the decision begins on page 2733 in that volume.

Likewise, to use the Shepard's Citations, one would find the citator that was used by the Supreme Court, Shepard's United States Citations: Supreme Court Reporter, and find the volume number, 98. In the column with the number 98, one would then look for the page number, 2733, and each case that has cited the Bakke decision in its opinion would be listed by its case number.

According to the LEXIS-NEXIS information sheet, a researcher may use the Shepard's Citation service to verify citations; check the validity of a case using Shepard's editorial analysis; trace the history and treatment of a pertinent case which has cited the
case; find parallel citations; find citations by courts in other jurisdictions; and find citing references by administrative agencies, law reviews, articles and texts.

Each case must be reviewed and analyzed to see if it would fit the research parameter. Cases involving higher education admissions policies in regards to race and affirmative action will be described and analyzed in this dissertation. Those cases not pertaining to higher education or representing other higher education legal issues besides race and affirmative action in the admissions process were not analyzed or presented in this dissertation.

Evaluating the Law

An internal law evaluation involves determining whether a particular legal authority applied to the fact situation in the research problem (Wren & Wren, 1983, p. 79). The similarities and the differences of the facts must be examined as well as a determination of the authority's intended legal significance and impact to the research question (Wren & Wren, 1983, p. 80).

The need for internal evaluation of judicial decisions is tied to the doctrine of stare decisis. This court-created document says, essentially, that when a court has applied a rule of law to a set of facts, that legal rule will apply whenever the same set of facts is again presented to the court (Wren & Wren, 1983, p. 80).

The more similarities a researcher finds between the two cases, the more likely the decided case will determine the outcome of the case in question. The less similar the two cases, the less likely the decided case will control the decision (Wren & Wren, 1983, p. 80).
The intent of the law must also be examined to determine if it can be narrowly or loosely interpreted (Wren & Wren, 1983, p. 84). A law can have conscious intent or extrapolated intent (Wren & Wren, 1983, p. 84).

An external evaluation of the law allows a researcher to evaluate the current status and validity of the authority (Wren & Wren, 1983, p. 89). To determine the current status of court decisions that are relevant, subsequent court decisions must be evaluated, interpreted and applied to the court case in question (Wren & Wren, 1983, p. 89).

In evaluating the applicable court cases after Bakke, this researcher “briefed” the cases according to Wren & Wren (1983, p. 92). The points included in the brief were the name of the case; citation; date the decision was rendered; votes of the judges; author of the minority decision; author (s) of concurring opinion; author (s) of dissenting opinion; procedural posture of the case; legal topic covered by the case; summary of facts; questions presented by the case; answers to the questions presented; summary of the court’s reasoning in reaching the answers; summary of significant concurring opinions; summary of dissenting opinions; and the significance of the case (Wren & Wren, 1983, p. 92).

According to Wren & Wren (1983), not all of these points must be included in every brief (p. 92). A researcher must make the decision as to what to include and what to omit in briefing a court case (Wren & Wren, 1983, p. 92).

Summary

An inductive analysis design was used in this dissertation. Court cases and decisions were examined concerning affirmative action in higher education admission.
procedures. These cases were limited in scope by those between Bakke and Hopwood and also those dealing only with admissions in higher education.

This chapter explained some of the legal research techniques used in this qualitative study, as well as legal doctrines used in research. The research methodology to be used in Chapter Four has been outlined.
CHAPTER IV

FINDINGS OF THE STUDY

Legal Decisions Since Bakke

In Chapter Four, court cases concerned with affirmative action and race in higher education admissions were reviewed, in particular for any references to the Regents of University of California vs. Bakke (1978). The cases using Bakke as a precedent were examined.

The courts of law have a particularly important role in a legal system dependent upon precedent cases (Mcmillian & Schumacher, 1997, p. 483). Law stemming from a superior government is authoritative on lesser government and its citizens. Thus, the law of the United States is considered the supreme law of the land and supersedes any contrary state or local law (p. 483).

Two hundred and thirty-seven court cases were listed by LEXIS-NEXIS (See Appendix A) as citing the Bakke decision within the opinions. Each of the court cases listed were reviewed and narrowed to the thirteen listed based on the parameters of the research. The parameters were limited to those legal cases identified as those using affirmative action involving race in higher education admissions. Many of the reviewed cases pertained to employment issues or higher education lawsuits regarding
gender and age discrimination, scholarships, residency and tenure. Those cases will not be included in this dissertation.

Traditionally, education has been a state function except when federal law is made applicable to an educational practice (McMillian & Schumacher, 1997, pp. 483-484). The purpose of a study of educational law is to become knowledgeable about what law actually is as it applies to education (p. 490).

By examining cases that were decided after the Supreme Court’s precedent decision in Bakke, higher education admissions personnel may understand how later courts viewed diversity and affirmative action concerning race in admissions. This knowledge can be used to assist in admissions policies within the legal guidelines as determined by the courts. By comprehending educational concepts and events of the past, one can better understand the educational policies, trends and practices of the present (McMillian & Schumacher, 1997, p. 491).

Methodology

The court cases analyzed in Chapter Four were chosen both by the citing of the Bakke decision within their opinions and by legal questions raised in the lawsuits in regard to affirmative action in higher education admission processes. Court decisions not pertaining to affirmative action in higher education admission policies were not analyzed, including those dealing with scholarships, financial aid and employment issues. Of the two hundred and thirty-seven court cases listed by the NEXIS-LEXIS computer research base citing the Bakke decision, which dealt with higher education, only thirteen of those were concerning affirmative action in higher education admissions
policies. These were analyzed in chronological order, with the most recent cases being discussed last. This chronological progression mapped an historical viewpoint of the Supreme Court’s precedent decision in *Bakke* and the decisions following this opinion.

Any court case that was reviewed by two courts, a lower court and an appeals court, was analyzed twice. The lower court’s date of decision was used for the chronology order, but the appeals court followed the lower court’s analysis without regard to the chronological date.

The cases analyzed, listed in chronological order, are: *DeRonde v. The Regents of University of California* (Superior Court of Yolo County, 1976); *DeRonde v. The Regents of the University of California* (Supreme Court of California, 1981); *Doherty v Rutgers School of Law – Newark* (United States District Court for the District of New Jersey, 1980); *Doherty v. Rutgers School of Law – Newark* (United States Court of Appeals, Third Circuit, 1981); *McAdams v. Regents of the University of Minnesota* (United States District Court for the District of Minnesota, Third Division, 1981); *Davis v. Halpren* (United States District Court for the Eastern Division of New York, 1991); *Hopwood et al. v. State of Texas et al.* (United States District Court, W.D. Texas, Austin Division, 1994); *Hopwood v. State of Texas, et al.* (United States Court of Appeals, Fifth Circuit, 1996); *Hopwood et al. v. State of Texas, et al.* (United States Court of Appeals, Fifth Circuit, Rehearing Denied, 1996); *Texas et al. v. Hopwood et al.* (Supreme Court of the United States, 1996), *Smith v. The University of Washington Law School* (United States District Court for the Western District of Washington, Seattle Division, 1998); *Lesage v. State of Texas* (United States Court of Appeals for the Fifth Circuit, 1998); and
Wooden v. Board of Regents of the University System of Georgia (United States District Court for the Southern District of Georgia, Savannah Division, 1999).

The format for analyzing these thirteen cases will include the name of the case; court of record; citation; date the decision was rendered; names of the judges; decision of the court; author of the minority decision; author (s) of concurring opinion; author (s) of dissenting opinion; and the significance of the case.

Legal Cases

DERONDE v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
Superior Court of Yolo County
No. 32781
December, 1976
Judge: Changaris

Question: Were the admissions procedures permitting the consideration of ethnic minority status as a factor in the 1975 selection of the first year class at King Hall, the University of California at Davis Law School, violative of the equal protection guarantees afforded nonminorities under the federal or state constitutions?

Summary of Case

DeRonde, a white male, applied to King Hall, the university’s law school, in 1975. He sought mandamus in the Yolo County Superior Court against the Regents of the University of California and the Dean of King Hall, to compel his admissions to King Hall and to recover damages for his exclusion. In his complaint, DeRonde attacked the University’s selection procedures, alleging that they were unconstitutional because of the preference extended to minority applicants (DeRonde v. Regents of the University of California, 1976).
The University relied on a formula to select candidates for admission that used an applicant’s GPA and LSAT score. However, the University also considered other factors to supplement the formula’s score including growth, maturity and commitment to law study; factors which had temporarily had affected previous academic grades; wide discrepancies between test scores and grades; rigor of undergraduate studies; economic disadvantage; and ethnic minority status contributing to diversity (DeRonde v. Regents of the University of California, 1976).

The final factor was the basis for DeRonde’s lawsuit against the university. Even though the minority status was included as one of several pertinent selection factors, the University did not employ a quota system or reserve a fixed number of positions for any minority applicants entering its class. The two reasons given by the University for considering minority status were for contributions of a valuable cultural diversity for both students and faculty and to assist in strengthening and preserving minority representation in the legal profession (DeRonde v. Regents of the University of California, 1976).

Decision

Because DeRonde would not have been successful even had the challenged procedures not been used, DeRonde was not entitled to the relief requested. However, the Court examined the merits of DeRonde’s constitutional challenge and concluded that the university’s admissions procedures were facially discriminatory (DeRonde v. Regents of the University of California, 1976).

The Court found that the procedures violated the equal protection clauses of both the state and federal Constitutions. Therefore, the Court enjoined the University from
utilizing any admission criteria based on an applicant’s race, color or ethnic origin
(DeRonde v. Regents of the University of California, 1976).

Significance

This court case was decided prior to the Supreme Court’s decision in Bakke. Even without the precedent of the Bakke decision, this court found the University incorrect in using race in admission criteria based on the equal protection clauses of both state and federal constitutions. Had DeRonde been qualified as an applicant and been accepted, minus the race criteria applied to the admissions process, this case may have made it to the United States Supreme Court prior to Bakke.

DERONDE v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Supreme Court of California
28 Cal. 3d 875; 625 P.2d.; 1981 Cal. LEXIS 119; 172 Cal. Rptr. 677
February 11, 1981
Judges: Opinion by Richardson, with Bird, Tobriner, and Rattigan, concurring. Separate dissenting opinion by Mosk, with Clark concurring

Question: Were the admissions procedures permitting the consideration of ethnic minority status as a factor in the 1975 selection of the first year class at King Hall, the University of California at Davis Law School, violative of the equal protection guarantees afforded nonminorities under the federal or state constitutions?

Summary of Case

The University filed a notice of appeal after the decision in 1976 to the Supreme Court of California and DeRonde cross-appealed (DeRonde v. Regents of the University of California, 1981).
In the interim, DeRonde graduated from another law school and was admitted to the State Bar. He no longer sought admittance to King Hall, but the appeals court chose not to dismiss the case as moot:

The trial court judgment, enjoining the University, as it does, from its continued use of certain of its admissions criteria, has cast a substantial cloud of uncertainty over the University’s multiple and widely used procedures...We have the benefit of additional instructive and controlling federal authority (DeRonde v. Regents of the University of California, 1981, 880).

The Court pointed out that there was now ample precedent for appellate resolution of issues of substantial and continuing public interest which otherwise may have been rendered moot and of no further immediate concern to the initiating parties:

We conclude that this is such a case and that the validity of ‘race conscious’ or ‘race attentive’ admissions programs is an important question of continuing statewide interest. Accordingly, we will resolve the issue (DeRonde v. Regents of the University of California, 1981, 879).

Decision

The majority opinion, written by Justice Richardson, concluded that the admissions procedures permitting consideration of ethnic minority status as a factor in the 1975 selection of the first year class at King Hall did not violate the equal protection guarantees afforded nonminorities under the federal and state constitutions.

Our analysis of the federal constitutional questions is both aided and controlled by the decision of the United States Supreme Court in University of California Regents v. Bakke...A majority of the judges voted to overturn the challenged
system. Of even greater importance to the resolution of the present case, however, a separate, but clear majority of the higher court (namely Powell, Brennan, White, Marshal and Blackmun JJ.) indicated approval of race conscious admissions programs similar to the University’s programs under scrutiny here (DeRonde v. Regents of the University of California, 1981, 882).

The Court stated that because two separate lines of high court reasoning “converged’ to reach the Bakke conclusion, they would review each opinion separately (DeRonde v. Regents of the University of California, 1981, 882).

The Court first reviewed the Powell opinion because he represented the swing or “pivotal” vote in Bakke. The Court pointed out that Judge Powell had concluded in his opinion, that even though race conscious classifications must serve a compelling governmental interest, the State had a “substantial” interest that could legitimately may be served by a properly devised admissions program that considered race and ethnic origin (DeRonde v. Regents of the University of California, 1981, 883).

The Court also found significance in Justice Powell’s description and evaluation of the Harvard program.

In such an admissions program, race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats (Regents of the University of California v. Bakke, 1978).

The Court found that the admissions program used by the University to select its 1975 entering class at King Hall did not vary in any significant way from the Harvard Program. Each application was individually evaluated and examined. “As Justice Powell
pointedly observed, the primary and obvious defect in the quota system in Bakke was that it precluded individualized consideration of every applicant without consideration of race" (DeRonde v. Regents of the University of California, 1981, 883-884).

The Court did not find that "fatal flaw" happening in the 1975 admissions process at King Hall. They did not believe it was a "quota case".

Thus we conclude that the race attentive admissions procedure used by the University in 1975 would have passed federal constitutional muster under the standards prescribed by Justice Powell in Bakke (DeRonde v. Regents of the University of California, 1981, 885).

In examining the Brennan opinion, which represented the views of four justices, the Court believed that a race conscious law school admissions program, that did not involve a quota, would be upheld by those holding the Brennan opinion (DeRonde v. Regents of the University of California, 1981, 885). Justice Brennan also approved of the Harvard Plan, but because of the use of race based admission polices to relieve the lingering effects of past discrimination (DeRonde v. Regents of the University of California, 1981, 885).

According to the Court, the evidence also supported a finding that the use of race conscious admissions program was needed to prevent a disproportionate underrepresentation of minorities in King Hall. Past societal discrimination against ethnic minorities was also a fact acknowledged by this Court, as well as in the Powell and Brennan opinions in Bakke.

The Brennan opinion also asserted the existence of a nexus between past discrimination and present disproportionate academic and professional
underrepresentation (*DeRonde v. Regents of the University of California*, 1981,886). The Court used the Brennan opinion in Bakke to support their decision:

Although the foregoing observations were expressed within the context of a discussion of minority admissions to medical school, it seems fair to conclude that the justices joining in the Brennan opinion would reach an identical conclusion with respect to the effect of past societal discrimination upon minority applicants at King Hall... Accordingly, we conclude that, whether based on the Powell reasoning of assuring an academically beneficial diversity among the student body, or on the Brennan rationale of mitigating the effects of historical discrimination, it is abundantly clear that the University’s 1975 admissions program would, on its face, meet the federal constitutional standards as declared by a majority of the justices of the high court (*DeRonde v. Regents of the University of California*, 1981,886).

The Court contended that the record of the University proved that it was not using the minority admissions procedure either as a cover for a quota system or as a means of systematic exclusion of, or discrimination against, white male applicants. Without proof of intent, the University’s procedures must be upheld against a claim of unlawful racial discrimination. The evidence failed to support a finding of such disproportionate impact (*DeRonde v. Regents of the University of California*, 1981,887).

We conclude that the University’s 1975 admissions procedures did not violate the equal protection clause of the federal Constitution, as authoritatively interpreted by a majority of the United States Supreme Court in its *Bakke* decision (*DeRonde v. Regents of the University of California*, 1981,889).
Turning to DeRonde’s contention that the admissions procedures violated similar provisions of the California Constitution, the Court concluded:

The high court’s Bakke decision, although based on differing rationales, gives clear guidance for our decision to the extent that it is controlled by the equal protection requirements of the United States Constitution. We, ourselves, by majority vote very recently in Price, concluded that even utilization of a fixed quota did not offend the California Constitution (DeRonde v. Regents of the University of California, 1981,890).

The Court decided that the King Hall admissions program was “conceived in good faith” and was implemented within state constitutional boundaries. The appeals court reversed the judgment of the lower court by declaring the University’s admissions not discriminatory or a violation of equal protection laws and allowed the university to allow consideration of race, color or ethnic origin in the admissions process at King Hall (DeRonde v. Regents of the University of California, 1981,891).

Dissenting Opinion

Judge Mosk, in the dissenting opinion, felt the majority opinion was “preordained” (DeRonde v. Regents of the University of California, 1981,892). He believed that the constitutionality of state action must be tested according to whether the rights of an individual are restricted because of his race (DeRonde v. Regents of the University of California, 1981,892).

Because classification of race was involved, Mosk asserted that the rule of strict scrutiny must be followed (DeRonde v. Regents of the University of California, 1981,894). He believed that the university admission program was of “dubious validity
on its face” and that evidence showed that it failed as applied to the use of racial classifications under strict scrutiny (DeRonde v. Regents of the University of California, 1981,894).

Mosk concluded that the formula used by Davis made a mockery of selection on the basis of individual merit and violated the condemnation of quotas in Justice Powell’s opinion in Bakke (DeRonde v. Regents of the University of California, 1981,896).

Significance

Both the majority opinion and the dissenting opinion followed the Bakke decision to make their conclusions but reached different decisions. The majority opinion believed that following the Bakke decision, the admissions policy did not violate the equal protection laws afforded by both the state and the federal constitutions. Justice Mosk, in his dissenting argument, found that by the Bakke standards, there was no compelling reason for the admissions policy.

This was the first affirmative action admissions case in higher education to use the Bakke decision as precedent. As the Bakke court found itself divided in its decision, this court also did not reach a total consensus.

The significance of this case was as the first admissions case to use Bakke as a precedent and to also follow the same path of dissenting opinions.

DOHERTY v. RUTGERS SCHOOL OF LAW-NEWARK

United States District Court for the District of New Jersey
487 F. Supp. 1291
April 18, 1980
Judge: Whipple

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Question: May an applicant for admission to a state university law school challenge the law school’s admission policies in the face of a finding that he did not possess the qualifications to have been admitted in the absence of the minority student program he challenged?

Summary of Case

Robert Doherty, the plaintiff, asked the United States District Court for the District of New Jersey, to invalidate on federal constitutional and statutory grounds a minority student admissions program at the Rutgers University of Law-Newark. Rutgers asked the Court to dismiss the complaint for lack of subject matter jurisdiction on account of Doherty’s alleged lack of standing. (Doherty v. Rutgers School of Law-Newark, 1980).

Doherty was a white male who applied to the law school for the academic year beginning in fall of 1979. He was refused admittance and filed a complaint, asserting violations of his rights under the Fourteenth Amendment and under the Equal Education Act. (Doherty v. Rutgers School of Law-Newark, 1980).

The form of application to the law school contained a series of questions designed to determine whether a particular individual was eligible to be considered under the minority admissions program. The candidate did not have to answer the questions to be admitted and if the questions were not answered, the application was considered solely under the regular program admissions criteria. The minority admissions program gave more weight to a candidate’s education, factors such as academic honors, pattern of improvement, work experience and graduate degrees than did the regular admissions program (Doherty v. Rutgers School of Law-Newark, 1980).
The plaintiff's complaint argued that the defendant admissions officers incorrectly scored his application under the criteria of both the minority and the regular admissions program. The law school submitted affidavits and memoranda which alleged that when Doherty submitted his application for the minority program, he asserted that he was a member of the Irish-American ethnic group and had a blue collar, middle class socioeconomic background. The Dean of Minority Affairs determined that Doherty did not meet the eligibility based on the minority application guidelines (Doherty v. Rutgers School of Law-Newark, 1980).

The defendants alleged that Doherty did not meet the cut-off score even with the assumption that he would get the total subjective points. Therefore, the subjective criteria were not evaluated and Doherty was sent a rejection letter. Had Doherty’s application been evaluated under the minority application process and been given the highest possible subjective points, the defendants contended that Doherty would have still been below the cut-off point. (Doherty v. Rutgers School of Law-Newark, 1980).

Decision

The Court found Doherty without standing to challenge the law school’s minority admissions program. The first possible injury, rejection from the law school, was the result of the plaintiff’s academic deficiencies relative to other law school applicants. The second possible injury, that pertained to not being permitted to compete for minority admissions seats on the basis of race or ethnic origin, was also rejected on the basis of affidavits and exhibits submitted by Rutgers. These documents demonstrated, and the defendant did not dispute, that no applicant was prohibited from being considered under
the minority admissions program because of his or her race or ethnic background

(Doherty v. Rutgers School of Law-Newark, 1980).

The concept of the 'minority' in the challenged program includes economically disadvantaged whites. Unlike the admissions program in Bakke, which was found to be facially infirm because it totally and unconditionally excluded members of the white race from competing for a pre-ordained number of seats at a medical school, an applicant of any racial or ethnic background may compete for minority admissions seats at Rutgers. Thus, unlike Allan Bakke, plaintiff cannot claim as an injury upon which to predicate standing, that he was denied an opportunity to compete for seats for racial or ethnic reasons (Doherty v. Rutgers School of Law-Newark, 1980, 1298).

Significance

Using Bakke as a precedence, the court held that a plaintiff cannot claim he was denied an opportunity to compete for admissions to a university based on racial and ethnic reasons when the competitive process allows disadvantaged applicants of any race to compete for these seats and when the plaintiff could not meet the minimum requirements for admission.

This decision did not discourage the University from what appeared to be a "two-track" system, where not all applicants were compared with each other. The court seemed to be more focused on the factors used in the "minority" groups admissions than in the separate application procedures and requirements.
DOHERTY v. RUTGERS SCHOOL OF LAW – NEWARK

United States Court of Appeals, Third Circuit
651 F. 2d. 893; 60 A.L.R. Fed. 598; U.S.App. LEXIS 12263
June 16, 1981
Judges: Seitz, Rosenn, Sloviter.

Question: May an applicant for admission to a state university law school challenge the law school’s admission policies in the face of a finding that he did not possess the qualifications to have been admitted in the absence of the minority student program he challenged?

Summary of Case

After this rejection, Doherty filed a pro se action and sued the law school, several of its’ administrative officers and the State of New Jersey in the United States Court of Appeals, Third Circuit. He alleged that Rutgers had violated his rights under the Fourteenth Amendment (Doherty v. Rutgers School of Law-Newark, 1981).

The issue presented in this appeal was whether an applicant for admission to a state university could challenge the law school’s admission policies in the face of a finding that he did not possess the qualifications to have been admitted in the absence of a minority admissions program he challenged (Doherty v. Rutgers School of Law-Newark, 1981).

Decision

The Third Circuit Court, after conducting an evidentiary hearing on the issue, held that the defendant lacked standing and granted the defendants’ motion to dismiss (Doherty v. Rutgers School of Law-Newark, 1981).
Significance

The Third Circuit Court's opinion noted that, in contrast to the situation in Bakke, the plaintiff did not meet the criteria needed for the acceptance for any of the seats at Rutgers Law School. The Court did not address the admission procedures examined by the lower court.

MCADAMS v. REGENTS OF THE UNIVERSITY OF MINNESOTA

United States District Court for the District of Minnesota, Third Division
March 3, 1981
Judge: Devitt

Question: Did The University of Minnesota Law School unfairly discriminate against the plaintiff in favor of minorities for the law school admissions policies during school years 1977-79?

Summary

Scott McAdams filed a reverse discrimination case against the University of Minnesota Law School, claiming he was unfairly discriminated against in favor of ethnic minorities in the admissions policies. McAdams applied for law school during the school years of 1977-79 and was not accepted. In his senior year at another law school, McAdams claimed monetary and punitive damages against the University (McAdams v. Regents of the University of Minnesota, 1981).

The complaint before the Court was in two issues. In Count I, the plaintiff alleged that when the University learned he was not a minority, they withdrew their offer of admission. In Count II, McAdams also contended that the University effected an illegal quota system, through their special minorities admission program, to determine students...

The University argued that the case be dismissed because the plaintiff lacked standing to challenge the minorities admissions program. They contended that McAdams would not have been accepted even if the special admissions program had not been in force (McAdams v. Regents of the University of Minnesota, 1981, 355).

The plaintiff was placed on the deferred list by the University and was sent a letter inviting admittance by mistake. He was then sent two rejection letters and telephonic notice of rejection. McAdams contended that another Scott McAdams, of an ethnic minority group, was offered the position. But when he, a white male, accepted, the offer was withdrawn.

Decision

The lack of factual support for the theory involving another student with the plaintiff's name caused the Court to consider it no more than "fanciful speculation". The University’s motion for summary judgment for Count I was granted (McAdams v. Regents of the University of Minnesota, 1981).

In Count II, the law school’s special risk admissions program was challenged. This program was in effect during the academic years the plaintiff applied for law school and provided that the committee could admit not more than fifteen applicants as special risk students.

The special risk applicants were chosen from educationally and culturally disadvantaged students or members of minority groups who did not meet the usual admissions requirements, but who did have a satisfactory score based on weighted
averages of the LSAT and the applicant's undergraduate grade point average (*McAdams v. Regents of the University of Minnesota*, 1981).

In 1977, there were 310 applicants ahead of McAdams; in 1978, there were 136; and in 1979, the special admissions program was abandoned. The special risk program was redrafted in 1979 apparently in light of *Regents of California v. Bakke* (*McAdams v. Regents of the University of Minnesota*, 1981, 357).

Plaintiff argued that notwithstanding his relative position, he still may have been admitted. The Court contended that the plaintiff's alleged injury is not likely to be redressed by a decision and determined that the Court had no power to make such a ruling. The Court interpreted *Bakke* to require at least some showing of causation.

The mere allegation of a constitutional violation is not sufficient particularly where no remedial relief is available. Such an interpretation is consistent with the purposes of the standing requirement as it assures that the decision of the federal court is not merely gratuitous and thus inconsistent with the case or controversy requirement of and 'assures that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult questions' (*McAdams v. Regents of the University of Minnesota*, 1981, 359).

**Significance**

In the opinion, the *Doherty v. Rutgers School of Law-Newark* (1980) is also used as a precedent in addition to *Bakke*. The Court stated that relief for the plaintiff's inability to compete for all seats in 1977-1979 was not sufficient to grant plaintiff standing because relief was not available. But that the injury could have been sufficient when
relief was available before the university changed admission policies. The Court referred to the Doherty decision where the Court could order the University to allow the plaintiff to compete for all seats.

However, the alleged discriminatory program no longer existed and the plaintiff could not prove he would have been admitted absent the program's existence.

The significance in this case rests with the Court using not only the Bakke precedent, but also a court case which had referenced the Bakke decision in its' decision. Also, the admission policies in question were redrafted based on the Bakke decision, bringing them more in line with the Supreme Courts' opinion.

DAVIS v. HALPREN, ET AL.

United States District Court for the Eastern District of New York
768 F. Supp. 968; 1991 U.S. Dist. LEXIS 7842
June 5, 1991
Judge: Glasser

Question: Did the City University of New York Law School at Queens College discriminate against the plaintiff by favoring less qualified non-white, non-Jewish, and female applicants for admission through the use of a quota system?

Summary of Case

Plaintiff David Davis, a white male, had applied for admissions to and was rejected from the City University of New York Law School at Queens College every year since 1983 when the law school opened. He initiated a lawsuit in 1985 alleging violations of the Fourteenth Amendment and sought damages and injunctive relief (Davis v. Halpren, 1991).
Davis contended that the law school discriminated against him by favoring less qualified, non-white, non-Jewish, and female applicants through the use of quota system. He further alleged that the law school rejected him in retaliation for him bringing this and two prior state actions to obtain relief from this discrimination (Davis v. Halpren, 1991). Halpren, the first defendant noted on the case, was the Dean of the Law School at the time of this lawsuit.

In 1987, this same court rejected the defendant's motion to dismiss for failure to state a claim on which relief could be granted. The School of Law claimed that their admissions policy did not utilize a quota system for women or minorities and fully complied with the requirements of Regents of the University of California v. Bakke. This court, in 1987, ruled that the plaintiff's allegations were sufficient to state a claim. More than three years later, the defendants returned to the Court with a motion for summary judgement. (Davis v. Halpren, 1991, 970-971).

The admissions process is the subject of this lawsuit. Diversity was one of the four criteria used by the law school to select students. The law school's mandate, in part, was to seek students who would "otherwise be unable to attend law school, or who are members of populations that have traditionally been underserved by the law" (Davis v. Halpren, 1991, 971).

The defendants argued that plaintiff's rejections were due neither to discrimination no to retaliation, but rather to Davis' poor qualifications and poor comparison with competing applicants. They rejected the plaintiff's contentions as not supported by facts, and moved for summary judgment.
Decision

The defendant’s motion to dismiss the Fourteenth Amendment claim was denied based partially on the law school’s policy for selecting a diverse group of students. The Court quotes Bakke as reference:

If the policy expressed in these statements is a simple preference for members of certain minorities over other individuals, then it is unconstitutional as ‘discrimination for its own sake’ (Regents of the University of California v. Bakke, 1978, 307).

The Court continued:

If it is to combat the effects of societal discrimination on the legal profession, then it is unconstitutional for its failure to be limited to the goal of remedying specific prior discriminatory practices by the law school. Neither side in this case has proffered a shred of evidence suggesting that the law school has ever engaged in discrimination against those underrepresented groups (Davis v. Halpren, 1991, 980).

The defendant’s motion for summary judgment was granted only as to the claims of sex discrimination and the claim for money relief against the defendants in their official capacity.

Significance

The decision for summary judgment only to the claims of sex discrimination and money relief against the defendants denied the summary motion to other claims. A summary motion allows prompt and expeditious disposition of controversy without trial.
To deny this motion for the discrimination based on race or the case of retaliation may mean that there is a dispute of material facts or a question of law is involved.

The Court allowed the plaintiff to continue in his pursuit of claims against his Fourteenth Amendment rights and used *Bakke* to insist that a preference for one race is unconstitutional. Also, to use a defense of prior discrimination, the defendant must show cases of past discrimination by the law school itself.

No further record of this case was found. The case may have been settled out of court.

**HOPWOOD ET. AL. V. STATE OF TEXAS ET. AL**

United States District Court, W.D. Texas, Austin Division  
94 E. Law Rep. 760  
August 19, 1994  
Judge: Sparks

**Question:** Did the University of Texas School of Law violate the plaintiffs’ Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 rights by discriminating against them by favoring less qualified black and Mexican American applicants for admissions through the use of a quota system?

**Summary of Case**

The suit considered the case of nonminority applicants who were rejected by the University of Texas School of Law and who challenged the law school’s affirmative action admissions program as violating equal protection (*Hopwood v. State of Texas*, 1994). Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers, the plaintiffs in this action, applied for admissions to the University of Texas School of Law...
in 1992. All four applicants were white residents of Texas and all four were denied admittance.

The University of Texas School of Law is one of the nation’s leading law schools and consistently ranks in the top twenty. Admission to the law school is extremely competitive, with over 4,000 applicants a year and only approximately 900 candidates offered admission to an entering class of 500 students. Because of its competitiveness, many of the applicants have some of the highest test scores and grades in the country (Hopwood v. State of Texas, 1994).

In the early 1990's, the law school based its initial admissions decisions upon a Texas Index (“TI”) number which was a composite of their undergraduate grade point average and the Law School Aptitude Test (“LSAT”) scores. This composite number was then used to rank candidates and used as a prediction of a candidate’s probable success in law schools (Hopwood v. State of Texas, 1994).

The admissions office also took into consideration such factors as the strength of a student’s undergraduate education, the difficulty of the major, and the possible grade inflation at the respective college. In addition, the admissions office could also consider an applicant’s background, life experiences, and outlook. These subjective factors were very important for the marginal candidates whom did not rank high on the Texas Index (Hopwood v. State of Texas, 1994).

For the class entering the 1992 class, the applicants were placed in one of three categories according to their TI scores. These categories were “presumptive admit”, “presumptive deny”, or a middle “discretionary zone”. How extensive a review an applicant received was determined by the TI category. However, Black and Mexican-
American candidate files were treated differently. Unlike the white and non-preferred minority candidates, these candidates' scores were compared to lower TI ranges that allowed the law school to consider and admit more of them *(Hopwood v. State of Texas, 1994)*.

In addition to the different TI score levels for Blacks and Mexican-Americans, they were also given a separate application evaluation process. The university color-coded the applications according to race. If a candidate failed to indicate their race, they were treated as a non-preferred or as a white applicant *(Hopwood v. State of Texas, 1994)*.

Blacks and Mexican-Americans were the only two minority categories granted preferential treatment in admissions. The law school's stated purpose in lowering the standards for just these two groups was to meet a goal of admitting a class consisting of ten percent Mexican-Americans and five percent Blacks. These were roughly the proportions comparable to the percentages of those races graduating from Texas Colleges *(Hopwood v. State of Texas, 1994)*.

The plaintiffs, whose applications were denied, sued. The plaintiffs' central claim was that they were subjected to unconstitutional racial discrimination by the law school's evaluation of their admissions. They sought injunctive and declaratory relief and compensatory and punitive damages. *(Hopwood v. State of Texas, 1994)*.

**Decision**

The district court held that the law school had violated the plaintiffs' equal protection rights. The court also found that the affirmative action program employed in 1992 by the law school in its admissions procedures did not meet the legal standard
required for such programs to pass constitutional muster. But the district court refused to
enjoin the law school from using race in admissions decisions or to grant damages
beyond a one-dollar nominal award to each plaintiff. However, the district court did order
that the plaintiffs be allowed to apply again (Hopwood v. State of Texas, 1994).

Significance

The district court evaluated the admissions program under the constitutional
standard of strict scrutiny as used in Bakke. Finding that the University did treat
applicants differently based on their race, the court then looked at whether the law school
had a compelling government interest and was narrowly tailored to meet that interest.

The court held that there were two reasons that met Constitutional muster: those
benefits of a diverse student body and overcoming past effects of discrimination. The
court did not limit the past discrimination to just the law school, but to all institutions of
education in Texas.

However, the court did hold that differential treatment was not allowed where
candidates of different races were not compared at some point in the admissions process,
so that process was struck down. Since the law school promised to abandon the
two-committee system, no prospective relief was justified.

The significance of this decision is the use of Justice Powell's separate opinion in
Bakke to support the Court's decision of approval for the non-remedial goal of a diverse
student body. The court also found that the use of racial classifications could be justified
as a remedy for past discrimination in the Texas education system as a whole, so did not
seem to follow the "compelling state interest of past discrimination" of the Bakke
decision.
Question: Did the district court err in the decision holding for the plaintiffs in the case of nonminority applicants who were rejected by the state university law school’s affirmative action program as violating equal protection?

Summary of Case

The University of Texas School of Law appealed the District Court’s decision to the United States Court of Appeals, Fifth Circuit (Hopwood v. State of Texas, 1996).

Decision

The United States Court of Appeals, Fifth Circuit, held that the state university law school’s admission’s program, which discriminated in favor of minority applicants by giving substantial racial preferences in it’s admission’s program, violated equal protection (Hopwood v. State of Texas, 1996, p. 932). The main purpose of the equal protection clause was to prevent purposeful discrimination between individuals on the basis of race. It seeks to ultimately render issues of race irrelevant in government decisions (Hopwood v. State of Texas, 1996, p. 932).

The Court of Appeals found no compelling justification for the law school to treat applicants differently, even for the purpose of correcting perceived racial imbalance in the student body. While the district court found that the law school could continue to impose racial preferences, the appeals court reversed and remanded, concluding that the
law school could not use race as a factor in law school admissions (Hopwood v. State of Texas, 1996, p. 935).

The plaintiffs argued that diversity was not a compelling interest under superseding Supreme Court precedent and in fact:

... the plaintiffs assert that the district court misapplied Justice Powell's Bakke standard, as the law school program here uses race as a strong determinant rather than a mere 'plus' factor and, in any case, the preference is not narrowly applied (Hopwood v. State of Texas, 1996, p. 944).

The Court of Appeals agreed with the plaintiffs that it was not a compelling interest, under the Fourteenth Amendment, for the law school to consider race or ethnicity for the purpose of achieving a diverse student body. Race cannot be used to achieve a diverse student body; to believe that a person's race has certain characteristics is to stereotype them. "Justice Powell's separate opinion in Bakke provided the original impetus for recognizing diversity as a compelling state interest in higher education" (Hopwood v. State of Texas, 1996, p. 941). However:

We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in Bakke garnered only his own vote and has never been represented the view of a majority of the Court in Bakke or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of
race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection (Hopwood v. State of Texas, 1996, p. 944).

The Appeals Court went even further in their discussion of the Bakke decision:

Justice Powell’s view in Bakke is not binding precedent on this issue. When he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale. In Bakke, the word ‘diversity’ is mentioned nowhere except in Justice Powell’s single-Justice opinion. In fact, the four-Justice opinion, which would have upheld the special admissions program under intermediate scrutiny, implicitly rejected Justice Powell’s opinion (Hopwood v. State of Texas, 1996, p. 944).

The Fifth Circuit Court also found that the Bakke case did not express a majority opinion and was questionable as a binding precedent. The Court asserted that “since Bakke, the Court has accepted the diversity rationale only once in its cases dealing with race” (Hopwood v. Texas, 1996, p. 944).

The judges also wrote in the Hopwood decision that Justice Powell’s “conception of race as a ‘plus’ factor would allow race always to be a potential factor in admission decisionmaking” (Hopwood v. State of Texas, 1996, p. 948).

In sum, the use of race to achieve a diverse student body, whether as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny (Hopwood v. State of Texas, 1996, p. 948).
Continuing, the Appeals Court argued that the "diversity interest will not satisfy strict scrutiny" and that the Supreme Court has appeared to recognize only one compelling state interest to justify racial classifications: remedying past wrongs (Hopwood v. State of Texas, 1996, p. 944).

In short, there has been no indications from the Supreme Court, other than Justice Powell's lonely opinion in Bakke, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court case law strongly suggests, in fact, that it is not (Hopwood v. State of Texas, 1996, p. 945.)

The Hopwood opinion asserted that race is "said to be justified in the diversity context" not on its own terms but as a "proxy for other characteristics" that universities value, but that do not raise similar constitutional concerns (Hopwood v. State of Texas, 1996, p. 946.) The other characteristics mentioned were athletic ability, academic excellence, or musical talent.

Turning to the district court's decision that the "remedial purpose of the law school's affirmative action program is a compelling governmental objective", the appeals court found the district court in error when it expanded the remedial justification to all public education in Texas. Based on the Supreme Court's warnings that the use of racial remedies must be carefully limited, the District Court of Appeals found that the law school would have to remedy any acts of discrimination only by the law school. It could not reflect any discrimination from the primary and secondary schools in Texas or any other institution in the state (Hopwood v. State of Texas, 1996).

The appeals court also found that the district court erred in concluding that
bad reputation and hostile environment were enough to sustain the use of race in the admissions process. The appeals court found no compelling state interest in remedying the present effects of past discrimination sufficient to maintain the current admissions process. The court stated, "...one cannot conclude that the law school’s past discrimination has created any current hostile environment for minorities (Hopwood v. State of Texas, 1996, p. 953).

The Court of Appeals decided it was not necessary to order the law school to stop its “affirmative action program” after this program was determined to be in violation of the equal protection clause. The court was confident the school would heed the directives contained in the judicial opinion.

Specially Concurring Opinion

Circuit Judge Wiener found himself unable to concur with the majority in rejecting the Bakke view of diversity in a public graduate school as a compelling governmental interest:

As to diversity, however, I respectfully disagree with the panel’s conclusion that diversity can never be a compelling governmental interest in a public graduate school. Rather than attempt to decide that issue, I would take a considerably narrower path – and, I believe, a more appropriate one – to reach an equally narrow result: I would assume arguendo that diversity can be a compelling interest but conclude that the admissions process here under scrutiny was not narrowly tailored to achieve diversity (Hopwood v. State of Texas, 1996, p. 962). Circuit Judge Wiener found that none disputed that the law school employed
racial classifications in the 1992 admissions process (Hopwood v. State of Texas, 1996, p. 963). Because of this, he asserted that, like all racial classifications by the government, the admissions process was subject to strict scrutiny (Hopwood v. State of Texas, 1996, p. 963).

The law school invokes the opinion of Justice Powell in the Regents of the University of California v. Bakke to support that postulate. The panel opinion rejects that support, concluding that from its inception Bakke had little precedential value and now... has none (Hopwood v. State of Texas, 1996, p. 963).

He further stated that the other judges declared categorically that “any consideration of race or ethnicity” for achieving a diverse student body by the law school was not a compelling interest under the Fourteenth Amendment (Hopwood v. State of Texas, 1996, p. 963). However, he believed this position remained an extension of the law and “overly broad and unnecessary to the disposition of this case” (Hopwood v. State of Texas, 1996, p. 963).

Judge Wiener felt unable to concur in the majority’s analysis:

My decision not to embrace the ratio decidendi of the majority opinion results from three premises: First, if Bakke is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement (Hopwood v. State of Texas, 1996, p. 963).

He questioned the majority’s opinion further:

Until further clarification issues from the Supreme Court defining ‘compelling interest’ (or telling us how to know one when we see it), I perceive no
compelling’ reason to rush in where the Supreme Court fears — or at least declines — to tread (Hopwood v. State of Texas, 1996, p. 965).

Proceeding with the assumption that diversity was a compelling interest, Circuit Judge Wiener then looked at the narrowly tailored inquiry. He then concluded that the law school’s 1992 admissions process misconceived the concept of diversity.

When the selective race-based preferences of the law school’s 1992 admissions process are evaluated under Justice Powell’s broad, multi-faceted concept of diversity, that process fails to satisfy the requirements of the Constitution...the limited racial effects of the law school’s preferential admissions process, targeting exclusively Blacks and Mexican Americans, more closely resembles a set aside or a quota system for those two disadvantaged minorities than it does an academic admissions program narrowly tailored to achieve true diversity (Hopwood v. State of Texas, 1996, p. 966).

Following this line of reasoning, Circuit Judge Wiener contended that the law school’s race-based 1992 admissions process was not narrowly tailored to achieve diversity and held it constitutionally invalid. Instead of following the “primrose path of compelling interest”, Circuit Judge Wiener preferred to follow the “solitary path of narrow tailoring” on the issue of strict scrutiny concerning the question of diversity (Hopwood v. State of Texas, 1996, p. 966).

Significance

In one of the few cases, if any, critical of the Bakke decision as noted in the Shepard’s United States Citations: Supreme Court Reporter (1998, p. 464), the Hopwood.
et al. v. State of Texas, et al. decision has become a very important challenge to the Bakke decision.

However, the University’s law school did use quotas in their admissions process and such a process would never pass a Bakke strict scrutiny test, as pointed out by Circuit Judge Wiener. Bakke did allow diversity, in some cases, but not quotas.

The Hopwood opinion also noted that “only one Justice concluded that race could be used solely for the reason of obtaining a heterogeneous student body” (Hopwood v. State of Texas, 1996, p. 944). But in the Powell’s opinion in Bakke, he allowed that race was just one factor to be considered for diversity:

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body (Regents of the University of California v. Bakke, 1978, p. 2761).

The law school’s admissions policies would never have been accepted using the Supreme Court’s decision in Bakke. Because of this, the Hopwood decision could be viewed as concurring with the Bakke decision. The Hopwood majority opinion did not seem to understand that Justice Powell’s opinion in Bakke clearly did not tolerate quotas for diversity.

One must also note that this case was heard only by three judges from the United States Court of Appeals, Fifth Circuit, not the entire court. Even though only one of the judges, Judge Wiener, disagreed with the panel’s conclusion that diversity could never be a compelling state interest, only two judges out of the entire Fifth Circuit Court of Appeals were in concurrence with the decision.
The Circuit Court denied a rehearing en banc, remarking in their opinion that neither the plaintiffs nor the defendants requested it. The en banc hearing was requested by Attorney General Dan Morales of Texas, at the request of the Board of Regents of the University of Texas System.

However, in a dissenting opinion to the failure to grant rehearing en banc, Chief Judge Politz and Judges King, Wiener, Benavides, Stewart, Parker and Dennis, stated:

In resolving the case presented by these four plaintiffs, the panel opinion directed the Law School not to use race as a factor in the admissions process at all. In so doing, the opinion goes out of its way to break ground that the Supreme Court itself has been careful to avoid and purports to overrule a Supreme Court decision, namely *Regents of the University of California v. Bakke*. The radical implications of this opinion, with its sweeping dicta, will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation. A case of such monumental import demands the attention of more than a divided panel. It should have the attention of every active judge on this court. We respectfully but emphatically dissent from the denial of rehearing en banc (Dissenting Opinion on rehearing en banc *Hopwood et al. v. State of Texas, et al.* 1998).

The dissenting judges also make the point that the Supreme Court had made it
clear that a constitutionally inferior court must follow a directly controlling Supreme Court precedent unless and until the Supreme Court determines to overrule it (Dissenting Opinion on rehearing en banc Hopwood et al. v. State of Texas, et al., 1998).

The syllogisms tacked together and proffered by the majority opinion as proof that Justice Powell's diversity conclusion is no longer good law do not, under any standards, of which we are aware, qualify as an overruling of Bakke. To the contrary, direct reference to Justice Powell's diversity analysis documents, supports, and reinforces its continuing validity (Dissenting Opinion on rehearing en banc Hopwood et al. v. State of Texas, et al., 1998).

Significance

To further confuse the courts and nation on the policy of affirmative action in higher education admissions, the Circuit Court itself was divided on the issue of a rehearing en banc.

TEXAS ET AL. v. HOPWOOD ET AL.

Supreme Court of the United States
No. 95-1773
July 1, 1996

The Supreme Court denied certiorari, with two Justices noting that the certiorari was denied because the admissions program was no longer "genuinely in controversy". The two Justices who commented on the court's decision said the case lacked a judgment for the court to review. Justice Ginsberg, in a comment joined by Justice Souter, noted that the court reviews judgments, not opinions (Texas v. Hopwood, 1996).

The use of race or national origin as a factor in its admission process is an issue of
great national importance. The petition before us, however, does not challenge the lower courts' judgments that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional...Instead, petitioners challenge the rationale relied on by the Court of Appeals. This Court, however, reviews judgments, not opinions. Accordingly, we must wait a final judgment on a program genuinely in controversy before addressing the important question raised in this petition *(Texas v. Hopwood, 1996)*.

**Significance**

Attorney General Dan Morales of Texas interpreted the *Hopwood* ruling as banning affirmative action in admissions, scholarships, and recruiting programs. This ruling applies to all public and private Texas colleges that receive Federal money such as student grants and loans. The other states in the Fifth Circuit, Mississippi and Louisiana, are under Federal desegregation orders and have not yet banned affirmative action *(Morales Letter Opinion, 1997)*.

With the Supreme Court denying certiorari in the Hopwood case, the *Bakke* opinion still stands as the precedent. However, this case has been appealed again to the United States Fifth Circuit Appeals Court for an en banc hearing. It was filed on June 6, 1998, No. 98-50506 and is still pending.
Question: Are the admissions policies of the University of Washington Law School unconstitutional and discriminatory against Caucasian applicants?

Summary of Case

Plaintiffs Katuria Smith, Angela Rock, and Michael Pyle applied to the University of Washington School of Law for the 1994, 1995, and 1996 entering classes, respectively. The Law School's admission's policy, which did not change during this time, was to:

...select individuals who have the highest potential for achievement in and contribution to the legal profession, legal scholarship, or law-related activities.

The Law School has determined that this objective is best obtained by selection of individuals who have demonstrated the greatest capacity for high quality work at the Law School and who...will contribute to the diversity of the student body and of the legally trained segment of the population (Smith v. University of Washington Law School, 1998, 1328).

The plaintiffs contended that race was not merely one of several diversity factors considered by the defendants in making admissions decisions, but rather a dispositive factor in many instances. The plaintiffs noted also, that prior to 1989, the only diversity factors the Law School considered were race and ethnicity. The Law School changed its policy in 1989 to include other diversity factors, but the plaintiffs asserted...
that the changes were cosmetic and made only to avoid a legal challenge (Smith v. University of Washington Law School, 1998, 1329).

The plaintiffs alleged that they had a right under the Equal Protection Clause of the Fourteenth Amendment not to be discriminated against by a state educational institution on the basis of race. Plaintiffs claimed their right was violated by the Law School because the defendants used different admissions standards for ‘favored racial groups’ consisting of minority applicants, than for ‘disfavored’ racial groups, consisting of nonminority applicants (Smith v. University of Washington Law School, 1998, 1333).

The defendants argued that the specific aspects of the Law School’s admission program challenged by the plaintiffs were not prohibited by any clearly established law. They contended that there is no clearly established law precluding the Law School from using its plan to achieve diversity in the legal profession, or from according greater weight to race than to other diversity factors, or from making decisions about minority candidates at a different time than decisions about nonminority candidates (Smith v. University of Washington Law School, 1998, 1333).

The Law School additionally maintained that at all times they followed a “Harvard Plan” which has been held constitutional under established law. Following the Bakke decision:

A ‘Harvard Plan’ is an admissions plan that considers race as one of several diversity factors, and allows race to be considered a ‘plus’ factor as long as all applicants are placed on the same footing for consideration (Smith v. University of Washington Law School, 1998, 1333).
The plaintiffs claimed that race was used as a determinative, rather than a plus, factor in the admissions process. Further, that the Law School used different standards for considering minority and nonminority applicants. The plaintiffs also asserted that nonminority and minority applicants were placed on unequal footing with respect to consideration for admission (Smith v. University of Washington Law School, 1998, 1333).

Decision

According to this Court, there is a binding Supreme Court and Ninth Circuit authority (Regents of the University of California v. Bakke, 1978) which clearly establishes guidelines for implementing and carrying out race-conscious programs:

In Bakke, Justice Powell established certain standards for considering race or ethnicity in a graduate admissions program. First, there must be a compelling state interest that justifies the consideration of race by the institution. ‘Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake’ which the Constitution forbids... The attainment of a diverse student body, however, is a compelling interest and constitutionally permissible goal for a university or graduate program. Thus, an institution of higher education may take race into account in achieving ‘educational diversity’ (Smith v. University of Washington Law School, 1998, 1334).

According to this Court, the Harvard Plan of admissions, which was appended to the opinion of Justice Powell, represented an admissions program that considered race in a manner consistent with constitutional requirements.

Although not binding authority, several state court opinions have adopted
Justice Powell's views in *Bakke* during the period the Law School was applying its admissions. Although Bakke established several guidelines for race-conscious programs, there are certain matters as to which there is no clearly established law (*Smith v. University of Washington Law School*, 1998, 1334).

There is no clearly established law, according to this Court, on the issue of whether the attainment of diversity in the legal profession is a goal that justifies the consideration of race in law school admissions. It is also not clearly established, to this Court, whether the "presence of mixed motives and interests, some constitutionally sufficient and some not, renders a race-conscious admissions program unconstitutional as a whole" (*Smith v. University of Washington Law School*, 1998, 1335).

*Bakke* has made clear, however, that there must be at least one constitutionally proper justification for considering race in admissions, and that the program must be narrowly tailored to serve that interest. Thus, to the extent a program is tailored to serve a state interest that is not compelling, rather than one that is, the program would be unconstitutional (*Smith v. University of Washington Law School*, 1998, 1335).

The Court wrestled with the question of whether a program is constitutional if it is tailored to serve both a constitutional and an unconstitutional goal, and it in fact, serves both goals. However, that the question of mixed motives was unresolved did not entitle the defendants to qualified immunity at that time. The Court found itself unable to make a qualified immunity determination based on the factual record submitted (*Smith v. University of Washington Law School*, 1998).
The Court was also unable to determine at that time if the Law School had followed a Harvard Plan:

The defendants argue that they have implemented and applied a ‘Harvard Plan’ of admissions, and a Harvard Plan is constitutional under clearly established law. Assuming defendants have adopted a Harvard Plan and followed that plan in making its admissions decisions, the defendants would be entitled to qualified immunity (Smith v. University of Washington Law School, 1998, 1335).

Compensatory relief under Title VI requires a showing that the defendants intentionally discriminated in violation of the statute.

The Law School argues that it cannot be held liable under Title VI because (1) it engaged in conduct consisted with Bakke and OCR rulings, (2) it did not have ‘unambiguous notice’ that its admissions program was discriminatory, and (3) any violations would be unintentional. Defendant’s summary judgment motion turns on its argument that it followed existing law, specifically Bakke and OCR rulings, concerning the consideration of race as a factor in admissions (Smith v. University of Washington Law School, 1998, 1337).

The Court noted that it may determine at a later date that there was no basis for finding that the defendant intentionally discriminated against the plaintiffs, but it couldn’t do so on the current record. Accordingly, the Court denied without prejudice the Law School’s motion for summary judgment on Title VI claims (Smith v. University of Washington Law School, 1998, 1337).

The Court concluded that a class action suit would be granted on the certification as to the issue of liability as to whether the defendants’ admissions policy and practices
discriminate against Caucasians on the basis of race in violation of the Fourteenth Amendment. The class suit was limited to claims for injunctive and declaratory relief. To the extent the plaintiffs have claims for damage, they would be dealt with only after liability was established. The Court granted the plaintiffs motion for bifurcation (Smith v. University of Washington Law School, 1998, 1344-1345).

Significance

The court found enough evidence to allow a trial court to examine these issues separately. First there will be a court decision on the liability of the college before relief could be sought. A class action suit was approved concerning the liability of whether the admissions process discriminated against whites.

Using Bakke throughout the opinion, the Court found itself with insufficient evidence to view the Law School’s program. Noting that the “Harvard Plan”, as explained in the Bakke decision, was an acceptable model, the Court did not have enough evidence to determine if the Law School followed the Harvard Plan as presented.

This Court appeared to follow Bakke, but was not given enough information to make a decision concerning the issue of affirmative action in higher education admissions.

LESAGE v. STATE OF TEXAS

United States Court of Appeals for the Fifth Circuit
158 F. 3d. 213; 1998 U.S. App. LEXIS 26723
October 13, 1998
Judges: Reavley, DeMoss, and Parker

Question: Did the University of Texas at Austin impermissibly rely on race as a selection criterion by giving preferred status to Black and Hispanic applicants?
Summary of Case

Lesage applied to enroll in a doctorate program in counseling psychology at the University of Texas at Austin. Midway through the University’s process of accepting applications, the Fifth Circuit (this Court) handed down its Hopwood v. State of Texas decision (Lesage v. State of Texas, 1998).

An African immigrant of Caucasian descent, Lesage was denied admission. Consequently, he sued the State of Texas and the University. He alleged that the University impermissibly relied on race as a selection criteria by giving preferred status to Black and Hispanic applicants. Lesage asserted that the University’s admissions policy violated the Fourteenth Amendment and he sought monetary, declaratory and injunctive relief (Lesage v. State of Texas, 1998).

At an earlier stage, the district court dismissed Lesage’s claims to the extent that he sought monetary relief. Lesage moved for partial summary judgment on the issue of the state’s liability. The state moved for summary judgment based on its theory that Lesage would not have been admitted regardless of the use of racial preferences in admissions. The district court granted the state’s motion and dismissed the case. Lesage appealed the decision to the United States Court of Appeals for the Fifth Circuit (Lesage v. State of Texas, 1998, 215).

In Lesage’s motion for partial summary judgment, he relied entirely upon the state’s admission that its pre-Hopwood admissions process did involve explicit assessments of many candidates’ attributes, including race. The state responded with its own motion for summary judgment and replied that race had nothing to do with the decision to exclude Lesage from the counseling psychology program. The state’s two
contentions were that Lesage was eliminated from consideration before race was taken into account and that Lesage wouldn’t have been offered admission even if racial preferences had not been employed (Lesage v. State of Texas, 1998, 219).

Decision

Based on the evidence, the Fifth Circuit assumed that the university did employ a racially discriminatory counseling psychology admissions program as alleged. The applicants that had not yet been eliminated from consideration at the time racially preferential criteria were applied would have suffered an implied injury, even if their applications would not have resulted in admissions under a nondiscriminatory admissions program (Lesage v. State of Texas, 1998, 222).

Even though the district court predicted that Lesage suffered no direct injury and therefore incurred no compensatory damages, it does not foreclose the availability of other relief to which he may be entitled. It was improper grounds for summary judgment. The Fifth Circuit Court reversed the judgment of the district court and remanded for further proceedings (Lesage v. State of Texas, 1998, 222).

Concurring Opinion

Circuit Judge Reavley wrote in his concurring opinion in support of the Bakke decision:

This court’s writing in Hopwood, upon which the instant judgment is reversed, was inconsistent with the judgment of the Supreme Court in Regents of the University of California v. Bakke and was unnecessary to the holding or judgment of the Hopwood court. This circuit court, however, considers that Hopwood
writing to be binding law. I concur here in judgment only (Lesage v. State of Texas, 1998, 223).

Significance

It is interesting to note that the Hopwood Court used the Hopwood decision as precedence instead of Bakke. The concurring opinion, written by Circuit Judge Reavley, also asserted that referring to the Bakke decision in Hopwood was “unnecessary to the holding or judgment of the Hopwood court”. In other words, Circuit Judge Reavely found the Hopwood Court used unnecessary dicta in its opinion.

WOODEN v. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

United States District Court for the Southern District of Georgia,
Savannah Division
32 F. Supp. 2d. 1370; 1999 U.S. Dist. LEXIS 85
January 6, 1999
Judge: Zilly

Question: Does the University of Georgia utilize a racially discriminatory admission policy?

Summary of Case

Plaintiffs Wooden, et al. constitutionally challenged alleged racial discrimination within Georgia’s University System. They complained that the defendant had utilized a racially discriminatory admission policy at the University of Georgia (UGA). All parties in this lawsuit moved for summary judgment (Wooden v. Board of Regents of the University System of Georgia, 1999).

Two of the plaintiffs, both white, contended that the defendants denied them admission to UGA by applying race-based affirmative action admission policies which
violated their Fourteenth Amendment equal protection rights. On a broader scale, a second attack was upon policies affecting the state's historically Black institutions. Because these two issues are analytically different, the Court decided these “prongs” separately (Wooden v. Board of Regents of the University System of Georgia, 1999, 1372).

Referencing the Bakke decision, the Court discussed the concept of affirmative action and the difficulty it involved:

The Court is compelled to note, however, that both prongs are encased by an implacable polemic. For decades governments have taken ‘affirmative action’ to further minority representation in education and employment. That has generated intense debate over both its justification and constitutionality (Wooden v. Board of Regents of the University System of Georgia, 1999, 1372).

The Court explained that its authority was limited to reaching only the underlying constitutional issues presented to it. The opinion, cautioned the Court, extended only so far was necessary to fulfill the federal judiciary’s sole mission, which was to uphold the rights of individuals who are concretely impacted by government action (Wooden v. Board of Regents of the University System of Georgia, 1999, 1373).

Admission to UGA is competitive and the applications exceed the available freshmen seats. The Board of Regents admitted that UGA’s admission policy classified applicants as Black or Non-Black, with Black applicants receiving preferential treatment in admissions decisions. The Board did not want to litigate the constitutionality of the admissions policy, but insisted that Plaintiff Kirby Tracy lacked standing to sue (Wooden v. Board of Regents of the University System of Georgia, 1999).
The Court considered the two-track admission policy:

Engaging in racial discrimination proscribes only such racial classifications which would violate the equal protection clause of the Fourteenth Amendment (Regents of the University of California v. Bakke, 1978) The Board has admitted that UGA’s dual track admission policy employed an outright racial classification (Wooden v. Board of Regents of the University System of Georgia, 1999, 1379).

In reviewing the constitutionality of racial classifications, strict scrutiny was used to “smoke out” illegitimate uses of race. Bakke, in this decision, was used to explain this standard of review.

This standard of review is not dependant on the race of those burdened or benefitted in a particular classification. The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color (Regents of University of California v. Bakke, 1978, 289-290).

In Wooden, et. al. v. Board of Regents of the University System of Georgia (1999), the Georgia State Conference NAACP petitioned the court as Intrevenor Defendants. The NAACP contended that the diversity and remedial interests undergirding UGA’s admissions policy were complementary and mutually reinforcing. However, the Court found:

This is not the case. A diversity-based affirmative action programs which benefits only one ethnic group is fatally under inclusive (Wooden, et. al. v. Board of Regents of the University System of Georgia, 1999, n.11).
The Court used the Bakke decision to explain their decision:

“Special admissions programs which focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity” (Regents of University of California v. Bakke, 1978, 315).

The Court further explained that a remedial-based affirmative action program that benefited groups who were not the victims of current effects of past discrimination was overly inclusive (Wooden v. Board of Regents of the University System of Georgia, 1999, n.11).

The Court recognized the theoretical benefits of an educational institution that is open to a diverse collection of viewpoints. But it was not convinced that those benefits justified outright discriminatory admission practices that cause concrete constitutional injuries. Practices aimed at marginally increasing diversity simply cannot carry the day because such a benefit is far outweighed by the costs imposed by racial classifications (Wooden v. Board of Regents of the University System of Georgia, 1999, 1379).

The Court explained the Bakke decision in Wooden v. Board of Regents of the University System of Georgia in the following quote:

Justice Powell’s concurring opinion in Bakke suggests that the goal of genuine diversity in an educational setting is a compelling government interest. Though finding the actual admission policy at issue in Bakke unconstitutional on equal protection grounds, he suggested that a compelling interest existed for a State university to seek a ‘diverse student body’. This part of the opinion, as has been pointed out by the parties, numerous commentators and other Courts, was not
joined by any other Justice. Its precedential value is therefore questionable
(Wooden v. Board of Regents of the University System of Georgia, 1999, 1380).

The Court continued the discussion of diversity within admissions in higher
education, by citing Hopwood v. State of Texas as an example of a court decision that
contended diversity is not a compelling government interest warranting racial
classification (Wooden v. Board of Regents of the University System of Georgia, 1999,
1381).

Remarking that some courts view Justice Powell's Bakke opinion, along with
various concurring opinions of other Justices, as nonbinding dicta, this Court argued that
a majority of the Bakke court struck down an admission policy, which was in several key
respects, similar to UGA's admission policy (Wooden v. Board of Regents of the
University System of Georgia, 1999, 1381).

In Bakke, Justice Powell found that program, which focused solely on ethnicity,
to be at odds with what he felt was a compelling interest in diversity. Direct preferential
treatment was given to certain minority applicants at the expense of other applicants. The
Bakke program never compared the preferred minority applicants to the other applicants
and was described as a "two-track system" (Wooden v. Board of Regents of the
University System of Georgia, 1999, 1381).

This Court contended that "like the Bakke program, UGA's 1990-95 admission
policy was 'dual track' (Wooden v. Board of Regents of the University System of
Georgia, 1999, 1381).

Both the Bakke program and UGA programs 'focused solely on ethnic diversity'
in making admissions decisions. To that end, the Court agrees with Justice Powell that such a simplistic approach actually hinders the attainment of 'genuine diversity'. The diversity interest he defended in Bakke was not based solely on race or ethnicity, nor advanced by way of a simplistic, mechanical preference system. Thus, even if diversity is a compelling government interest, UGA failed to narrowly tailor its 1990-95 admission policy to further it (Wooden v. Board of Regents of the University System of Georgia, 1999, 1382).

Remediating past discrimination has been recognized as a compelling government interest, but only where there is a strong basis in the evidence for the government's conclusion that remedial action is necessary. The Court pointed out also that the racial classification must be in response to actual discrimination at the institution in question (Wooden v. Board of Regents of the University System of Georgia, 1999, 1382). Quoting from Bakke, the Court noted that "racial classification to remedy general, 'societal discrimination' is simply not a compelling State interest" (Regents of the University of California v. Bakke, 1978, 265).

Past or present discrimination at other University System institutions or at the primary or secondary school level did not justify the use of racially discriminatory admissions at UGA, according to this Court's decision. The UGA admission policy is institution-specific and so must be the purported reason for its existence at UGA (Wooden v. Board of Regents of the University System of Georgia, 1999, 1382).

The Court recognized that decades ago, UGA engaged in segregative admissions. However, it argued, temporary remote past practices, without any connection to the present discriminatory effects, were insufficient to warrant current racial discrimination
in admissions. UGA long ago discontinued its segregationist practices and now actively recruits Black applicants (Wooden v. Board of Regents of the University System of Georgia, 1999, 1383).

Decision

The Court then found that Tracy was entitled to partial judgment against the Board for UGA’s violation of his right to equal protection of the law. The amount of his Title VI damages were to be resolved at a later date. The defendant’s motion for summary judgement for all plaintiffs except Tracey was granted (Wooden v. Board of Regents of the University System of Georgia, 1999, 1384).

Significance

Using the Bakke decision, this court found that the University of Georgia did not have a compelling government reason to use race as a factor in admissions and also found the program not narrowly tailored enough to meet the Bakke specifications.

On an interesting note, the Court also used the Hopwood decision in its opinion, although these Courts are in different United States Appeals Courts. Hopwood took place in the Fifth Circuit; this court is in the Eleventh Circuit.

Analysis of Cases

There appears to be no Federal Judicial Circuit with a majority of cases. The Second Circuit Court jurisdiction had one case regarding higher education affirmative action admission policies which was Davis in New York. The Doherty case in New Jersey was in the Third Circuit jurisdiction and the Fifth Circuit Court jurisdiction had
two cases regarding higher education admissions policies; Hopwood and Lesage. McAdams was in Minnesota, which is in the Eighth Circuit. The Ninth Circuit Court had two cases; Smith in the state of Washington and DeRonde in California. The Eleventh Circuit Court had Wooden in Georgia.

A time period of ten years between McAdams v. Regents of the University of Minnesota (1981) and Davis v. Halpren et al. (1991) may be significant in this discussion. During this time period, no lawsuits concerning race in higher education admission policies occurred. The majority of the cases examined have happened in the 1990s; seven cases have been in the courts since 1991.

The Bakke decision may have assisted admissions personnel in higher education with their policy making and allowed legal guidelines with regard to diversity during those ten years of peace. In the 1990s, however, a influx of lawsuits have been filed regarding this issue which may indicate that the Supreme Court’s decision in Bakke is under attack.

Scholarly Review of Bakke v. Hopwood

After the Hopwood case was denied by the Supreme Court, many legal scholars were critical of the decision. Those who both supported and contested the Bakke decision had opinions on the comparison of the two cases. The commentaries below represented both sides of the discussion.

The only case critical of the Bakke decision in the cases reviewed previously in this paper was Hopwood v. State of Texas. With the Supreme Court refusing certiorari in this case, the Supreme Court left intact the strict standards set by the appeals court for
Texas, Louisiana, and Mississippi with respect to their use of race in admissions decisions (Riccucci, 1997).

At first blush, it seems an abdication of responsibility when the U.S. Supreme Court declined to review the U.S. Court of Appeals for the 5th Circuit’s sweeping decision barring all consideration of race in admissions at the University of Texas Law School (Taylor, 1996, p.9).

Sheesgreen (1996) reported that after the Hopwood decision, many higher education officials found themselves uncertain about the legal status of the “beleaguered” concept of affirmative action (p. S33). The officials had been hoping that the Supreme Court would quickly step in and settle the debate on admissions preferences:

Instead, the court’s decision not to review the lower court’s ruling in Hopwood further muddled the issue, leaving law school administrators disappointed, perplexed and anxious (Shesgreen, 1996, p. S33).

Taylor (1996) echoed this sentiment, commenting that the Hopwood decision “sowed confusion, probably into the next millennium, as to the legality of racial preferences” (p. 9). He pointed out that state universities in most of the country will presumably feel free to continue using racial preferences, based on the reasoning that the Supreme Court’s Bakke decision still remains the “law of the land” (p.9).

But those (state universities) in Texas, Louisiana and Mississippi are subject to the 5th Circuit’s broad directives in Hopwood that Bakke is no longer good law, that universities may not consider race and that any who do so risk punitive damage awards to rejected white applicants (Taylor, 1996, p. 9).

In an editorial entitled “Bias Confusion” (The National Law Review,
p. A16), the review commented on the Supreme Court's denial of certiorari in the *Hopwood* case. The article observed that the denial left unclear whether the Fifth Circuit was right in saying the Supreme Court had overturned *Bakke* sotto voce (p. A16). “The justices have hinted that *Bakke* is as dead as the Fifth Circuit said” (p. A16).

Taylor (1996) appeared perplexed about the Supreme Court's denial of certiorari and found the reason for denial less than convincing (p. 9). Noting that Justice Ginsberg contended that Texas no longer defended the quota-like admissions process that the law school used when the case was filed in 1992, he still believed the Court should have heard the *Hopwood* case:

Such factors might warrant passing up an ordinary case. But this case involved pressing issues, of huge national importance. And it will probably take at least four years for another university admissions case to make its way to the court and present the justices with another opportunity to resolve the state of confusion they have helped to create (p. 9).

In a letter opinion to the Chancellor of the University of Houston System, Dan Morales, Attorney General of Texas (1997), wrote that he did not believe the Fifth Circuit decision in *Hopwood* purported to overturn *Bakke*. Instead, the Court asserted not that *Bakke* was wrongly decided, but that Justice Powell’s opinion in the case did “not articulate the proposition for which the case had theretofore been thought to stand” (Morales, 1997, p. 11). Or in other words, that *Bakke* did not stand for the proposition that maintaining a diverse student body was a compelling state interest that would survive strict scrutiny (Morales, 1997, p. 11).

Abrams (1996) believed that the decision in *Hopwood v. State of Texas*
posed the greatest threat to America’s commitment to equality since the end of Jim Crow segregation (p. 31). He believed the Hopwood decision received much deservedly “critical comment”:

The Hopwood majority found that the Supreme Court had overruled the prevailing 1978 Bakke precedent allowing consideration of race in university admissions, although Bakke was never mentioned in any of the post-1978 Supreme Court opinions cited by the panel. We are not told that Justice Powell’s controlling concurrence in Bakke was merely the opinion of ‘a single Justice’. Even a first-year law student knows better that that (p.31).

Abrahms (1996) also asserted that Judge Powell’s concurrence approved the consideration of race as “one element in a range of factors” a university could consider in attainment of diversity. He pointed out that although four judges dissented, four judges agreed that race could be considered, although they did not limit the consideration as strictly as Justice Powell (p. 31).

Since 1978, every court that has considered this issue and every educational institution that has fulfilled its commitment to diversity has followed these guiding principles. Now, with one stroke of the pen, two activist judges on the Fifth Circuit have attempted to rewrite history (p.31).

Taylor (1996) admitted to being conflicted about the racial preferences as “I imagine Justice O’Connor to be” (p. 9). He spoke of his view that the court may have made the “least bad choice when it ducked Hopwood” because the alternative would have been worse. He cautioned that a climatic decision, probably by a 5-4 margin, could have
pre-empted "evolutionary, democratic decision-making on an issue of vital national importance to which the country and the court alike are deeply divided" (p. 9).

On the other hand, had the Supreme Court affirmed the Fifth Circuit Court, Taylor (1996), surmised that it would have virtually outlawed racial preferences (p.9). This would have resulted in radical changes for admissions procedures nationwide, over the "bitter opposition of the vast majority of educators" (p.9).

Any such ruling would have been seen by a great many minorities, rightly or wrongly, as a pretext for returning to the bad old days of racial hierarchy. It would also lack legitimacy in many eyes as having been imposed, with no popular mandate, by a bare majority of nine unelected judges, with four dissenters excoriating the court for perverting the Constitution (Taylor, 1996, p.9).

Abrams (1996) found the outcome in the Hopwood case troubling. He asserted that the issue is so important to the future of legal education, "one wishes it would have been addressed once and for all" (p. 27). But, he contended, if the case was going to come out the "wrong way", it is much better to leave it for another day. In the meanwhile, he believed that there was work to do as legal academics to educate the next "diverse generation of lawyers" (p. 27).

Akerman (1998) quoted the lawyer for Rutger's Law School-Newark, George Reilly, as stating that Rutger's will not discontinue the Minority Student's Program even after the Hopwood decision:

The U.S. Supreme Court denied certiorari in Hopwood in July, 1996, finding that Texas' abandonment of its preference quotas made the case moot. The controlling case is still Regents of the University of California v. Bakke, wherein the Court
concluded that rigid, race-based quotas were impermissible, but that schools could treat race as a ‘plus’ factor to achieve a diverse student body (Ackermann, 1996, p. 4).

Carl Monk, executive director of the Association of American Law Schools, contended that there is only one solution to the ambiguities surrounding affirmative action:

I think the sooner the Supreme Court reviews a case of that type – and hopefully affirms it – the better (Shesgreen, 1996, p. S33).

With an eye to the future, Taylor (1996) proposed an optimistic viewpoint to the legal confusion:

Meanwhile, perhaps in part because of the legal uncertainty that that court has created, there is at least a glimmer of hope that our institutions, and our democratic process, may be starting to feel their way toward a tolerable resolution of the controversy over racial preferences. With the threat of judicial invalidation looming, and with preferences under growing political attack, people of diverse ideological perspective are scrambling to find alternatives to race-based programs (Taylor, 1996, p. 9).

The Bakke precedent as it is “generally understood” may be “exceedingly vulnerable” today simply because it is not clear what constitutional holding can be found among the varied opinions (Scanlon, 1995, p. 9). However, Barbara Aldave, the Dean of St. Mary’s University School of Law asserted that common sense should “tell us” that the Fifth Circuit U.S. Court of Appeals cannot overrule a Supreme Court decision:

It is my considered opinion that a court of appeals should not and cannot
overrule a decision of the U.S. Supreme Court, even if – and this is not true with respect to Bakke – it appears to be unmistakably clear that the Supreme Court precedent in question has been thoroughly discredited. The court of appeals...has neither the right nor the power to change the general law as previously announced by the U.S. Supreme Court (Aldave, 1996, p. 43).

The Supreme Court has been described as “being in a state of flux on affirmative action” by Kent Greenfield, who teaches a seminar on the Supreme Court at Boston College Law School (“Affirmative action won’t be appealed”, 1999, p. 12A). However, he believed that many court observers expect two or three justices to retire in the coming years which would possibly give the next president the ability to “dramatically reshape the court’s stance on affirmative action” (“Affirmative action won’t be appealed”, 1999, p. 12A).

Richard Fallon, a constitutional scholar at Harvard Law School, and several other legal experts contended that several of the Supreme Court Justices, most notable Chief Justice William Rehnquist and Justices Antonio Scalia and Clarence Thomas, are generally seen as strongly opposed to affirmative action (“Affirmative action won’t be appealed”, 1999, p. 12A). Whether the Supreme Court will again endorse the position of Bakke, that race may be a factor in admission policies, has yet to be determined (Hendrickson, 1999, p. 171).

Summary

In this chapter, law cases using Bakke as a precedent in higher education admission policies were examined and analyzed. The legal doctrines used in the
determination of affirmative action policies were also explored and other methods used in promoting diversity in higher education admissions were examined.

Of the thirteen cases examined, only the Hopwood opinion appeared to be in conflict with the Bakke precedent. Upon closer examination, the Hopwood decision, which purportedly contested the Bakke opinion, would have most likely been supported by the Bakke court.

The University of Texas Law School, in 1992, did use quotas and the Bakke decision would not have allowed this. In this, the Hopwood court appeared to be just using obiter dictum; that is, remarking on the Bakke decision without it being necessary or essential to the Hopwood case.

In Chapter Five, conclusions and recommendations are explored and include suggestions for those in higher education responsible for developing admission policies. Also, recommendations for further research are addressed.
CHAPTER V

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

Introduction

This study examined the legal history of affirmative action in higher education admission policies, using race as a factor, from the Bakke decision in 1978 through the Wooden case in 1999. The purpose was to determine the legal status of affirmative action of admissions policies, using race as a factor, in colleges and universities.

It is becoming much more difficult for colleges and universities to implement affirmative action admissions policies that do not violate federal law. After the Bakke decision in 1978, accepted in lower courts as a precedent set by the Supreme Court, it appeared that diversity, not quotas, could be used legally for affirmative action policies. There have been no affirmative action admissions lawsuits accepted by the Supreme Court since Bakke.

This study was, in part, to decide if the Bakke decision is still the precedent to be followed by higher education personnel in admission policies. And, in addition, to determine if there are any other legal decisions or guidelines that can prove helpful in making these decisions with regard to diversity in college admissions.
Research Questions

The questions explored in this dissertation included examining the current status of the Regents of the University of California v. Bakke decision as a basis for assessing higher education admission policies; exploring any legal benchmarks that have emerged since the Bakke decision which may impact university admission policy development; and investigating any other policies which may achieve diversity without incurring any legal risks by using ethnic and race in the admissions process.

Methodology

In order to explore the history of affirmative action in higher education, the precedent setting case, the Regents of the University of California v. Bakke, was examined. The review of literature, in Chapter Two, perused scholarly legal reviews and discussion of Bakke.

Chapter Three outlined the legal research techniques employed in this study. Using the LEXIS-NEXIS to shepardize Bakke, thirteen cases involving affirmative action in higher education admissions were found that mentioned Bakke in their opinions.

The format for analyzing these thirteen cases included the name of the case; court of record; citation; date the decision was rendered; names of the judges; decision of the court; author of the minority decision; author (s) of concurring opinion; author (s) of dissenting opinion; and the significance of the case.
Interpretation of Findings

The first research question was “What is the legal status of the Regents of California v. Bakke decision as a basis for assessing higher education admission policies using race as a factor?”

Legally, the Supreme Court decision in the Regents of the University of California v. Bakke (1978) continues to be the law of the land. Most of the cases examined in Chapter Four used Bakke to support their decisions, mainly against the use of quotas in university admission policies.


The first case reviewed, DeRonde v. The Regents of University of California (1976), was prior to the Bakke case. This case was outside the limitations of the study, but was considered significant for two reasons. This case was very similar to the Bakke case and if the student had not lacked standing as an eligible applicant, it may very well have reached the Supreme Court prior to Bakke.
This court, without the Bakke precedent upon which to base their findings, still found the University incorrect in using race in admissions criteria based on the equal protection clauses of both state and federal constitutions. This case, under appeal in 1981, was also the first recorded case after Bakke to use Bakke as a precedent for higher education admission policies using race as a factor.

Doherty v. Rutgers School of Law-Newark (1980) also used Bakke as a precedent in determining that Doherty did not meet minimum requirements for admissions under either of the “tracks”. This court determined that a two-track system was legal because disadvantaged whites were allowed to compete under the disadvantaged track.

Upon appeal, Doherty v. Rutgers School of Law-Newark (1981), the appeals court also did not address the issue of a two-track admission policy. Instead, they agreed with the lower court that Doherty lacked standing. These two court decisions did nothing to advance the Bakke decisions; however, had the plaintiff not lacked standing in the case, the courts may have been forced to reexamine the two-track admission system employed by Rutgers School of Law-Newark.

McAdams v. Regents of the University of Minnesota (1981) was the first court case to not only use Bakke as a precedent, but also Doherty v. Rutgers School of Law-Newark (1980). The similarity between McAdams and Doherty rested with the lack of standing of the plaintiff.

Also of importance is the fact that the University of Minnesota Law School had redrafted its admission policies based on the Bakke decision, to bring them more in line with the Supreme Court decision. The significance of this act is the influence Bakke had
in assisting with new affirmative action admission policies in higher education soon after the Supreme Court decision.

Bakke was used by a court as a precedent in Davis v. Halpren et al. (1991) to insist that a preference for race in higher education admissions policy is unconstitutional. This court also followed Bakke by determining that to use a case of prior discrimination, it must be shown the law school itself must have a history of past discrimination.

The Hopwood cases (1994; 1996; 1996) mimicked Bakke with regard to a University using separate tracks for minority students and using different admissions application standards for minority candidates. There was also a quota system for minority students.

The significance of this case and appeals was more the dicta of the judges than the actual outcome of the cases. The Bakke decision was referenced throughout the Fifth Circuit Court of Appeals, but mainly in a disparaging way.

The other points of significance in this case are the denial of a rehearing en banc by the Fifth Circuit Court of Appeals, which left the Hopwood decision holding in the states comprising the United States Court of Appeals in the Fifth Circuit and the denial of certiorari from the United States Supreme Court, which left the opinion in Bakke still the law of the land.

The significance of Smith v. The University of Washington Law School (1998), was in reference to the Law School’s defense of using the “Harvard Plan” mentioned in the Bakke decision. The Court did find the Harvard Plan still an acceptable model for affirmative action admission policies. However, the Court did not find enough evidence to determine if the Law School followed the Harvard Plan or not.
Lesage v. State of Texas (1998) was heard in the United States Court of Appeals for the Fifth Circuit after the Hopwood decision. The Appeals Court used the Hopwood case as precedent instead of Bakke. Also of significance, in a concurring opinion, Circuit Court Judge Reavely mentioned his opinion that the Fifth Circuit Court of Appeals opinion in Hopwood used unnecessary dicta concerning Bakke.

A case heard in the United States District Court for the Southern District of Georgia, Savannah Division, Wooden v. Board of Regents of the University System of Georgia (1999), referred to Bakke in its decision of this case. This court found that the University of Georgia did not have a compelling governmental reason, as defined in Bakke, to use race as a factor in admissions.

Based on the analysis of these cases, the decision reached in Regents of the University of California v. Bakke is still used in lower courts, most recently in Wooden v. Board of Regents of the University System of Georgia in January of 1999. The current status of Bakke as a basis for assessing higher education admission policies, involving the use of race as a factor, is that Bakke is still the precedent being followed by the majority of the lower courts as shown in the analysis of the cases outlined in Chapter Four.

Bakke's strength as a precedent to be followed is also illustrated by the current United States Supreme Court's hesitation to accept cases concerning race as a factor in higher education admissions. With the Court's denial of certiorari for Hopwood, Bakke was left intact as the law of the land.

Legal Benchmarks

The second research question addressed in this paper was “What legal
benchmarks have emerged since the Bakke decision which impact on university admission policy development”?

The Hopwood decision (1996) seemed to indicate that diversity was no longer a compelling state interest to be used under a strict scrutiny analysis. The United States Court of Appeals, Fifth Circuit, opined that the only compelling state interest the Supreme Court now recognizes is that of remedying past wrongs (Hopwood et al. v. State of Texas et al., 1996, pp. 944-945).

Hopwood appeared to attack the diversity component of Bakke, but in reality, challenged the quotas and the two-track system used by the law school. The decision in Hopwood (1996) noted that “the law school may not use race as a factor in law school admissions” (p. 935). The Bakke decision (1978), held that “race may be one of a number of factors” considered in admissions applications (p. 2733).

But, at least in the United States District Court of Appeals, Fifth District, diversity is suspect as a compelling state interest to be used as factor in university admissions. Prior to Hopwood, diversity was recognized as a compelling state interest in lower courts because of the Bakke precedent.

Hopwood may be considered a legal benchmark because of the questions and amount of public outcry it raised. Arguably, no case since Bakke has focused so much attention on affirmative action in higher education admissions.

Also of impact for college admissions in California was Proposition 209 which was upheld to be legal by the United States Court of Appeals, Ninth Circuit in 1997. Proposition 209 prohibits state and local agencies from granting preferences based on race or gender classifications in any government program.
This would include colleges and universities and has been the catalyst for the revision of many affirmative action plans used by higher education in California. This was a benchmark piece of legislation, as other states have followed suit in attempting to pass similar legislation.

Other Policies

The third research question addressed in this study was: "What policies may achieve diversity in higher education admissions without incurring legal risks by using ethnicity and race in the admissions process?"

These alternative methods may include academic merit; socioeconomic status; outreach programs; cascading; legislative measures; and legal guidelines, including affirmative action audits, to avoid legal problems.

Academic merit would be based on grade point averages and test scores. Some insist merit is not a quantifiable characteristic while others point out that past academic performance may not be a good indicator of future performance. Research has also shown that using academic credentials only would filter out minority candidates dramatically. Many minority candidates come from economically deprived backgrounds and educated in school districts that are economically disadvantaged (Bowen & Bok, 1998; Cole, 1998; Guiner, 1997; Tbernstrom & Tbernstrom, 1997; Ratnesar, 1998; Scott, 1996).

Instead of using race and ethnicity, the use of socioeconomic status has been suggested. The disadvantagement of being poor would take the place of the disadvantagement of skin color and is not legally prohibited in equal protection laws (Bowen & Bok, 1998; Cimino, 1997; Feinberg, 1996).
Looking at each individual and weighing his/her merits has also been suggested in the whole person review method. By this process, the institution could select students for a diverse student body without the use of a race classification (Bowen & Bok, 1998; Elliott, 1997; Guiner, 1997; Traub, 1999).

Others assert that more outreach programs into disadvantaged neighborhoods would result in encouraging students at an earlier age to concentrate on their grades and other scholarly endeavors. It would also expose them to careers and college life they had never considered. This may lead to an increase of diversity in the student body (Guilano, 1998; Hirschman, 1997; Traub, 1999).

Cascading is a term used for students that do not qualify for one university, but may qualify for another. These students could be then accepted into the university that best fit their qualifications. In this way, the student would be among his/her academic peers and still be allowed to seek higher education (Bowen & Bok, 1998; Thernstrom & Thernstrom, 1997; Traub, 1999).

Another method sought by some administrators is to legislate measures in their states to assist in achieving diversity within the student body or to prevent affirmative action policies from taking place in their institution. Some states have followed California’s lead with adopting legislation patterned after Proposition 209 (Biskupic, 1997; Cohen, 1998; Egelko, 1997; Hirschman, 1997; Traub, 1999).

Affirmative action audits may be conducted by university legal staff to ensure that results are privileged and protected from civil disclosure. Audits may consist of interviews or written questionnaires that address such issues as written materials; purposes to be served by the program; the duration of the program; its evaluation process;
the program's goals and definition; the structure of the program; and documentation to show that race-neutral alternatives were considered and rejected (Hirschman, 1997; Kurz & White, 1997; Van Tyle, 1996).

**Recommendations**

There are other legal guidelines that higher education admissions personnel can follow to avoid legal risks, yet which allow diversity in the student body. Listed below are recommendations that are legally safe and may provide a resource guide for admissions personnel (Kurz & White, 1997; Stephanopoulos & Edley, 1995; Van Tyle, 1996):

1. An institution must first identify a compelling government objective, such as diversity, in order to implement affirmative action admission policies. The objective must be supported by a compelling justification to withstand legal scrutiny.

2. The program must be narrowly tailored and implemented in the strictest possible way consistent with the compelling purpose for which the program was designed to serve. It must be the minimum required to achieve the goal; it cannot be broader or more ambitious.

3. Quotas cannot be used to obtain diversity in higher education admissions policies. Even the use of flexible goals can cause potential problems if the goals are reached so regularly that they may function as the equivalent of quotas.
4. Race-neutral options must have been considered, analyzed and rejected for reasonable and documented causes. These race-neutral alternatives must be shown to be unacceptable in advancing the program objectives.

5. Another detail to be considered is the duration of the program. The measure should be limited in duration and the university should periodically review and evaluate the continuing need for the program.

6. An affirmative action program should also be balanced to protect the rights of non-minorities. Benefits should be available to all applicants and every applicant’s file must be compared to every other applicant’s file. There cannot be a separate admission committee for minority files only, nor can there be separate admission standards for minority and non-minority applicants.

7. An on-going monitoring and evaluation system is important to make sure the program is implemented and followed as it was designed. This will ensure the program does not result in hidden preferences.

8. To avoid adverse criticism and litigation, admissions personnel must keep informed and updated on preferential admission policies. Admissions personnel can also observe other legally acceptable models of affirmative action programs and base their own programs on these models.

9. Affirmative action admissions policies must be advertised and explained to university constituencies to ensure the program is conducted in a legally, defensible manner. It is also important to develop written justification for the affirmative action admission policies that meet all legal requirements.
10. Legal counsel should be sought and followed because of the ever-changing legal landscape in affirmative action. Audits that are conducted by legal staff can provide results that are protected from civil disclosure and can be used by the university to make decisions concerning the program.

11. Other methods to encourage and promote diversity, besides or in addition to affirmative action, should be explored. Examples of other ways to promote diversity in admissions policy are to use academic merit; socioeconomic status; a whole person review; outreach programs; the use of cascading; and legislative measures. Resources, such as websites (See Appendix B) may also be utilized.

Further Research

This legal analysis explored Bakke (1978) through Wooden v. Board of Regents of the University System of Georgia (1999) and included the Hopwood decision (1996). Many questions concerning affirmative action in higher education admissions still remain for the courts to decide.

Still to be decided are other legal challenges to admission policies using race as a factor in higher education. The results of these and other lawsuits are, as yet, unknown.

University of Michigan

The University of Michigan’s admissions policy is currently the target of two lawsuits by a total of three rejected white applicants, all turned down, they contended, because of their race. The university, in rebuttal, pointed out that greater weight is given
to high school grades than to either of the other factors. The University is relying on the Bakke opinion to base most of its defense on diversity (Holmes, 1999).

The two lawsuits, one against the law school and the other against the undergraduate college, will be argued in the fall of 1999. Whatever the outcome of the Michigan suits in the district court, both sides agree that the matter is headed for appeal (Holmes, 1999).

University of California

Five civil rights organizations have sued the University of California at Berkeley on behalf of more than 750 Black, Hispanic and Filipino-American students for what is claimed to be discriminatory policies that denied admissions to disadvantaged members of minorities with excellent academic records.

The lawsuit, filed in Federal District Court, argued that Berkely has an admissions policy that gave more consideration to applicants that take advanced-placement classes that are not available to all California high school students. Most of the schools that do not have advanced-placement classes have high concentrations of Black, Hispanic and Filipino-American students.

According to the lawsuit, that meant that the admission policy rewards students who have access to the advanced-placement classes and in essence, rewarding privilege, not merit (Nieves, 1999).
Significance of the Study

The significance of reviewing legal cases concerned with affirmative action policies in higher education is to understand the history and possibly, the future, of these admission policies. Admissions personnel in higher education are faced with encouraging diversity in their student bodies, but without assuming the legal risks that may occur with affirmative action.

This dissertation is significant by providing an analysis of legal cases over a twenty year period; the opinions of the courts; an overview of what affirmative action policies are legal; legal guidelines to follow in implementing affirmative action; and a review of other policies which entail less legal risk than affirmative action, but may provide diversity in the classroom. This study may also prove to be a resource guide for higher education admissions policy development.

Limitations of the Study

This study was concerned only with affirmative action legal cases in higher education admissions using race as a factor. Other higher education affirmative action areas such as financial aid, scholarships, employment, and testing were not discussed. Only those cases that resulted from affirmative action complaints concerning race and ethnicity in higher education admissions were considered.

This study was originally planned to be limited to legal cases between The Regents of the University of California v. Bakke (1978) and Hopwood et al. v. State of Texas et al. (1996). However, this limitation was expanded to include one case prior to
Bakke, DeRonde v. The Regents of University of California (1976) because of the nature of the case and the appeal of this case after the Bakke decision.

This dissertation also followed the Hopwood case through a denial of rehearing en banc by the United States District Court of Appeals for the Fifth Circuit (1996) and the Supreme Court's denial of certiorari (1996).

Three other cases which were concerned with affirmative action policies in higher education admissions were also included; Smith v. The University of Washington Law School (1998); Lesage v. State of Texas (1998); and Wooden v. Board of Regents of the University of System of Georgia (1999). These were considered significant because of the challenge of affirmative action in higher education admission policies.

Every case that was reviewed was found by shepardizing Bakke on the LEXIS-NEXIS electronic computer bank at UNLV. The study was limited to a descriptive and analytical style of reasoning, rather than statistical. The author of this dissertation was another limitation as a threat to external validity. The biases and expectations of this writer may have led to distortions of the data.

Concluding Statements

Affirmative action admission policies in higher education will continue to be a legal "hotspot" until the Supreme Court once again examines this issue and presents an opinion. As the guardians of the "law of the land", the Court is required to assist in times like these and to issue legal guidelines for colleges and universities to follow. Until this happens, Bakke continues to be the final Supreme Court decision, to be followed until a new one is issued.
Meanwhile, college and university admissions personnel can protect themselves and their institutions by ensuring their policies meet the legal guidelines, when using race as a factor in admissions. Other, less risky, means may also be used to increase diversity in the student body.

Affirmative action policies may not be dead; they may just need to be more cautiously administered.
APPENDIX A

BAKKE CITATIONS

SHEPARD'S(R) Signal: Warning: Negative treatment is indicated
Restrictions: Unrestricted
FOCUS Terms: None

CITING REFERENCES (237 citing references)

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<<182-1> 793 F.2d 969 p.988

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Ohio Supreme Court

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Pennsylvania Supreme Court

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Gonz-'a-lez, 1994 Juris P.R. No. 125 (1994)

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APPENDIX B

AFFIRMATIVE ACTION

WEB SITES
AFFIRMATIVE ACTION WEB SITES

Vote Smart Web Yellow Pages

Affirmative Action
http://www.vote-smart.org/issues/AFFIRMATIVE_ACTION/

AAUP—Diversity and Affirmative Action in Higher Education
http://www.aaup.org/aacntnts.htm

Essays, articles and background information about Affirmative Action in higher education. Online from American Association of University Professors.

Adversity Net
http://www.adversity.net/

Adversity Net and a growing number of our leaders and the courts believe that it is possible to have affirmative action without racial quotas and without endorsing or requiring race-based hiring decisions.

AffActWeb: Home Page of the American Association for Affirmative Action (AAAA)
http://www.affirmativeaction.org/

AffActWeb contains information, news, and Web links on Affirmative Action and Congress, federal agencies, the White House, the courts, the states, the news and other topics.
Affirmative Action Information Center

http://www.ajdj.com/noccri/defeat.html

The Campaign to Defeat 209 is a broad-based coalition of state and national organizations who are committed to defending Proposition 209, also deceptively called the “California Civil Rights Initiative (CCRI)”.

Affirmative Action: Myths vs. Facts

http://bbcc.ctc.edu/~webb/cabb.htm

Site contains statistics and information about Affirmative Action, Online from the Coalition Against Bigotry and Bias, a Washington-state based organization.

American Civil Rights Coalition

http://www.acrc1.org/

A grassroots advocacy organization focused on the elimination of racial and gender preferences.

Americans Against Discrimination and Preferences

http://www.aadap.org/

Works for the abolition of racial and gender discrimination and preferences at the local, state, and federal levels, along the lines established by California’s Proposition 209. Site includes frequent updates of links to news articles on affirmative action and race.
Americans United for Affirmative Action

http://www.auaa.org/

Americans United for Affirmative Action is a national, non-profit organization committed to educating the public on the importance of maintaining affirmative action programs and the principles of equal opportunity in employment and education.

Atlantic Unbound: Race and Affirmative Action


An archive of articles originally published in the “Atlantic Monthly”.

Background Materials on Affirmative Action

http://www.civilrights.org/aa/packet.html

Contains links to essays, articles and talking points on various aspects of Affirmative Action. Online from The Leadership Conference on Civil Rights.

BAMN – Coalition to Defend Affirmative Action By Any Means Necessary

http://www.bamn.com/

BAMN was formed for the purpose of organizing the struggle against the resegregation of higher education.

The Center for Individual Rights: Civil Rights – Affirmative Action


A non-profit organization dedicated to the protection of individual rights. We are dedicated to a broad civil-libertarian conception of individual rights, encompassing both civil liberties and economic freedoms. Online from the Center for Individual Rights, CIR.
Chinese for Affirmative Action
http://www.caasf.org/html/about_caa.html

CAA's mission is to eliminate those societal conditions that foster bigotry and racial discrimination against Asian Americans and other minorities.

In Defense of Affirmative Action
http://www.inmotionmagazine.com/pr.html

Recent articles, interviews, and opinions generally favoring affirmative action. Online from In Motion Magazine.

Index of Articles of Affirmative Action
http://www.berkshire-aap.com/Articles/

From Berkshire Associates, Inc. A national human resource consulting organization that specializes in ...affirmative action training, and diversity, gender equity and ADA training.

Maintaining Affirmative Action
http://www.law.ucla.edu/Classes/Archive/CivAA/

From UCLA's School of Law. Designed to provide a variety of information about affirmative action.

Minority Affairs Forum's Affirmative Action Page

Articles and editorial pieces regarding Affirmative Action issues. Online from the University of California, Davis.
NCPA: Affirmative Action Policy  
http://www.public-policy.org/~ncpa/pd/affirm/afirm.html

National Center for Policy Analysis papers, backgrounders, and briefs discussing affirmative action policy issues.

Supreme Court Historic Decisions Search: Affirmative Action  
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DeRonde v. The Regents of the University of California, 28 Cal. 3d 875 (Supreme Court of California, 1981).


Doherty v. Rutgers School of Law-Newark, 651 F. 2d. 893. (United States Court of Appeals, 1981).


Hopwood et al. v. State of Texas et al., 78 F. 3d 932 (United States Court of Appeals, Fifth Circuit, 1996).


Texas, et. al v. Cheryl Hopwood, et. al., No. 95-1773 (Supreme Court of the United States, July 1, 1996).


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Court allows minority groups to argue for affirmative action: White applicants suing university of michigan. (1999, August 11). Las Vegas Review Journal, 7A.


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