

# Racial Preference Is Dynamite

*The Bakke case illustrates the danger of official favoritism by race or national origin—however honorable the goal*

By Carl Cohen

WHAT IS AT ISSUE in the case of *Allan Bakke v. the Regents of the University of California*? Affirmative action? No; all sides agree that vigorous action, affirmative steps, must be taken to integrate the professional schools. The traditional admissions criteria of medical (or law) schools? No; all sides agree that professional schools may properly use, in screening for admission, a host of factors other than test scores and grade-point averages: dedication or dexterity, compassion or professional aims. Compensation? No; all sides agree that persons unfairly injured are entitled to full, appropriate, and timely redress.

What, then? Since both parties in this litigation are deeply committed to justice among the races, to an integrated society, and to excellence in professional education, what remains at issue? One thing only: *preference by race*.

Allan Bakke was twice rejected (in 1973 and 1974) by the medical school of the University of California at Davis. His undergraduate performance was fine, his test scores excellent, his character and interview performance admirable; he ranked very high among the more than 3,000 applicants for 100 seats. But 16 of those seats were reserved for minority-group applicants, who faced admission standards deliberately and markedly lower than did majority-group students like Bakke. The University of California (like many of its sister universities) was determined to enroll a representative proportion of blacks and members of other minority groups in its medical school—however distasteful the double standard believed necessary to accomplish that end.

The Davis medical school established a special committee to fill the reserved slots, and the committee evaluated the minority-group candidates, who competed only against one another. Officially, any disadvantaged person could seek admission under the special program; in fact, all persons admitted under that program, from its inception in 1969, were minority-group members. Officially, that committee reported to the admissions committee; in fact, the applicants chosen by the special committee were invariably admitted. In each of the years Bakke was rejected, some minority-group admittees had grade-point averages so low (2.11 in 1973, 2.21 in 1974) that, if they had been white, they would have been summarily rejected.

THE University of California does not deny that the overall ranking of many of the minority-group applicants who were accepted—after interviews, and with character, interests, test scores, and averages all considered—was substantially below that of many majority applicants who were rejected. Bakke contends that had his skin been of a darker color he would certainly have been admitted. He argues that, refused admission solely because of his race, he was denied "the equal protection of the laws" guaranteed him by the 14th Amendment of the U. S. Constitution.

The advocates of racially preferential systems reply: Equal protection requires different treatment for people in different circumstances. Minority-group members are in very special circumstances. Preference by race is here a reasonable instrument to achieve, for members of minority groups, objectives both just and compelling.

Such preference (not denied by the medical school) is thus defended by two central arguments. The first is grounded in alleged demands of justice: Only by deliberately preferring minority applicants can we give adequate compensation for generations of oppressive maltreatment. The second is grounded in the alleged needs of society: If we do not continue to give deliberate racial preference, our medical and law schools will again become what they long were—white enclaves.

Compensation is the heart of the first argument, integration of the second. Both arguments are profoundly mistaken.

Compensation first. Redress is rightly given for injury—not for being black or brown. Members of minority groups have been cruelly damaged, but whatever damage is rightly compensated for—cultural or economic deprivation, inferior schooling, or other—any applicant so unfairly damaged is fully entitled to the same special consideration, no matter his race or ethnic group. The prohibition of special favor by race—any race—is the central thrust of a constitutional guarantee that all will receive the protection of the laws equally. Classification by race for the distribution of goods or opportunities is intrinsically odious, always invidious, and morally impermissible, no matter how laudable the goals in view.

What of the school-desegregation cases, then—the cases in which the U. S. Supreme Court has approved the use of racial categories to insure racial integration? Don't these show that racial preference is permissible if the aim is good? Certainly not. In these cases attention to race was allowed in order to ascertain whether school boards that had been discriminating wrongfully by race had really ceased to do so. Racial identification was there permitted—but only to insure that all students, of whatever race, received absolutely equal treatment. The distinction between that use of racial counting, and the use of racial categories to reintroduce special preference, is sharp and profound.

CAN the University of California be defended on the ground that its system of racial preference is not injurious but benign? No. Results, not intentions, determine benignity. All racial quotas have injurious results and therefore cannot be benign. When the goods being distributed are in short supply, and some get more of those goods because of their race, then others get less because of their race. There is no escaping that cold logic. Bakke and many anonymous others like him are seriously penalized for no other reason than their race. Such a system, as even the Washington State Supreme Court in the *DeFunis* case agreed, "is certainly not benign with respect to non-minority students who are displaced by it."

All this says not an iota against compensation. If redress is due, let us give it, and give it fully. If compensation is to be offered through special favor in professional-school admissions—a questionable mode of payment but a possible one—then let us be certain that we look in every case to the injury for which we give redress, and not to the race of the applicant.

Second, integration. If the requirements of justice cannot support racial preference, perhaps the society's interest in integration can. The Supreme Court of California, while upholding Bakke's claim, allowed, *arguendo*, that integration is a compelling interest. "Integration" has different meanings, of course. That ambiguity invites the university's most appealing complaint. "You have told us to integrate," the university has said, in effect, "and when we devise admissions systems designed to do just that, you tell us we may not use racial preference. But the problem is a racial one. We cannot achieve racial balance unless we give special preference to racial minorities. Do not ask the impossible of us. And do not, please, ask us to do in devious ways what you will not permit us to do straightforwardly."

That argument by the University of California is not sound. A considered reply to it (here much compressed) is threefold.

First, as the Supreme Court of California emphasized, no party has shown that preference by race in admissions—which all agree is objectionable—is necessary to achieve our social goals. With other forms of affirmative action pursued vigorously, and admissions criteria enlarged and enriched and applied even-handedly to all applicants, diversity and integration may be much advanced. Still more might be accomplished if various compensatory schemes were introduced, but they must be applied in a racially neutral way. Some majority applicants who deserve compensatory preference will also benefit under such programs, but this is entirely fitting.

There is nothing crafty about this reply. The claim that these are but devious ways to reach the same ends is simply false, and betrays an inclination to introduce racial preference somehow, through the back door if need be. That would be ugly. There is no reason to fear or to be ashamed of an honest admissions program, or of an honest compensatory

program, honestly applied. The racial count that results may not be the same as that when racial preference is used, but perhaps it ought not be. Even if the count were the same, the individuals (admitted using principles, not race) would be different, and that makes all the difference. In any case it is certain that substantial progress in diversifying and integrating professional-school classes can be achieved without racial preference.

Second, we must see that granting favor on the basis of race alone is a nasty business, however honorable the goal. The moral issue comes in classic form: Terribly pressing objectives (integrated professions, adequate legal and medical service for members of minority groups) appear to require impermissible means. Might we not wink at the Constitution, this once, in view of the importance and decency of our objectives?

Such winking is precisely the hope of every party having aims that are, to that party's profound conviction, of absolutely overriding importance. Constitutional short-cuts have been and will be urged for the sake of national security (Can we forget the internment of Japanese-Americans during World War II?), for the enforcement of criminal laws, and in other spheres. But wink we must not. Each party in its turn must abide the restrictions of constitutional process. The single most important feature of a constitution, if it is more than paper, is

its preclusion of unjust means. Hence the preciousness and power of the guarantee of equality before the law. When good process and laudable objectives conflict, long experience teaches the priority of process. Means that are corrupt will infect the result and (with societies as with individuals) will corrupt the user in the end. So it is with wire-tapping, with censorship—with every short-cut taken knowingly at the expense of the rights of individuals. So it is also with racial preference, even when well intended.

The third response to the integration argument is as compelling as the first two, but adds bitter irony. Hating the taste of racial preference in admissions, the advocates of these programs swallow them only because convinced they are so good for us. Bitter, but (they think) medicinal. In this, too, they are mistaken. Racial preference is good for nobody, black or white, majority or minority. It will not integrate the races but will disintegrate them, forcing attention to race, creating anxiety and agitation about race in all the wrong contexts, exciting envy, ill-will, and widespread resentment of unfair penalties and undeserved rewards.

It will not serve the minority well if it becomes clear that minority-group students admitted preferentially are less well qualified to pursue their studies and to practice their professions. A black psychiatrist at Case Western Reserve University Hospital, Dr. Charles DeLeon, told the *New York Times* in 1974: "I wouldn't hit a dog with some of the minority students I've seen, and I have an idea that you honkies are taking in these dummies so that eight years from now you'll be able to turn around and say, 'Look how bad they all turned out.'"

ABOVE ALL, racial preference clouds the accomplishments and undermines the reputations of those superbly qualified minority-group professionals who neither need nor get special favor. When, in the minds of everyone, black and white, a physician's dark skin is automatically linked to charity and payoff, who among members of minority groups is served? It is a cruel result.

Racial preference is dynamite. Many who play with such preference are now blinded by honest zeal and hide from themselves the explosions in the sequel. Justice John Marshall Harlan, dissenting in 1892 from the Supreme Court ruling that established the "separate but equal" doctrine, insisted that the U. S. Constitution was and must be color blind. Some would have the law be color-conscious now so that it can indeed become color-blind in the future. That cannot be. One is reminded of political leaders who "suspend" constitutions to "build a firmer base for democracy." Once established as constitutionally acceptable grounds for discriminatory distribution, racial categories will wax, not wane, in importance. No prescription for racial disharmony can be surer of success.

Official favoritism by race or national origin is poison in society. In American society—built of manifold racial and ethnic layers—it is deadly poison. How gravely mistaken it will be to take new doses of the same stuff, while still suffering the pains of recovery from the old.

Carl Cohen is professor of philosophy at the University of Michigan.

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