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Book Review [The Bakke Case: Race, Education, and Affirmative Action]

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BOOK REVIEW

The Bakke Case: Race, Education, and Affirmative Action. By Howard Ball. Lawrence, Kansas: University Press of Kansas, 2000. Pp. 231. Hardcover. \$29.95.

*Reviewed by Harvey Gee**

I. INTRODUCTION

The U.S. District Court for the Eastern District of Michigan recently rang the latest death toll for affirmative action in the context of higher education in the case of *Grutter v. Bollinger*.¹ The *Grutter* case concerned the admissions standards at the University of Michigan Law School, and involved claims of reverse discrimination brought by a white applicant. Significantly, U.S. District Judge Bernard A. Friedman concluded in *Grutter* that the Supreme Court in *Regents of the University of California v. Bakke*² did not recognize the achievement of racial diversity in university admissions as a compelling state interest. On that basis, Judge Friedman issued a lengthy opinion declaring that the admissions policies at the University of Michigan's Law School were unconstitutional. The *Grutter* decision and other recent affirmative action rulings³ have signaled the

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1. 137 F. Supp. 2d 821 (E.D. Mich. 2001). See also Jeffrey Selingo, *Michigan Law School's Admissions Policies Found to be Unconstitutional*, CHRON. OF HIGHER EDUC., Apr. 6, 2001, at A29 ("The ruling [in the *Grutter* case] marked a sudden reversal in momentum for supporters of affirmative action, after back-to-back decisions late last year upheld the use of race in undergraduate admissions at the University of Washington and the University of Michigan.").

2. 438 U.S. 265 (1978).

3. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (declaring

retrenchment of affirmative action in university admissions and the gradual erosion of the *Bakke* decision.⁴ The drama of the *Bakke* case is chronicled and analyzed by University of Vermont Political Science Professor Howard Ball in his recent work, *The Bakke Case: Race, Education, and Affirmative Action*. Ball looks behind the judicial opinions drafted by the Court, to reveal the political debate between the Justices about this important case that has become the bedrock of the contemporary affirmative action debate. The book is released at a time when other branches of the federal government, along with various states and private institutions, consider whether to abolish affirmative action. As such, it is now imperative to revisit the *Bakke* decision and the impact that it has had on the present admissions controversy, and on the adjoining political discourse. In his book, *The Bakke Case*,

societal discrimination and statistical disparities irrelevant and requiring an identifiable, particularized showing of prior discrimination by a particular industry to demonstrate a compelling interest for a race-sensitive public contracting plan); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991) (setting the stage for schools to contest their desegregation decrees and seek a declaration of unitary status based on good faith compliance with the decree even if schools are still segregated); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (declaring that congressional race-sensitive planes must be subjected to strict scrutiny rather than intermediate scrutiny); *Miller v. Johnson*, 515 U.S. 900 (1995) (declaring that there is an equal protection violation where the shape and demographics of a voting district in conjunction with indirect evidence demonstrates that race was a predominant factor in the creation of the district); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that (1) there is no compelling interest in diversity in education; (2) the law school-not the state of Texas-is the relevant government entity in measuring a constitutional violation; and (3) a hostile university environment is not a present effect of past discrimination).

4. See HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION*, 198 (2000) ("It has been almost a quarter of a century since *Bakke* came down in 1978. It is not hanging by a thread, but it has been battered by lower federal court judges and by political opponents of preferential affirmative action programs in American higher education."). Other commentators noted:

The succeeding generation has seen that noble dream devolve from one heralding equal treatment regardless of race to one demanding preferential treatment because of race. The pendulum, though, has recently begun to swing back toward Dr. [Martin Luther] King's vision. In courts of law and the court of public opinion, citizens are increasingly voicing dissatisfaction with affirmative action as it is currently employed, where people are favored due solely to race rather than to actual disadvantage.

T. Vance McMahan & Don R. Willett, *Hope from Hopwood: Charting a Positive Civil Rights Course for Texas and the Nation*, 10 STAN. L. & POL'Y REV. 163, 163 (1999).

Howard Ball remarks that “[i]t has been almost a quarter of a century since *Bakke* came down in 1978. [Although it] is not hanging by a thread, it has been battered by lower federal court judges and by political opponents of preferential affirmative action programs in American higher education.”⁵ With this in mind, observers expect the Supreme Court will soon be compelled to accept a case such as *Grutter* for review in its upcoming term.⁶ Recent affirmative action cases such as *Grutter* illustrate the deep animosity toward *Bakke* even today, twenty-three years after the decision.

The Supreme Court intended *Bakke* to be the definitive ruling on the constitutionality of affirmative action programs in the context of higher education.⁷ In 1977, Allan Bakke was denied admission to the University of California, Davis (“UCD”) Medical School and subsequently brought suit against the University. In the process, he set off the contemporary debate over affirmative action.⁸ The Court, for the first time, utilized the Equal Protection Clause in the

5. BALL, *supra* note 4, at 198.

6. See also Tony Mauro, *Affirmative Action Cases may get High Court Hearing*, *The Recorder*, Oct. 23, 2001 at 3 (reporting that “advocates on both sides of the racial preferences issue are looking to a pair of cases involving affirmative action programs at the University of Michigan as the ones with the most staying power and the highest likelihood of attracting Supreme Court attention.”).

7. See also ROBERT POST, INTRODUCTION: AFTER BAKKE, IN RACE AND REPRESENTATION: AFFIRMATIVE ACTION 13, 20 (Robert Post & Michael Rogin eds., 1998) (“[O]ver time *Bakke* has come to stand for the proposition that race and ethnicity are constitutive of a structural and a temporal value of diversity.”); REVA B. SIEGEL, THE RACIAL RHETORICS OF COLORBLIND CONSTITUTIONALISM: THE CASE OF HOPWOOD V. TEXAS, IN RACE AND REPRESENTATION: AFFIRMATIVE ACTION 29, 40 (Robert Post & Michael Rogin eds., 1998) (“Ever since the Supreme Court’s decision in *University of California v. Bakke*, educational institutions have justified affirmative action programs by emphasizing the goal of attaining a diverse student body.”).

8. See also TERRY EASTAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE 76 (1996) (“The passage of years since *Bakke* has diluted the force of the remedial rationale. . . the practice of affirmative action today makes it difficult to accept the remedial rationale at face value.”). But see Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 STAN. L. & POL’Y REV. 129, 139-40 (1999) (“[T]he [Supreme] Court has gone to considerable lengths to underscore that its decisions do not prohibit affirmative action in all circumstances. To the contrary, the Court has consistently stated that a program tailored to eliminate discrimination ‘plainly serves compelling state interests of the highest order.’” (citing to *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984))).

context of affirmative action. The 154 page *Bakke* decision, considered by many to be the most important civil rights decision since the end of segregation, established that race *may* be used as a factor in college admissions. Despite the *Bakke* decision, there has been a gradual erosion of affirmative action as a result of a series of challenges to the use of such programs as a legitimate tool to end discrimination in higher education.

According to Ball, one central issue in *Bakke* was whether the case was about fairness or equal opportunity.⁹ Here, Ball does an admirable job in highlighting the idea that this case was representative of affirmative action's inherent conflict between numerical quality (the UCD position) and moral equality (Bakke's position) and how this conflict divides those in charge of interpreting the constitutionality of such a conflict into starkly different opposing camps. Ball insists that the *Bakke* case epitomized the societal clash between the values of meritocracy and race neutrality and those of racial balance and equality of opportunity.¹⁰ "It was the ideal notion of equality versus the need to provide members of minority groups with an educational boost so that they could enter areas of employment formerly denied them."¹¹ In *The Bakke Case*, Ball attempts to reconcile these competing interests. The end result is a well-written authoritative discussion of the issue of affirmative action and an excellent synopsis of the most important and defining case on the subject. Demonstrating his comprehensive scope of analysis, Ball covers *DeFunis v. Odegard*,¹² the affirmative action case that preceded *Bakke*, the post-*Bakke* Supreme Court decisions, and a brief forecast of the uncertain future of affirmative action. Ball's volume is an enjoyable, informative, and worthwhile read. *The Bakke Case* is valuable to anyone

9. See BALL, *supra* note 4, at xii.

The lawyers for the university knew that they were caught between a rock (the Fourteenth Amendment's demand that a state provide all persons with the equal protection of the laws) and the hard place (Title VI of the 1964 Civil Rights Act, as amended, which prohibited discrimination based on race, religion, national origin, or gender, by any public institution receiving federal financial aid).

Id.

10. See *id.* at 10-15.

11. *Id.* at 7.

12. 416 U.S. 312 (1974).

interested in the affirmative action controversy, especially in light of the fact that the federal government, various states and private institutions are considering whether to abolish affirmative action.

This book review summarizes the major sections of Ball's book, which include: (1) *DeFunis*, the largely forgotten affirmative action case that set the stage for the *Bakke* litigation; (2) the UCD admissions program; (3) Allan Bakke's crusade to gain admission to the medical school; (4) the lawyers' roles in the litigation; (5) the Supreme Court oral arguments; and (6) the divided decision itself.

II. *DEFUNIS*: THE PRELUDE CASE TO *BAKKE*

In *DeFunis*, Marcos DeFunis, a Jewish American, applied for admission to the University of Washington School of Law, but was denied admission on two separate occasions during a time when the University had set aside sixteen percent of the places in the entering classes exclusively for members of racial minorities.¹³ All of these special admission applicants were screened with standards that were lower than those for the majority students. DeFunis believed that he had been discriminated against in the admissions process because of his race due to the fact that he otherwise met each qualification that the University had in place.¹⁴ Put simply, DeFunis claimed that he had been deprived of his constitutional right to the equal protection of the laws, and challenged the affirmative action programs at the University.¹⁵ When the case was heard in the lower courts, DeFunis won and was admitted to the law school. The school appealed the decision and was able to have the decision overturned, but that ruling was stayed.¹⁶ This stay allowed DeFunis to remain in school while he continued his appeal.¹⁷ The case eventually made its way to the Supreme Court where Justices found the issue of affirmative action to be moot because DeFunis was ready to graduate.¹⁸ This inability of the Court to reach the core constitutional issue in *DeFunis*

13. See BALL, *supra* note 4, at 23.

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.*

demonstrated the reluctance of the Supreme Court to tackle the affirmative action issue.¹⁹ In the final analysis of *DeFunis*, the Supreme Court only managed to delay for a few more years the inevitable clash over affirmative action.

III. THE UNIVERSITY OF CALIFORNIA, DAVIS ADMISSIONS PROGRAM

After a brief opening account of the state of racial affairs in higher education during the mid-1970s post-*DeFunis*, Ball proceeds to a legalistic description of the inter-workings of the *Bakke* case. While the Supreme Court was quick to avoid the affirmative action issue in the *DeFunis* case, it still did not make a definitive statement in *Bakke*. Ball begins the book by discussing the UCD admissions program.²⁰ Importantly, the author notes that most of the recent affirmative action cases reiterate the same issues that were first introduced in *Bakke*.²¹ The *Bakke* case involved a "special admissions" program developed by the medical school at UCD. This program involved a number of slots that were "set aside" for minority applicants, who were evaluated on a separate set of criteria in comparison to that of non-minority applicants. The goal of the medical school was simple: increase the number of minority doctors.²²

For four years, the UCD Medical School had no preferential affirmative action admissions program.²³ During that time, only three percent of its applicants were minority.²⁴ The administration was concerned about the lack of diversity at the University and established a special preferential admissions program in 1970.²⁵ Ball cites to the University of California Board of Regents' lawyer Donald Reidhaar's brief, and explains that the objectives of the admissions program were to "enhance diversity in the student body and the profession, eliminate historic barriers to medical careers for

19. See BALL, *supra* note 4, at 23.

20. See *id.* at 41-59.

21. See *id.* at 186-92.

22. See *id.* at 49 ("The general objectives of the program. . . were to enhance diversity in the student body and the profession, eliminate historic barriers for medical careers for disadvantaged racial and ethnic minority groups, and increase aspiration for such careers on the part of members of those groups.").

23. See *id.*

24. See *id.*

25. See BALL, *supra* note 4, at 49.

disadvantaged racial and ethnic minority groups, and increase aspiration for such careers on the part of members of those groups."²⁶

Under the regular selection process, if an applicant's grade point average ("GPA") was less than 2.5, there was summary rejection.²⁷ Of those applicants who had better than a 2.5 GPA, forty percent were invited to the campus for interviews with admissions committee members. They observed the applicant's personality, motivation, and other non-statistical characteristics.²⁸ Afterward, the interviewers reviewed the entire file and graded the applicant, using a scale of 1-100, with 100 being the highest possible score.²⁹ All the interviewers gave scores in the following categories: (1) the interview, (2) the overall GPA, (3) the scores received on the Medical College Admission Test ("MCAT"), (4) letters of recommendation, and (5) extracurricular experiences.³⁰ Four other committee members then followed the same process.³¹ The scores for each of the five categories were tallied and averaged, producing the "benchmark score."³² In 1973, the maximum score possible was 500, and in 1974, it was 600.³³ In order to be considered for admission through the special program, an applicant had to be an "economically and/or educationally disadvantaged person."³⁴

In determining whether the applicant met this criterion, the special admissions committee considered such factors as the applicant's general social and economic background. But if the candidate was not deemed disadvantaged, the file was sent to the regular admissions committee for their review and judgment.³⁵

26. *Id.*

27. *See id.* at 50.

28. *See id.*

29. *See id.*

30. *See id.*

31. *See BALL, supra* note 4, at 50.

32. *See id.*

33. *See id.*

34. *Id.* at 50-51.

35. *See id.* at 51. The committee considered whether the application fee was waived;

whether the applicant worked their way through college; whether the applicant interrupted their studies and took a leave of absence because of economic disadvantage; whether the applicant participated in an equal educational opportunity program as an undergraduate; and what occupations were held by

After being denied admission to the UCD Medical School in 1973, the year before, Bakke re-applied.³⁶ In the meantime, UCD had adopted a new general application form.³⁷ The applicant was asked whether they wished to be considered an “economically and/or educationally disadvantaged” person in one of four enumerated minority groups: “Black, Chicano, Asian, and American Indians.”³⁸ The UCD Medical School again rejected Bakke, whereupon he sought legal counsel to continue his efforts to gain admission to the school.³⁹ According to Ball, the major issues in *Bakke* were whether the Constitution’s Equal Protection Clause or Title VI of the 1964 Civil Rights Act prohibited a public university from using set-asides or quotas to admit minority applicants.⁴⁰

IV. ALLAN BAKKE’S LEGAL CRUSADE

The next section of the book traces the factual events that led to the eventual lawsuit filed by Allan Bakke. Bakke developed an interest in medicine while he was serving as an officer in the U.S. Marine Corps during a combat tour in Vietnam.⁴¹ While attending night courses at San Jose State University and Stanford University, he enrolled in all the undergraduate chemistry and biology courses required for admission to medical school.⁴² He also gained the requisite practical experience by volunteering for emergency room work at El Camino Hospital in Mountain View, California.⁴³ Ball suggests that Bakke’s age was a hindrance for him in the medical school admissions process.⁴⁴ Several medical schools,

the applicant’s parents. *Id.*

36. *See id.*

37. *See BALL, supra* note 4, at 51.

38. *Id.* Asian Americans were not included in the preferential program. Notably, a decade later, the number of Asian Americans in higher education would cause them to be excluded from many affirmative action programs due to their “overrepresentation.” Under these admissions schemes, Asian Americans are grouped together with whites, and not considered minorities. *See Harvey Gee, Why did Asian Americans Vote Against the 1996 California Civil Rights Initiative?*, 2 LOYOLA J. OF PUB. INT. L. 1, 6-8 (2001).

39. *See id.* at 47.

40. *See id.* at 48.

41. *See id.* at 46.

42. *See id.*

43. *See BALL, supra* note 4, at 46-47.

44. *See id.* at 47.

including UCD informed him that his age was a significant factor in his rejection. In fact, Ball states that Bakke was told by the UCD admissions committee that "when an applicant is over thirty, his age is a serious factor which must be considered. . . . The Committee believes that an older applicant must be unusually highly qualified if he is to be seriously considered."⁴⁵ In 1973 all eleven medical schools Bakke applied to rejected him, and Bakke's age was given as the major factor in their decisions not to admit him.⁴⁶

When Bakke initially applied to UCD his benchmark score was 468 out of a possible 500 points.⁴⁷ However, he had applied late because of his mother-in-law's serious illness.⁴⁸ UCD used a rolling admissions process, and had already sent admission letters to 123 applicants. A score of 470 was used as the minimum benchmark score for admission at that late date.⁴⁹ On May 14, 1973, Bakke received his first rejection letter from UCD.⁵⁰

When Bakke re-applied in August 1973, there were over 3,100 non-minority applicants for eighty-four available seats.⁵¹ His total score after the admissions committee reviewed his file was 549 out of a possible 600 points.⁵² In late September 1973, UCD informed Bakke that he had not been admitted under the early-admission process and that he would not be placed on the alternate wait-list.⁵³ Interestingly, thirty-two non-minority applicants with scores higher than Bakke's were also not admitted to the UCD Medical School, and of these applicants, twelve did not make the alternates list.⁵⁴ On April Fool's Day 1974, Bakke was informed that the UCD Medical School rejected him.⁵⁵

Allan Bakke filed suit against UCD alleging that he was the victim of "reverse discrimination" as a result of the UCD affirmative action admissions policy. He argued that out of

45. *Id.*

46. *See id.* at 54.

47. *See id.*

48. *See id.*

49. *See BALL, supra* note 4, at 55.

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.* at 56.

54. *See id.*

55. *See BALL, supra* note 4, at 56.

the one hundred seats annually filled by first-year medical students, the University of California at Davis Medical School had set aside sixteen solely for minority applicants.⁵⁶ Bakke claimed that the school's admission scheme violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act.⁵⁷ Bakke contended that he was rejected not because of his qualifications, but because of his race.⁵⁸ Specifically, he asserted that he was not admitted into the medical program despite the fact that his grade point average and MCAT scores were higher than those of certain minority persons who had been awarded one of the sixteen minority set-aside slots.⁵⁹

Ball goes on to discuss the political climate in which Bakke brought his litigation.⁶⁰ In the 1970s, there was an exponential growth in the number of students interested in attending medical school.⁶¹ America's medical schools however, did not have the capacity to provide all qualified applicants with a medical education.⁶² Coinciding with this extraordinary increase in applications for admission, most medical schools established a variety of preferential admission policies in order to increase the number of qualified minority students attending their predominately white medical schools.⁶³ Ball suggests that this led to more non-minority applicants being rejected in favor of admitting minority applicants.⁶⁴ Certainly the time was ripe for Bakke to bring his lawsuit.

V. THE LAWYERS

A particular strength of *The Bakke Case* is its insightful analysis of the early stages of the case and its discussion of the lawyers involved in the litigation. Demonstrating his comprehensive analytical style, Ball offers an in-depth background of the parties in *Bakke*. Bakke retained well-renowned San Francisco lawyer Reynold Colvin to represent

56. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 275 (1978).

57. See *id.* at 277-78.

58. See *id.* at 278.

59. See *id.* at 277.

60. See BALL, *supra* note 4, at 49.

61. See *id.*

62. See *id.*

63. See *id.*

64. See *id.*

him.⁶⁵ Colvin was an active member of San Francisco's Jewish community, and served as the president of the city's chapter of the American Jewish Committee.⁶⁶ Colvin argued that setting aside sixteen seats for minority applicants was an illegal, unconstitutional racial quota, prohibited by the Fourteenth Amendment's Equal Protection Clause and Title VI of the 1964 Civil Rights Act.⁶⁷ At the same time, he downplayed the enormous disparities between regular and special admittees as well as Bakke's qualifications, which were categorically better than most of the admittees, whether minority or non-minority.⁶⁸ The prevailing theme was that racial quotas, regardless of their name or whether they were benign or remedial, were nonetheless illegal.⁶⁹

On the other side, representing the University of California ("UC"), was university general counsel Donald Reidhaar and his three-person legal defense team.⁷⁰ Reidhaar argued that there was nothing illegal or unconstitutional about UCD's creation of a preferential admissions program for minorities.⁷¹ According to his view, when race is used as a positive factor to overcome the vestiges of slavery and race discrimination, the racial preferences are constitutional.⁷² He maintained that the UCD admissions' "goal" was not a "quota."⁷³ Reidhaar insisted that if there were fewer qualified "special" candidates in a given year, then the unfilled seats would revert to qualified regular applicants.⁷⁴ The University's arguments, however, were weak. A stronger argument would have pointed out that the program was necessary because the public educational system has failed to produce African American professionals. Instead, Reidhaar merely accepted Bakke's assertion that he was better qualified than African American students enrolled at the medical school.⁷⁵ He also relied on the even weaker argument

65. *See id.* at 53.

66. *See BALL, supra* note 4, at 53.

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.* at 53-54.

71. *See id.* at 54.

72. *See BALL, supra* note 4, at 54.

73. *See id.*

74. *See id.*

75. *See id.*

that Bakke had no "standing to sue" in court because he had fallen short of the minimum scores necessary for admission to the medical school, even though his scores were admittedly higher than those of minority admittees.⁷⁶

After discussing the litigation at the state trial court level and at the California Supreme Court, Ball proceeds to devote the remainder of his book to a discussion of the *Bakke* case before the United States Supreme Court and how the Justices of the Supreme Court interpreted the substantive issues. By February 1977, Allan Bakke was almost thirty-eight years old. His last hope for admission into UCD's Medical School, and for the resolution of the moral, political, and legal issue of racial quotas, now rested with the Supreme Court.⁷⁷ With the grant of certiorari, the Court announced that it would hear the case in the 1977-1978 term and decide whether preferential admissions processes based on race and ethnicity were unconstitutional.⁷⁸

VI. SUPREME COURT ORAL ARGUMENTS

Oral arguments before the U.S. Supreme Court took place as scheduled on October 12, 1977.⁷⁹ Because of the importance of the *Bakke* case, hundreds of would-be spectators lined up in the Court's plaza, some as early as 4 a.m., hoping to gain entrance to the oral arguments.⁸⁰ Many who heard the arguments were members of minority groups,⁸¹ but Allan Bakke himself was not present.⁸² Anti-Bakke picketers appeared, in the Court's plaza, chanting: "Defend. Extend Affirmative Action!"⁸³ The press treated the *Bakke* oral arguments as a major event in American politics.⁸⁴

Meanwhile, inside the Supreme Court, the Justices participated in the two-hour *Bakke* oral arguments.⁸⁵ Using those documents as their primary data, Ball simplifies and provides great understanding to such a complex case.

76. *See id.*

77. *See id.* at 68.

78. *See BALL, supra* note 4, at 68.

79. *See id.* at 88.

80. *See id.*

81. *See id.*

82. *See id.*

83. *Id.*

84. *See BALL, supra* note 4, at 88.

85. *See id.* at 89.

Furthermore, he extensively covers the amicus curiae briefs, providing relative understanding and communicating the vast importance that these briefs had in the case.

Colvin's brief for the respondent Bakke urged the Court to let the California Supreme Court's decision stand.⁸⁶ Colvin argued that the Court should deny certiorari because

(1) the plaintiff's petition "distorted the holding of the California Supreme Court," (2) the "alleged conflict between the California Supreme Court and other state Supreme Courts is not a true conflict meriting resolution by this Court," and (3) the California Supreme Court correctly decided *Bakke* "and did so by way of a reasoned application of this Court's prior constitutional decisions."⁸⁷

Reidhaar and the University of California Regents asked U.S. Solicitor General Archibald Cox to help them prepare and argue the case before the Supreme Court. Cox had prior experience arguing before the Court, and had taught at a university that had a similar admissions procedure.⁸⁸ Cox argued in his brief that a "race-conscious plan for minority admissions" is the only affirmative action program that actually works to enable "qualified applicants from disadvantaged minorities to attend medical schools, law schools, and other institutions of higher learning in sufficient numbers to enhance the quality of the education for all students."⁸⁹

Cox never mentioned Allen Bakke, in contrast to Colvin.⁹⁰ According to Ball, Colvin's inexperience showed, because he spent nearly half his time repeating the facts in the case.⁹¹ Colvin began by claiming that Allan Bakke was the victim of an illegal quota that violated the U.S. Constitution's Equal Protection Clause, the "privileges and immunities" clause of the California Constitution, and Title VI of the 1964 Civil

86. *See id.* at 64. Colvin's position was that "the primary issue in this case is Allan Bakke's right to be admitted to the medical school. . . as well as the constitutionality of the petitioner's procedure for selecting students to attend the medical school." *Id.*

87. *Id.*

88. *See id.* at 92.

89. *Id.* at 69.

90. "Colvin's "at times impassioned" presentation, according to the *Washington Post* reporter covering the story, focused solely on Allan Bakke's rights, rights that were violated by the UCD medical school's affirmative action program." BALL, *supra* note 4, at 96.

91. *See* BALL, *supra* note 4, at 96.

Rights Act.⁹² He explained that the program was unconstitutional because it was based on a racial quota, "where sixteen of the one hundred vacancies were filled with minority applicants with lower overall ratings than some majority applicants who were rejected."⁹³ After the conclusion of the oral arguments, the Justices deliberated at length before drafting their respective decisions.⁹⁴

In *The Bakke Case*, Ball uses published and unpublished sources, including interviews with the Supreme Court Justices, to reveal the deep divisions within the Court, in an effort to enable the reader to draw their own conclusions about how and why the Justices decided the case as they did.⁹⁵ The highly divided Court in *Bakke* expressed a begrudging acceptance of race-based affirmative action.⁹⁶ Ball explains that the *Bakke* opinion was actually six separate opinions, and in the end, there was no single Court pronouncement that had the full support of five or more of the nine Justices.⁹⁷ Instead, according to Ball, there was a bifurcated judgment of the Court as announced by Justice Powell, with each of the "gangs" of four concurring and dissenting in different segments of the Powell "judgment."⁹⁸

VII. THE SUPREME COURT DECISION

In *Bakke*, the U.S. Supreme Court affirmed the unconstitutionality of the "special admissions" program, but reversed the lower court's prohibition of using race consideration as an admission criteria.⁹⁹ The Court applied the traditional equal protection test, i.e. strict scrutiny, whereby racial classifications may be used only when the classifications serve a compelling governmental interest and is narrowly tailored to further that interest.¹⁰⁰ Yet, in this section, Ball points out the Court's unwillingness to make policy and its preference only to interpret the legality of such controversial issues.

92. See *id.*

93. *Id.*

94. See *id.* at 99-102.

95. See *id.* at xiii.

96. See *id.* at 139-40.

97. See BALL, *supra* note 4, at 135.

98. See *id.*

99. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271 (1978).

100. See *id.* at 315-20.

Four Justices, led by Justices Brennan and Thurgood Marshall, voted to approve affirmative action programs as constitutional.¹⁰¹ Justice Brennan wrote the opinion for this group, concurring with Justice Powell to sustain affirmative action in principle, and declaring that public graduate schools can take race into consideration to achieve diversity among the student body.¹⁰² Ball reveals that these four Justices concluded that the UCD plan was valid in every respect, whether from the Title VI perspective or from the perspective of the Fourteenth Amendment's Equal Protection Clause.¹⁰³

For Brennan and the others, "under any standard of Fourteenth Amendment review other than one requiring absolute color-blindness, the Davis program clearly passes muster. . . . [It] used race in furtherance of educational and social objectives that are proper and even compelling."¹⁰⁴ Marshall echoed Brennan's sentiments in writing that:

[a]s to this country being a melting pot—either the Negro did not get into the pot or he did not get melted down. . . . If only the principle of color-blindness had been accepted by the majority in *Plessy* in 1896, we would not be faced with this problem in 1978. . . . For us to now say that the principle of color-blindness prevents the University from giving 'special' consideration to race when this Court, in 1896, licensed the states to continue to consider race, is to make a mockery of the principle of 'equal justice under law.'¹⁰⁵

Marshall concluded by saying,

We are stuck with this case. We must decide it. We are not yet all equals, in large part because of the refusal of the [Court in *Plessy v. Ferguson*] to adopt the principle of color-blindness. It would be the cruelest irony for this Court to adopt the dissent in *Plessy* now and hold that the University must use color-blind admissions.¹⁰⁶

Marshall insisted on using his more flexible standard, one that he had discussed and used on a number of occasions before *Bakke*.¹⁰⁷ It took into account the importance of the

101. *See id.* at 272.

102. *See id.* at 315-20.

103. *See* Ball, *supra* note 4, at 118.

104. *Id.*

105. *Id.* at 119.

106. *Id.* at 119.

107. *See id.* at 102.

governmental purpose as well as the severity of the discrimination.¹⁰⁸ He also argued, as he did in all "equality" cases, that the Court could not deal with the issue of affirmative action in the purely rational legalistic fashion, appropriate for an ideal world.¹⁰⁹ For Marshall, the "legality of affirmative action simply could not be resolved without consideration of the historical, legal, and sociological context of past racial policies and practices."¹¹⁰

In Ball's view, the Brennan opinion¹¹¹ joined by White, Marshall, and Blackmun, was a milestone opinion of sorts.¹¹² For the very first time, these four Justices adopted a transformational interpretation of the Fourteenth Amendment.¹¹³ Brennan's opinion reflected his groups' views on the manner of affirmative action, and it received Powell's tempered approval "on the issue of treating the race of a candidate affirmatively."¹¹⁴

The Brennan opinion noted that four Justices supported the view that the judgment of the California Supreme Court should be reversed in all aspects, not only insofar as it prohibits the University from establishing race-conscious programs in the future, but also insofar as the judgment orders that respondent Bakke be admitted to the Davis Medical School.¹¹⁵

Another four Justices voted with Justice Powell to strike down the affirmative action plan as unconstitutional.¹¹⁶ Justice Stevens wrote the opinion of this quartet of Burger, Rehnquist, Stewart, and himself.¹¹⁷ Justice Stevens argued that the UCD plan was invalid in every respect, and concluded that Bakke was excluded from UCD in violation of Title VI of the 1964 Civil Rights Act.¹¹⁸ Unlike the Brennan group, the Stevens' group rejected *any* use of race as a factor in admission procedures at colleges and universities.¹¹⁹

108. *See id.*

109. *See BALL, supra note 4, at 102.*

110. *Id.*

111. *See id.* at 137.

112. *See id.* at 136.

113. *See id.*

114. *See id.* at 137.

115. *See BALL, supra note 4, at 136-37.*

116. *See id.*

117. *See id.* at 136.

118. *See id.*

119. *See id.*

Stevens stated that "it is perfectly clear that the question of 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."¹²⁰ Justice Stevens was of the view that as a matter of judicial parsimony and self-restraint, the case could be resolved through statutory interpretation alone.¹²¹

In Justice Powell's opinion, the UCD special admissions program unconstitutionally denied Bakke equal treatment in violation of the Equal Protection Clause of the Fourteenth Amendment and therefore the California Supreme Court's order admitting Bakke to the medical school was valid.¹²² He noted, however, that the use of quotas or set-asides *can* be justified in situations where there was actual proof that an institution receiving federal funds had indeed discriminated against applicants on the basis of race or color.¹²³ Nonetheless, Powell thought that it was unnecessary to explore that matter in *Bakke*, since UCD had no record of intentional discrimination against minorities.¹²⁴ Title VI of the 1964 Civil Rights Act, according to Powell, was not controlling in this case, because it goes no further in prohibiting the use of race than the Equal Protection Clause.¹²⁵

Justice Powell believed that race could be used as a factor in the admissions process, but that the UCD process was an unconstitutional racial quota.¹²⁶ Therefore, the California Supreme Court should be affirmed as to the UC's reliance on unconstitutional quotas and reversed as to the use of race as a "plus" in the admissions process.¹²⁷ Brennan, White, and Marshall agreed with Powell's contention, although not with his proposal to utilize the strict scrutiny standard to decide the matter.¹²⁸ Brennan believed that strict scrutiny should only be used in cases where race was used to stigmatize and

120. *Id.*

121. *See* BALL, *supra* note 4, at 136.

122. *See id.* at 138.

123. *See id.*

124. *See id.* at 138-39.

125. *See id.* at 139.

126. *See id.* at 101.

127. *See* BALL, *supra* note 4, at 101-02.

128. *See id.* at 102.

demean.¹²⁹ Brennan thought that in this case, where race was used for remedial purposes, the standard should not be strict scrutiny but rather "scrutiny more exacting than minimal rationality."¹³⁰ Thus, the divided decision in *Bakke* became the central source of the affirmative action debate, which would be closely examined by law students, lawyers, judges, and constitutional scholars for generations to come.

VIII. CONCLUSION

Many scholars have referred to *The Bakke Case* in their discussion of the case or its relationship to the affirmative action debate. Yet, few writers bother to re-examine the particular facts of the actual litigation in the case. Howard Ball represents the rare type. In *The Bakke Case*, Ball succeeds in this ambitious task. Unlike other tracts that discuss *Bakke* and its holding in the abstraction and its theoretical level of analysis, Ball seeks not only to address the issues of the case, but also to discuss the litigants, their advocates, and the justices involved in the decisions from the lower courts to the U.S. Supreme Court. It is a worthwhile endeavor, well executed. Whatever views one may hold on affirmative action, the volume is an intriguing narrative intertwined with subtle legal interpretations which should serve as a tremendous resource for those seeking a more complete understanding of the case, and its ramifications. It is highly recommended for any reader who cares about the origins of the modern debate and the future of affirmative action in higher education, and curious about the facts and issues that brought about Justice Powell's compromise decision and the personal story of Allan Bakke.

129. *See id.*

130. *Id.*