Master Thesis American Studies

A Beacon of Hope: Affirmative Action and Bakke's Judicial Road to Fairness

By Thomas Boekhoud

J. Verheul

21.186 words

August, 2012

Index

INTRODUCTION

On June 28, 1978, after the Supreme Court issued its ruling on *Regents of the University of California v. Bakke*, Justice Thurgood Marshall, the only African-American among the Justices of the Supreme Court, summarized his vision of the political and social impact of landmark judicial decisions such as *Bakke* when he spoke to the gathered press.[1] According to Marshall, the ramifications of the decision went so far beyond a mere judgment on the conflict that he doubted there was "*a computer capable of determining the number of persons and institutions that may be affected by the decision in this case.*"[2] When reviewing the political and social impact of *Bakke* more than three decades later it can only be concluded that Marshall was right.

A. The Case of Bakke

The story of Allan Bakke's pursuit of fairness started in 1974 when Bakke, a white applicant to the University of California, filed a lawsuit against the university after his application to the Davis medical school was denied for the second year in a row. In his suit, Bakke argued that the school's admission policy, which reserved 16 slots for non-white students, was in violation of both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act.[3] At first the Supreme Court of California denied Bakke's request for admission to the medical school. Although the court ruled that UC Davis's admissions practices were illegal, it argued that Bakke had not adequately demonstrated that he would have been admitted to Davis

[1] P. Marin and C.L. Horn, *Realizing Bakke's Legacy: Affirmative Action, Equal Opportunity and Access to Higher Education* (Sterling: Stylus Publishing 2008) 1.
[2] W. Greider, "The scene: An hour of history, yes, but without the thunderclap, " *The Washington Post* (June 29 1978) pA1. As cited in Marin and Horn, *Realizing Bakke's Legacy*, 1.
[3] *Ibid.,* 2.

medical school if only the university had not implemented race-conscious quotas.[4] On appeal, the Californian Supreme Court reaffirmed its earlier position on the administration program and added a provision to the decision that ordered that UC Davis would have to admit Bakke.[5] However, the university appealed the lower court's decision, and the case went before the U.S. Supreme Court, which agreed to hear oral arguments in the fall of 1977. Although Bakke had originally started his suit with the intention of forcing his admission into medical school, his pursuit of personal fairness unintentionally became a major controversial event which divided the entire nation as Bakke's case not only tested the constitutionality of UC Davis' affirmative action policy, but also the validity of affirmative action in general.[6]

B. Bakke as Catalyst for Social Change

Bakke is considered by many to be a landmark Supreme Court decision. At first glance it might seem that the implications of the ruling were not as groundbreaking as other landmark Supreme Court decisions, since *Bakke* did uphold the constitutionality of affirmative action policies.[7] However, when thoroughly examining the scope of the decision it becomes clear that significant social change was in fact achieved. Two aspects of the ruling were responsible for this result. First, the decision addressed the issue of race-based affirmative action policies by ruling that racial preferences in favor of minorities were constitutionally equivalent to discrimination, and therefore required the same level of judicial scrutiny.[8] Second, the decision changed the way race-based admission programs were to be implemented. In effect, racial quotas and policies that isolated race as the primary factor in admission would be forbidden in the future. The decision

[4] *Ibid.*, 2-3.
[5] *Ibid.*, 2.
[6] T.H. Anderson, *The Pursuit of Fairness: A History of Affirmative Action* (Oxford: Oxford Univ. Press, 2005) 153.
[7] J.C. Jeffries, "Bakke Revisited," *The Supreme Court Review*, Issue of 2003 (2003) 1-25: 2.
[8] Jeffries, "Bakke Revisited," 2.

consequently ended the policy of using racial quotas in school admission and job application policies, which had become more and more common in the United States.[9]

But *Bakke* was not a judicial review in the traditional sense, as the case did not follow the conventional process of validating the constitutionality of policies. Instead, *Bakke* was a political compromise that resulted in a new understanding on how to define and implement affirmative action programs. *Bakke* is also responsible for more than just providing a legal framework upon which to consider race and ethnicity in higher education admissions. In effect, the new guidelines, proposed by the Supreme Court on how to apply affirmative action in admission policies, would eventually become the new "law of the land" for affirmative action in general.[10] Over a period of fifteen years, the U.S. government would implement the guidelines for institutions of higher learning, as *Bakke* mandated a new standard for all affirmative action policies. [11] Consequently, all policies attempting to promote the integration of minorities in federal and private workforces would eventually have to face the same level of judicial scrutiny as admission policies.

The social reform enacted by the ruling has had a lasting influence. The legal framework established by *Bakke* has only been slightly modified in the last thirty years, and the changes brought on by *Bakke* would influence the lives of millions. [12] In light of these vast implications,

---

[9] According to one Ohio State dean, "a university does not deserve to call itself a university if it's not diverse." Since many college administrators agreed with this statement, most universities had supported and executed affirmative action programs that used racial quotas. Anderson, *The Pursuit of Fairness: A History of Affirmative Action*, 150-51.

[10] H. Ball, *The Bakke Case: Race, Education, and Affirmative Action* (Lawrence: Kansas Univ. Pr., 2000) 176-186 and 206.

[11] After some initial debate on the reach of the guidelines proposed by *Bakke* and whether they should be applied to all affirmative action policies, the Supreme Court eventually ruled in *Adarand Constructors, Inc. v. Peña* (1995) that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under a standard of "strict scrutiny," *see* 488 U.S. 469 (1995). As cited from *Oyez.org* http://www.oyez.org/cases/1990-1999/1994/1994_93_1841.

[12] Marin and Horn, *Realizing Bakke's Legacy,* 15.

it seems that Justice Marshall argued with good reason that the ruling would affect so many people and institutions that no computer in the world could determine how much it would change the country and those in it.[13]

Bakke may not seem as glamorous or groundbreaking as other landmark Supreme Court cases, such as *Brown v. Board of Education of Topeca* (1948) and *Roe v. Wade* (1973), but it does share certain qualities with them.[14] Aside from the large amounts of public controversy the cases generated, there is another important denominator they have in common. According to the American public, the Court acted in these cases as a catalyst for social change, thereby securing a place in American history for producing lasting social reform through its judicial decisions.[15] This belief that the Court acted beyond its enumerated powers and become more activist, in spite of large public and political opposition, was seen by some as an expansion of Judicial power beyond what had been granted by the Constitution, while others saw it as a "beacon of hope" to protect and or defend their constitutional rights.

C. The Emergence of the Colorblind Ideal

The case of Bakke been extensively examined and researched in the last few decades. Current scholarship about the source of the social reforms following the *Bakke* reversal seems to trivialize the role of the Supreme Court. Instead of seeing the Court as the catalyst for change, some current theories emphasize the importance of the rhetoric of the anti-affirmative action camp, which is deemed responsible for creating a public outcry against affirmative action programs.[16]

---

[13] Marin and C.L. Horn, *Realizing Bakke's Legacy,* 1.
[14] 347 U.S. 483 (1954) and 410 U.S. 113 (1973). Both cited on www.oyez.org.
[15] A.R. Amar and N.K. Katyal, "Bakke's Fate," *UCLA Law Review,* Vol. 43 (1996) 1745-1778: 1770.
[16] I. F. Haney Lopez, "A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness," *Stan. L. Review,* Vol. 59, Iss. 4 (2007) 985-1064: 1029-1046.

Adherents of this theory, such as Ian Haney Lopez and Deidre Bowen, deem the success of the anti-affirmative action discourse responsible for the reforms that came to fruition after *Bakke.* [17] These scholars argue that *Bakke* was a landmark victory for the colorblind ideal and can be perceived as the culmination of a public debate between on the one hand the supporters of affirmative action, who believed race-conscious policies were necessary because of the hardship some minorities had to face at school, work, and their personal lives, and on the other hand their opponents, who believed the Constitution required colorblindness.[18] Thus, according to this scholarship, it is presumed that the Court merely reacted to the diminishing support for affirmative action by *"shifting its course on race-based remedies and public policies from one of general endorsement to one of increasing skepticism and disapproval."*[19] Over time, this paradigm has become the dominant school of thought of scholars on the subject. In essence, it favors an interpretation of the Supreme Court that contends that the Court merely follows public opinion, which consequently diminishes the importance of the Supreme Court's role in American political and cultural society.

D. The Dynamic and the Constrained Court Theory

At first glance, the trivialization of the role of the Supreme Court during the *Bakke* reversal seems strange as so many people continue to perceive the U.S. Supreme Court as one of the most powerful court systems in the world. In fact, some have even argued that its ability to protect minorities and defend liberties in the face of opposition is one of the most notable features that

[17] For examples of academic work in which scholars criticize the S.C., and in particular Justice Powell, for their lack of courage to face public scrutiny during the Bakke trial, and for placating the demands of the anti-affirmative action movement through the *Bakke* decision, *see* I.F. Haney Lopez, "A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness," *Stan. L. Rev.,* Vol. 59, Iss. 4 (2007) 985-1064: 1044; D. Bowen, "Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action," *Ind. L. J.*, Vol. 85 (2010) 1197-1277: 1210-1211.
[18] D. Bowen, "Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action," *Indiana Law .Journal.* Vol. 85 (2010) 1197-1277: 1210-1211.
[19] Marin and Horn, *Realizing Bakke's Legacy,* 15.

make the American democracy exceptional.[20] This perception of the Court as a powerful judicial body able to protect minority rights despite opposition from the majority is supported by the Dynamic Court theory which presents the Supreme Court as a potent vehicle capable of resisting or producing political and social change. [21] Many renowned political and constitutional scholars, such as John Hart Ely and Alexander Bickel, have supported the paradigm of the "Dynamic Court" in the past.[22] These academics argued that it was the Supreme Court's insulated position that enabled it to act, even against massive public and political opposition, when the other branches of government could not.

However, since the early 1990s, its counter equivalent, the Constrained Court theory has replaced the Dynamic Court theory as the dominant school of thought by legal scholars. [23] This shift occurred as more and more prominent constitutional scholars, such as Robert Dahl, Gerald Rosenberg and Neal Devins, began to question the judicial effectiveness of old cases such as *Brown* and *Roe*. Advocates of the Constrained Court theory, empowered by a stream of empirical data that raised doubt about the significance of these cases, won considerable scholarly support.[24] Because of the concerns they raised and the salience of their arguments, it became harder and harder to unquestionably maintain that courts are free from the obstacles the other two branches of government face when proposing change.

---

[20] A.M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merill, 1962) 1.; G. Rosenberg, *Hollow Hope: Can Courts bring about Social Change*? (Chicago: Univ. of Chicago Press 1991) 428.
[21] G. Rosenberg, *Hollow Hope: Can Courts bring about Social Change*? (Chicago: Univ. of Chicago Press, 1991) 2.
[22] For examples of academic work in which scholars affirm the S.C. ability to produce social change, *see* A.M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merill, 1962). and J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).
[23] R.H. Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" *The Supreme C. Rev.,* Vol. 2011, Iss. 1 (2011) 103--158: 103-105.
[24] Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 104-105.

Most constitutional scholars currently favor the Constrained Court theory and its claim that the Supreme Court's ability to produce social and political change is severely limited by certain constraints.[25] The Constrained Court paradigm perceives the Court as weak, ineffective and powerless as compared to the other two branches, because the Court lacks both the budgetary and physical powers needed to make policy and achieve significant social change.[26]

Supporters of this theory contend that almost all Supreme Court decisions on controversial and ethical issues, and therefore all decisions that can theoretically produce significant social change, are in fact reflections of popular preference, of the will of the majority, instead of the product of judicial activism[27] These scholars therefore argue that popular preferences and social and economic recourses shape the outcomes of important, controversial cases such as *Bakke*, not thorough judicial work.[28] While the Court may play a role in the process of producing social change, by formalizing changes already in progress and even legitimizing them, the theory states that the Court cannot make a real difference on its own. Instead of being a vehicle for social change, it merely reacts to gradual changes in public opinion and the will of those involved.[29] When the Court does try to make a difference, and attempts to be a catalyst for social change, ahead of the curve as it was with its ruling of *Brown,* the theory concludes that the Court fails

---

[25] For examples of works in which scholars diminish the S.C. ability to produce social change, *see* R. Dahl, "Decision Making in a Democracy: The Supreme Court as National Policy Maker," *Journal of Public Law*, Vol. 6 (1957) 279-295; N. Devins, "Is Judicial Policymaking Countermajoritarian?", in M.C. Miller and J. Barnes, Making Policy, Making Law (George Town University Press: 2004) 189-201; G. Rosenberg, *Hollow Hope: Can Courts bring about Social Change*? (Chicago: University of Chicago Press, 2008); C. Sunstein, "Constitutional Politics and a Conservative Court," *The American Prospect,* December 26, 2000. Available at http://prospect.org/article/constitutional-politics-and-conservative-court.

[26] Rosenberg, *Hollow Hope,* 3, 15, 19, and 21.

[27] N. Devins, "Is Judicial Policymaking Countermajoritarian?" in M.C. Miller and J. Barnes, Making Policy, Making Law (George Town University Press: 2004) 189-201: 200.

[28] Rosenberg, *Hollow Hope,* 3.

[29] Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 104-105.

because it lacks the tools necessary to implement its own rulings.[30] In other words, the Supreme Court while possessing the power to advocate change, does not possess the power to enforce that change, and without such power, its rulings can ring hollow without the support of those willing to enforce it.

E. Research Goals

In effect, the Constrained Court theory contends that the Supreme Court cannot act alone when it wants to bring about social change because of the constraints it has to face. Therefore its adherents argue that the Court is unable to make any real difference or produce social change, and there is merit to this argument. Recently the issue of the political influence of the Court found new urgency. While the existence of constraints is obvious, it seems with regards to *Citizens United v. Federal Election Commission*, a case in which the Court held that the First Amendment prohibited the government from restricting independent political expenditures by corporations and unions, that the Court successfully embroiled itself in this high profile issue that led to significant changes in the political process.[31] Would it therefore not be conceivable that the supporters of the Constrained Court theory overstate the constraints that the Court has to face? In addition, would it not also be perfectly plausible that these constraints can be overcome when political, social, and economic conditions become supportive of change?

After considering this, this study contends that the Supreme Court can make, in fact, a real difference in some specific cases. But, the Court cannot act on its own, as proponents of the

[30] C. Sunstein, "Constitutional Politics and a Conservative Court," *The American Prospect,* December 26, 2000. Available at http://prospect.org/article/constitutional-politics-and-conservative-court.

[31] *Citizens United v. Federal Election Commission,* 558 U.S. 50 (2010), was a very controversial judicial decision as it declared a high profile campaign law, passed by the legislature, unconstitutional. Democrats and even some Republicans have condemned the Court's decision for being an example of judicial activism, as it gives special interests and their lobbyists more power in Washington at the expense of the average American, whose contributions can never match those of the corporations and the extremely rich. Cited in Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 105-114.

Constrained Court theory correctly have argued. It is clear that the Court can only produce social change when it is part of a broader array of forces in support or opposition of an issue, and when the Court has ample judicial precedent to base its claim. For this to happen, however, two main conditions need to be fulfilled. The first condition is the need for sufficient judicial precedent, since the Court is bound by the "norms and expectations of the legal culture."[32] The second condition is the need for an environment that looks favorable to change, or to put it less delicately, the Court needs support from both the public and the political elite when it wants to propose and encourage social change as will be explained further on.

To sum up, although the Supreme Court is attentive to popular preferences, this study argues that the Court can in fact bring about social change in specific cases which involve two opposing principles that have caused the public opinion to be either divided or uncertain on the issue and where strong sentiment exists to bring about change, and when Congress is leery to decide between the two sides.[33] It is when such a situation occurs that the Court has the ability to influence public policy through a judicial decision. As will be demonstrated, *Bakke* was an example of such a case in which the Court brought about social change through its actions.

The issue that culminated in *Bakke* came to the Court after a contentious legal battle between two opposing political convictions, however, in the end it was the Court that settled the dispute. Nonetheless this does not mean that this study favors the interpretation offered by the Dynamic Court paradigm over its rival the Constrained Court paradigm. As a matter of fact this study will explain why both Court paradigms are in their own respective ways flawed when it comes to *Bakke.*

[32] Rosenberg, *Hollow Hope,* 10-12 and 181.
[33] Devins, "Is Judicial Policymaking Countermajoritarian?" 200.

This study proposes that the role of the Supreme Court in *Bakke* was essential in shaping a new way of looking at the issue of affirmative action. The central argument of this study is that *Regents of the University of California v. Bakke* is an example of a judicial decision through which the Supreme Court produced significant social change. In order to defend this statement, this study will question to what extent the reforms that followed the 1978 *Bakke* reversal were influenced by changes in the debate over affirmative action that were seen in the years preceding the decision, and to what extent the Supreme Court succeeded in shaping them? In other words, whether the aforementioned social changes were the result of public majoritanism or whether it was judicial effectiveness that shaped the new climate of public opinion that followed *Bakke.*

In order to make this argument adequately, this study is divided into three parts. The first part will address the question as to whether the Supreme Court has the ability to produce significant social reform. In order to answer this question, different theories regarding the power, role and limitations of the Supreme Court will be considered. In the second part, the broader political and social context in which *Bakke* took place will be examined. To do this, a review of the conception of affirmative action in the 1960s as well as its fall from grace in the mid-1970s will be analyzed. Central to this discussion will be the anti-affirmative action movement, which was a catalyst for the social changes that followed *Bakke*. The last part of this study will be dedicated to the judicial argument of *Bakke*. Here it will be described how the Supreme Court overcame the constraints that limit its ability to produce social reform and how the Court influenced public opinion and proposed a political compromise regarding affirmative action that even today still holds.

I. Theories Regarding the Political Role and Power of the Court

This study contends that the Supreme Court produced social change by proposing the political compromise that would come to be known as *Bakke.* This contention is based on the idea that the Court has the ability to make political policy decisions and produce social change. Since the premise is founded on a very controversial notion that has been fought by scholars for decades, its plausibility must first be considered. [34] Central to the debate regarding the role and power of the Supreme Court are two opposing theories, both equally well established and both with a long history.

A. History of Two Different Interpretations of the Supreme Court

The debate concerning the political role and power of the Supreme Court is as old as the founding of the United States. Even the Founding Fathers did not see eye to eye on this issue, in particular with regards to the Court's ability to perform the judicial review. Unsurprisingly, as with almost all debates between the Founding Fathers, this discussion boiled down to a difference of opinion between Alexander Hamilton and Thomas Jefferson.

Thomas Jefferson, aside from being one of the most influential Founding Fathers, principal author of the Declaration of Independence, and third President of the United States, is also well-known as one of the earliest opponents of the political influence of the Supreme Court. Although Jefferson was a devout supporter of separation of power and the subsequent establishment of the judiciary as an independent branch of government, he feared that the Supreme Court had become too powerful after it had "usurped" the power of judicial review. According to Jefferson:

[34] Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 104-105.

> *The Constitution... meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the Legislature and Executive also in their spheres, would make the Judiciary a despotic branch.*[35]

Jefferson refers in this statement to the ruling in the landmark case of *Marbury v. Madison* in which the Supreme Court declared a law, passed by the legislature, unconstitutional, through its assumed authority to perform the judicial review.[36] The judicial review, as explained in the Constitution, works on the premise that the Constitution is a paramount law, and ordinary laws must be enforced to conform to it or otherwise be declared unconstitutional. The case of *Marbury* defined the boundary between the executive and the judicial branches of the American government. Before *Marbury* it was not established who had the authority to perform the judicial review as the Constitution had left that part vague. Therefore, by declaring a law the legislative branch passed unconstitutional, the Supreme Court usurped the exclusive right to perform the judicial review.

Through this case, the Supreme Court, with John Marshall as its Chief Justice, acquired the exclusive authority to "construe and apply" the Constitution to determine the constitutionality of ordinary legal acts.[37] As it is often unclear whether an act is in conflict with the Constitution, usurping the exclusive right to perform the judicial review provides the judiciary the ability to meddle in the political process itself. Even a legislative majority would theoretically be

---

[35] Thomas Jefferson to Abigail Adams, 1804. ME 11:51. As cited from "Thomas Jefferson on Politics & Government," *Famguardian.org*. http://www.famguardian.org/Subjects/Politics/ThomasJefferson/jeff1030.htm.
[36] William Marbury, who had been appointed by President John Adams as Justice of the Peace in the District of Columbia, petitioned the Supreme Court to force the new Secretary of State James Madison, to confirm his position, as Madison had refused to do so. Although the Court found Madison's refusal to confirm Marbury's appointment both illegal and remediable, it stopped short of compelling Madison. Instead the Court denied the petition as it ruled that the provision of the Judiciary Act of 1789 that enabled Marbury to bring his claim to the Supreme Court in the first place, was in itself unconstitutional because it extended the Court's original jurisdiction beyond that which Article III of the Constitution established. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). As explained in Bickel, *The Least Dangerous Branch*, 1-14.
[37] *Ibid*., 20.

powerless to resist judicial decisions that declared laws and policies, enacted through the regular democratic process, unconstitutional.[38]

Moreover, it was this specific power that distinguished the American judiciary from other court systems in the world, since it transformed the Supreme Court into a political institution that was more powerful than comparable bodies.[39] For this reason, Jefferson argued against the Court's usurpation of this particular power. For example, he argued that it was nowhere in the Constitution to be found that the Court had the exclusive right to perform the judicial review. He also articulated his fears by stating that giving so much power to an unelected body with life tenure could lead to "tyranny."[40]

While Jefferson feared the possibilities of a powerful activist court, henceforth referred to as a dynamic court, Alexander Hamilton, probably one the most influential Founding Father never to be president, can be portrayed as an early proponent of the Constrained Court theory. According to Hamilton:

> *The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution…the judiciary…has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.*[41]

Hamilton believed fears of "tyranny" from the Supreme Court to be unfounded, because the Supreme Court would need support from the other branches of the government to make important policy decisions and produce social change. Primarily, because the Court had "*no influence over either the sword or the purse,"* which are powers shared by the executive branch

---

[38] J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) 4-5.
[39] Bickel, *The Least Dangerous Branch,* 1 and 19-20.
[40] Jefferson, "Thomas Jefferson on Politics & Government." http://www.famguardian.org/Subjects/Politics/ThomasJefferson/jeff1030.htm.
[41] A. Hamilton, "The Judiciary Department," *Independent Journal* (June 14 1788) Federalist No. 78. Available at http://www.constitution.org/fed/federa78.htm.

in the form of the Presidency and the legislative branch in the form of Congress.[42] Thus, according to Hamilton, the Supreme Court had *"neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."*[43] In short, although the Court can issue decisions, it cannot directly implement them, which consequently constrains the impact of its decisions. Therefore the Court's dependency on societal support, in particular from the government, would make it nearly impossible for the Court to successfully oppose the wishes of the American society.[44]

Ultimately, the debate between Jefferson and Hamilton involved two opposing viewpoints about the political role and power of the Supreme Court and its relation with the other branches of government. In the preceding years, academic scholarship, in particular the work of Robert Dahl and Alexander Bickel, developed these two political viewpoints into full-fledged academic paradigms used to interpretat the Court's ability to produce social change.[45] The theories conceived by Bickel and other constitutional scholars view the Court as a powerful political entity capable of propelling change on its own and consequently support Jefferson's fears of a Supreme Court that is capable of interfering in the democratic process. The theories conceived by Dahl and other empirically-based political scientists came to support Hamilton's early viewpoints that perceived the Court as severely constrained and therefore incapable of producing lasting reforms without the consent of the lawmaking majority. These opposing theories are now sometimes known as the Dynamic and the Constrained Court theories.[46]

---

[42] Hamilton, "The Judiciary Department"
[43] *Ibid.*
[44] Devins, "Is Judicial Policymaking Countermajoritarian?" 200.
[45] Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 104-105.
[46] The Dynamic and The Constrained Court Theory are part of a terminology first proposed by Rosenberg in his book *The Hollow Hope* (1991).

B. Testing The Dynamic and the Constrained Court Theories

When considering both the Dynamic and the Constrained Court theory it is clear that the theories are in conflict. The Dynamic Court theory perceives the Supreme Court as a powerful political institution, capable of resisting or producing political and social change. Some of its advocates even argue that since the 1950s, the Court has been *"the most accessible and, often, the most effective instrument for producing changes in public policy sought by social movements."*[47] This would anecdotally be demonstrated by the number of social groups and organizations that have turned the Courts to achieve social or political change, and spend millions of dollars a year on complex judicial strategies aimed to convince the courts of the validity of their issues.[48]

The Dynamic Court theory was the more popular court theory among legal scholars between the New Deal period until the early 1990s.[49] As the theory was mostly informed by historic experience, its sudden rise in popularity is obvious when considering that during the 1930s, the Supreme Court showed its innate ability to resist the social change that had come in the form of the New Deal.[50] Moreover, the Court had done so with a certain degree of success, which in turn

---

[47] A. Neier, *Only Judgment: The Limits of Litigation in social Change* (Middletown: Wesleyan University Press, 1982) 9. As cited in Rosenberg, *The Hollow Hope,* 22

[48] G.N. Rosenberg, ""Ideological Preferences and Hollow Hopes: Responding to Criticism," *The University of Chicago Press*. http://www.press.uchicago.edu/books/rosenberg/index.html#note5.

[49] During this period when the Dynamic Court theory was at its prime, legal theorists, to a large extent inspired by Bickel's *The Least Dangerous Branch,* which was his seminal work on the power of the judicial review, focused their efforts on developing normative theories that dealt with the countermajoritarian difficulty, and often tried to accommodate the judicial review with widely accepted democratic theories. However, during the early 1990s, the legal community rediscovered the insights of Robert Dahl and other empirical minded political scientists after which the Constrained Court paradigm would come to dominate constitutional theory on the S.C., as will be discussed in detail later on. Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 104-105.

[50] J.M. Burns, *Packing the Court: The Rise of Judicial Review and the Coming Crisis of the Supreme Court* (New York: Penguin Press, 2009) 141-145. As cited in T.A. Schweitzer, "The Supreme Court and Judicial Review: Two Views," *Touro Law Review*, Volume 27, Number 1 (2011) 4 and 8-9.

led to a flood of scholarly work on the subject of the Supreme Court's ability to both bring and resist social change.[51]

In the decades after the New Deal, many social movements and groups who campaigned for social reforms came to believe in the Supreme Court abilities and increasingly turned to the courts.[52] This trend started with the famous cases during the era of the civil right movements such as *Brown v. Board of Education of Topeca*, but eventually spread to issues raised by women's groups, environmental groups, political reformers, and others.[53] After their apparent success, public opinion began to regard the Supreme Court as an effective producer of political and social change.[54]

Landmark cases such as *Roe v. Wade* and *Brown v. Board of Education* attained a mythical allure as harbingers of social change, and as such would speak to the public's imagination of the possibility for change for decades to come. Subsequently, the public conception of the Supreme Court as a beacon of hope was born. Some felt that the Court was the only branch of government that acted faithful to the Constitution during this period, while other branches had tried to resist dealing with such sensitive issues as Civil Rights and abortion. These cases strengthened the public's perception of a powerful Supreme Court. The aforementioned public perception of the Court as a powerful vehicle of social change, coupled with a normative belief among the general

[51] For example Robert Dahl's seminal article on the S.C. was written as a direct reaction to the public perception of the Court's ability to resist social change during the New Deal years. For more information, *see* R. Dahl, "Decision Making in a Democracy: The Supreme Court as National Policy Maker," *Journal of Public Law*, Vol. 6 (1957) 279-295

[52] Numerous social organizations and groups that campaigned for social reform were so convinced of the Court's ability to produce their desired change that they invested most of their economic recourses on litigation, thereby excluding other possible strategies. Rosenberg gives the NAACP as a primary example of such an organization that put all its hope for change on the S.C. Given the limited recourses of these kinds of organizations, this tells us a lot about the faith these people had in the Court's ability initiate social change. See G.N. Rosenberg, "Ideological Preferences and Hollow Hopes: Responding to Criticism," *University of Chicago Press*. http://www.press.uchicago.edu/books/rosenberg/index.html#note5

[53] Rosenberg, *The Hollow Hope,* 2.

[54] *Ibid.*

public that perceived the Court as the guardian of the fundamental rights and liberties enshrined in the U.S. Constitution, gave the Court an almost mythical allure as the titular "beacon of hope".[55]

Despite, or more precisely, because this theory was mostly informed by historical experience, the Constrained Court theory has been able to rapidly replace the Dynamic Court theory as the dominant court perspective among political scientists and legal scholars since the 1990s.[56] The relatively recent success of the old theory is explainable based on a new emphasis of empirical data in the field, brought from the perspectives of sociologists like Gerald Rosenberg. Advocates of this theory, which derived from the initial comments of Hamilton that portrayed the Supreme Court as "the least dangerous branch," have refuted previously accepted conceptions that stated that the Supreme Court was solely responsible for the social change that followed legendary cases as *Brown* and *Roe*. By producing a stream of empirical data that showed that especially *Brown* made little difference on its own, proponents of the Constrained Court theory made a very compelling case for their claim that the Court was ineffective because it is severely constrained by its lacks of both the budgetary and physical powers needed to make policy and achieve significant social change.[57] Instead they claim, it were popular preferences and social and economic recourses that shaped the outcomes of controversial cases such as *Bakke*.[58]

In order to determine the validity of the claims of these rivaling paradigms they have to be tested. Regretfully, opportunities to test these viewpoints do not come along that often. Only in some controversial cases, such as, *Bakke*, *Brown* or *Roe*, when courts overrule and invalidate the

[55] Bickel, *The Least Dangerous Branch,* 29-33.
[56] Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 104-105.
[57] Devins, "Is Judicial Policymaking Countermajoritarian?" 193.
[58] Rosenberg, *Hollow Hope,* 3-4.

actions of elected officials, or order actions beyond what elected officials are willing to do, Court's can be, like the Dynamic Court theory states, catalyst's of political and social change.[59] As there has been plenty of research in cases like these, this study will rely for the most part on the work of other scholars to determine the possibility for the Supreme Court to bring about social change.

C. Academic Interpretations of the Court's Role and Power

It is important to understand that both the Dynamic Court theory and the Constrained Court theory are theoretic models used to distinguish different beliefs on the relationship between the Supreme Court, the political branches, and the American democracy. Few scholars would argue that the Supreme Court is America's primary catalyst of social change or believe that Courts can never be an effective producer of social change. Nonetheless, this study will use these models to arrange the different theories and shape the academic context.

Jon H. Ely, one of the most influential legal scholars of the past half century, was during his life a strong supporter of the Dynamic Court theory. In his 1980 seminal work *Democracy and Distrust*, Ely proposes that the Supreme Court not only has the ability and the constitutional right to propel social change, but that the Court is sometimes even mandated by the Constitution to act. Ely defends this notion by using a radical interpretation of the Constitution, which states that the Court is mandated by the Constitution to reinforce the democratic process, by ensuring equal representation in the political branches.[60] For this reason, the Court has both the ability and the mandate to act on behalf of those who are treated as unequal and for those who are unrepresented in the political realm. As a result, the Court can act as a counterbalance for the

[59] Rosenberg, *Hollow Hope,* 22.
[60] Ely, *Democracy and Distrust*, 73-78 and 103.

excesses of unrestricted majoritianism, which Ely believes was the original intent of the Supreme Court.[61] Consequently, Ely argues that the Court's mandate to propose social change is limited to a certain extent, since the Court should only intervene when it serves the greater democratic or the political process, which is a notion that will be examined in greater detail in the third part of this study.

Ely recognizes the Supreme Court as a body not elected or otherwise politically responsible. Therefore, its ability to overturn legislation enacted by the people's elected representatives interrupts the work of the legislature and even popular sovereignty itself.[62] Nevertheless, Ely defends the Court's ability to act in the face of political and public opposition, by arguing that most elected and appointed officials are seldom willing to fight for unpopular causes, such as the protection of the rights of disliked minorities, for fear of political repercussions from the majority.[63] Courts on the other hand are not constrained in this way. According to his main argument, Courts have the ability to propel social change on an array of issues, because they are free from the electoral pressure other political branches face. Hence, courts have a unique position in the political spectrum. As courts do not face the obstacles other branches of government face, they can act when other institutions are politically unwilling or structurally unable.[64] Nonetheless, Ely concedes that the Court as *"a body that is not elected or otherwise*

[61] Ely believes the S.C. serves two related roles. It has to police the political process in the sense that it has to prevent the obstruction of this process by the existing office holders, and second it needs to prevent a tyranny of the majority. Because the risk of a tyranny of the majority is inherent to a representative democracy, this means the S.C. has to assure that the government protects minorities from unrestricted majoritarianism. Ely, *Democracy and Distrust*, 88-103.
[62] *Ibid.,* 4-5.
[63] For more information about the incentives of elected officials, see *Congress*, a seminal book on the subject of the electoral connection between elected officials and the causes they are willing to fight for. In this book, Mayhew, the author, argues that elected officials adapt their own policy views to reflect the dominant policy views in their districts. For this reason, scholars such as John Hart Ely argue that the protection of minorities is the predominant function of the S.C., because he believes that elected officials are either unwilling or unable to do so for fear of the majority. See D. Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974) 13–77.
[64] Ely, *Democracy and Distrust*, 11-12.

politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like, does raise the issue of the 'countermajoritarian' difficulty."[65]

The problem of the "countermajoritarian difficulty" was an issue first raised by Alexander Bickel, another prominent constitutional legal scholar whose interpretation on the relationship between the Supreme Court, the political branches and the American democracy was vital for the establishment of the Dynamic Court paradigm.[66] In one of the most enduring works on the subject, a book titled *The Least Dangerous Branch* (1960), Bickel acknowledges that authorizing the Court with the power of judicial review poses an inherent "countermajoritarian difficulty."[67] Nevertheless, Bickel defends the Court's "usurpation" of the power of judicial review on the grounds that it is exactly the insulation from public opinion and pressure that makes the judiciary uniquely qualified to assess executive and legislative actions.[68] Since the members of the Court do not have to worry about the popular will, Bickel thinks that courts are better suited than other branches of government to be faithful to the Constitution itself. Nevertheless, Bickel argues that the Court's ability to invoke the power of judicial review would be self-limited, because the Court has "neither force nor will," except "society's readiness" to accept rulings and take direction from the Court.[69] Thus, Bickel concludes, that while the Court is a "leader of opinion" and can initiate social change, it is inclined to show judicial discretion, since decisions that stray too far from the mainstream may lead to criticism or ultimately even a Congressional reversal.[70]

---

[65] *Ibid.*, 4-5.
[66] Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 103-105.
[67] Bickel, *The Least Dangerous Branch,* 16-21.
[68] *Ibid.,* 25-26.
[69] *Ibid.*, 204.
[70] Although the Court can lead popular opinion and initiate change, it cannot merely impose its own opinion. *Ibid.,* 239-240.

Neal Devins is the third expert on the power and limitations of the Supreme Court whose theories will be examined. Unlike the previously mentioned scholars, Devins can be perceived as a proponent of the Constrained Court Theory. Consequently, Devins disagrees with Ely's and Bickel's arguments that the Court's ability to perform the power of judicial review is by its essence always "countermajoritarian."

In an essay entitled "Is Judicial Policymaking Countermajoritarian?" Devins uses historical examples to prove that Court decisions are rarely countermajoritarian. According to his research, the Court is *"most of the time attentive to congressional and public opinion."*[71] Only when the public opinion is *"divided or uncertain,"* and when Congress is unwilling to decide between two alternatives, does the Court have the ability to significantly influence public policy by propelling social change.[72] In these kinds of controversial cases, the Court is empowered by Congress to settle certain hot issues. Nevertheless, congressional or public opposition can cause the Justices to adjust policy incrementally into accord within the *"permissible limits of public opinion."*[73] Devins concludes that, *"Lacking the power to appropriate funds or command the military, the court understands that it must act in a way that garners public acceptance."* [74] This theory would subsequently imply that the Supreme Court does not always act on principle, but looks for consensus and compromise instead.

Most of Devins' arguments derive from one of his predecessors, Robert Dahl, a political scientist whose views on the relationship between the Supreme Court, the political branches and

[71] Devins, "Is Judicial Policymaking Countermajoritarian?" 200.
[72] *Ibid.,* 200.
[73] *Ibid.,* 198-199.
[74] *Ibid.,* 193.

American democracy were essential for the establishment of the Constrained Court paradigm.[75] Dahl articulated his vision on the Supreme Court's power in "Decision Making in a Democracy," an article perceived as a landmark of scholarly work on the Court. In this influential article from 1957, Dahl examined whether the Court was really "countermajoritarian." In order to come to a proper answer for this question, Dahl examined 86 provisions of federal law that were initially passed by a "lawmaking majority," but later declared unconstitutional by the Supreme Court. After examining these cases, Dahl concludes with regards to the majority criteria that the Court is "*least likely to be successful in blocking a determined and persistent lawmaking majority on a major policy and most likely to succeed against a "weak" majority; e.g., a dead one, a transient one, a fragile one, or one weakly united upon a policy of subordinate importance.*"[76] Consequently Dahl believed, in contrast with the opinions of Ely and Bickel, that the Court cannot stand for long in the face of intensive political and public pressure.

Nevertheless, Dahl argues that one of *"the most important policy functions of the Supreme Court is to protect rights that are basic or fundamental."*[77] In order to protect these rights the Court is construes the Constitution as "an underlying fundamental body of rights and liberties," which it is then supposed to guarantee by its rulings.[78] Consequently, the court sometimes has to intervene on behalf of a minority. However, since justices are appointed by the lawmaking majority, it makes sense that the policy views that dominate the Supreme Court are rarely out of line with *"the policy views dominant among the lawmaking majorities of the United States."*[79] In conclusion, Dahl argues that by itself the Court does not have the power to alter "the course of

[75] Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 104-105.
[76] Dahl, "Decision Making in a Democracy," 286.
[77] *Ibid.*, 291.
[78] *Ibid.*, 280-281.
[79] *Ibid.,* 285.

national policy." Moreover, he believes that *"in the absence of substantial agreement within the dominant alliance, an attempt by the Court to make national policy is likely to lead to disaster."*[80] However, while the Court's ability to make policy is limited by the basic policy goals of the dominant political alliance, Dahl argues that it could be effective when it sets the bounds of policy enacted by the lawmaking majority.[81]

The last scholar whose interpretation of the Supreme Court to be examined is Gerald N. Rosenberg. Rosenberg is one of the most influential advocates of the Constrained Court theory. In the *Hollow Hope,* Rosenberg articulates his thesis that the Court's ability to produce social change, whether directly through their own decrees or indirectly through sparking other societal forces into activity, is often exaggerated.[82] While Rosenberg concedes that courts often try to make policy, he argues that they cannot succeed on their own. Instead. He maintains that courts can only succeed when they are part of an array of forces larger than themselves.[83]

For instance, the Supreme Court's decision in *Brown*, which is often perceived as a crucial moment for the Civil Rights Movement's efforts to abolish legal segregation, made by itself, according to Rosenberg's empirical data, little difference: *"Despite the unanimity and forcefulness of the Brown opinion, the Supreme Court's reiteration of its position and its steadfast refusal to yield, its decree was flagrantly disobeyed."* This was demonstrated by the fact that statistics on segregation were as bad by 1964 as they had been in 1954.[84] Eventually it was the political elite that made real social change possible through the enactment of the 1964

[80] *Ibid.,* 290.
[81] *Ibid.,* 294.
[82] Rosenberg, *Hollow Hope,* 425-427.
[83] With the example of Brown, Rosenberg explains how the S.C. reflected the societal pressure for civil rights and even became a part of it, however, as he keeps emphasizing, the contribution of the S.C. made little difference on its own. *Ibid.,* 152-156 and 167-169.
[84] *Ibid.*, 52.

Civil Rights Act. The *Brown* opinion was simply an empty decision when there was no one to enforce it.[85]

Nevertheless, Rosenberg argues that court decisions are not meaningless. For example in the case of *Brown*; the decision had some symbolic significance since it functioned as a confidence-building device for those who were fighting for reform. Still, when actually investigating the impact of *Brown* by examining a host of empirical data, Rosenberg contends that the difference made by *Brown*, often heralded as the most important judicial decisions in American history, was negligible.[86] Rosenberg concludes that policy made by the Court makes little difference which consequently affirms the views of Dahl and Devins who argued that the actions of the lawmaking majority ultimately determine whether society changes or not.

All considering, it is important to note that most of the interpretations do not exclude each other entirely. Advocates of the Constrained Court theory, emphasize that it is highly unlikely that the Supreme Court has the ability to propel significant social change because of the constraints it faces.[87] However, they are also careful enough to not exclude the possibility completely. Adherents of the Dynamic Court paradigm on the other hand, do not perceive that the Court is constrained, or at least diminish the importance of these constraints. This seems unwise, considering the merits of the Constrained Court theory which makes a well-argued case to show how courts face many of the same obstacles other branches of government face when proposing social reforms. Nevertheless, before dismissing the Dynamic Court paradigm entirely it is important to narrow down precisely what kind of constraints the Supreme Court has to face.

[85] *Ibid*., 52 and 156.
[86] *Ibid.,* 156.
[87] M.A. Graber, "The Nonmajoritarian Difficulty Legislative Deference to the Judiciary," *Studies in American Political Developments*, Vol. 7, Iss. 1 (1993) 35-73: 71-73.

D. Constraints of the Court

When taken the aforementioned theories into account it appears that the Supreme Court's constraints can be divided in three different categories. These categories are the limited nature of constitutional rights, the judiciary's lack of independence from the other branches of government, and the Court's lack of tools to implement its decisions and enforce compliance.[88]

Bickel believes the Supreme Court to be bound by the limited nature of its constitutional rights in the sense that the Court has to follow the Constitution and the set of beliefs that surround it when it reviews laws. Therefore, its members cannot develop policies on their own. Moreover, they have to base their claims on the existing body of law, which consequently limits their ability to propose social change. The Court is also bound by the norms and expectations of the legal culture.[89] Thus, ample judicial precedence is a necessity. Judicial decisions that stray too far from the mainstream may subsequently lead to criticism or ultimately even suffer a reversal as a result of new laws or Amendments to the Constitution proposed by Congress.[90] Unsurprisingly this dynamic induces the Court to follow the path of judicial discretion and restraint.

The second category of constrains is the judiciary's lack of independence. Dahl in particular makes an important point of this. The lack of independence begins, according to Dahl's theory, with the appointment process. Justices are appointed by the lawmaking majority. Therefore, it makes sense that the policy views will be in line with the policy views dominant among the lawmaking majorities who confirmed them, and specifically with the President who appointed them.[91] Another cause for the judiciary's lack of independence is the issue of democratic

[88] All three constraints are cited in Rosenberg, *Hollow Hope,* 10.
[89] *Ibid.,* 181.
[90] *Ibid.,* 21.
[91] Although it is true that life tenure for Supreme Court members makes it possible for individual justices to outlast the Congress and or the president that has appointed or confirmed them, Dahl makes the argument that each

accountability. Justices are not elected. Therefore Justices often defer to the positions of the federal government, which is democratically accountable.[92] Aside from the pressures to defer to federal government, the Supreme Court is also potentially limited by congressional action.[93] Congress has the constitutional power to override judicial decisions through Amendments. This does not occur frequently as the threat usually suffices. When taken the history of the Court into account, it appears that courts cannot stand for long against these kind of pressures.[94]

The last constraint the Supreme Court faces is its lack of tools to implement its decisions and enforce compliance. Courts lack, in the words of Hamilton, *"influence over either the sword or the purse."*[95] While the Court can initiate changes and issue decisions, it does not have the power to directly implement them. Whereas the Legislative branch of government possess the ability to appropriate money to ensure the implementation of their policies and the Executive has the capacity to enforce and police their decisions, the Court possesses neither.[96] Therefore it is always dependent on the other political branches, which is exactly why Hamilton deemed the judiciary "the least dangerous branch." In short, without political support from the other branches, Supreme Court decisions that propose social change are just empty threats, because it cannot enforce them on its own.[97]

In conclusion, despite the fact that the Supreme Court possesses certain strengths as a political institution and lacks the electoral pressure the other branches of government have to face, its

---

president approximately appoints one or two Justices, which, as he contends is usually enough to change the balance in favor of the sitting President and or Congress, *see* Dahl, "Decision Making in a Democracy," 285.
[92] Devins, "Is Judicial Policymaking Countermajoritarian?" 191.
[93] T.F. Burke, "The Judicial Implementation of Statutes" in M.C. Miller and J. Barnes, Making Policy, Making Law (Washington: George Town University Press: 2004) 123-139: 123-124.
[94] Dahl, "Decision Making in a Democracy," 284-286.
[95] Hamilton, "The Judiciary Department."
[96] S. Berenji, "The US Supreme Court: A 'Follower, not a Leader' of Social Change". Lethbridge Research Journal. Volume 3, Number 1 (2008). http://www.lurj.org/article.php/vol3n1/supreme.xml.
[97] Sunstein, "Constitutional Politics and a Conservative Court."

ability to propel significant social or political change through judicial decisions is severely constrained.

E. Conditions for Judicial Effectiveness

When reviewing the constraints that limit the Supreme Court's ability to produce social change it seems unlikely that the Court ever can make a real difference. Therefore, it is suggested that to a certain extent the paradigm of the Constrained Court is plausible. The Court is not an all-powerful entity as some adherents of the Dynamic Court theory seem to portray it. Furthermore, the public perception of the Supreme Court's ability to produce significant social reform is both "naive and misguided."[98] Nevertheless, the Constrained Court theory is also flawed, though to a lesser extent. Advocates of the Constrained Court paradigm seem to overstate the limitations on the Court. While the Court may not be all-powerful, it is neither as weak as the Constrained Court paradigm perceive. After all, since the 1930s, courts have constantly been embroiled in issues that often have led to major reforms.[99] Besides, is it not entirely plausible to conceive that these constraints can be overcome when political, social, and economic conditions become supportive of change? However, concluding that the Court can in fact make a difference in certain cases raises a question regarding the conditions that need to be fulfilled before the Court can produce significant social reform. This study argues that the following conditions would have to be in place.

The first condition that needs to be fulfilled to overcome the first category of constraints is the availability of ample judicial precedence. The Supreme Court is bound by the norms and

[98] Rosenberg, *Hollow Hope*, 429.
[99] *Ibid.,* 21-22.

expectations of the legal culture.[100] Subsequently, most Justices are gradualists, since decisions that stray off to far from the mainstream can lead to criticism. This means they will normally choose to argue small changes before they will propose major reforms.[101] Only when there are strong precedents to base its claims on will the Court likely argue for major change.

However important the need for strong judicial precedence, it is of even greater importance that political, social, and economic conditions are supportive of change. Since the Supreme Court cannot act effectively on its own and produce social change, political and public support for its decisions is imperative and therefore the second condition that needs to be fulfilled.[102] To overcome the second and third category of constraints, the Court needs a political and public environment that looks favorable to the reforms it proposes. Without an environment that looks favorable to the changes the Court proposes, judicial efficiency is improbable.

Therefore, some support from the other branches of government is a necessity when the Supreme Court attempts to achieve social change. In fact, government support would naturally be ideal. However, even when it does not exist, support from substantial numbers in Congress can be sufficient, as long as these Congressmen are able to put enough political pressure on the government to defer to a judicial decision.[103] This kind of support is essential, because, as previously mentioned, the other political branches wield the tools necessary to implement the judicial decisions and enforce compliance by providing benefits or imposing costs.[104]

---

[100] *Ibid.*, 10-12 and 181.
[101] *Ibid*., 31.
[102] *Ibid.,* 32-35.
[103] One famous example of a President who ignored a S.C. decision concerns President Andrew Jackson. When the S.C. sided with the Cherokees in the case of *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832) regarding their removal, Jackson famously joked, *"Chief Justice John Marshall has made his decision…now let him enforce it,"* thereby demonstrating the Court's inability to propel change without majority consent, *see* Berenji, "The US Supreme Court."
[104] Devins, "Is Judicial Policymaking Countermajoritarian?" 199-200.

In addition to the approval of parts of the political elite, ample support from the public or at least low levels of opposition is also of the essence.[105] Elected officials are seldom willing to fight for unpopular causes as they follow the incentive of reelection.[106] While the Supreme Court can act as a shield for willing legislators when public opinion is divided over a controversial judicial decision, too much opposition will effectively cause most officeholders to reconsider their support. Given the fact that courts need the approval of at least some members of the political elite when they propose big changes, it is clear why public support is also crucial.

F. The Majoritarian Thesis

Following the assessment of specific conditions needed before the Supreme Court is able to successfully propose major social reforms, some questions remain unanswered. This study is based on the theoretical assumption that the Court possesses the ability to produce significant social change. However, before it can be argued with certainty that the Court can actually utilize this power successfully, a better understanding of the nature of the Court's powers is imperative. Consequently a closer look at the nature of the Court's ability to do so is necessary.

Despite popular opinion, the Supreme Court's power to examine the constitutionality of laws, legally known as the judicial review, does not originate from the Constitution. Instead, this power derives from the Court's own legitimacy, which is therefore its biggest asset.[107] The Court's legitimacy originates from its mythical aura as the "protector of the Constitution" which has been affirmed by decades of consent from Presidents, Congress and public. Nevertheless, although it sometimes might seem that the Court has a tendency to exercise its powers to make policy on highly controversial matters, the Court's ability to produce significant changes is

[105] Rosenberg, *Hollow Hope,* 15-16.
[106] Mayhew, *Congress*, 13–77.
[107] Bickel, *The Least Dangerous Branch,* 29-33.

severely limited by the fact that it cannot ignore the will of the people or it will undermine its own legitimacy.[108] Consequently, the Court is often and must be attentive to Congressional and public opinion.[109]

This seems to bring forth a contradiction in the premise of this study, which has also been one of the key weaknesses of the Dynamic Court paradigm. The Dynamic Court theory, and subsequently the conclusion of this study, is that the Supreme Court has the ability to produce significant social change. The theory and the conclusions of this study therefore imply that the Court can make a real difference on its own by leading the public, instead of merely following the public opinion as implied by the majoritarian thesis. Advocates of the Constrained Court paradigm have presumed this hypothetical contradiction to be a key weakness and these scholars have consequently exploited it with notable success.[110]

Their majoritarian thesis starts with a description of the Supreme Court's inability to initiate decisions independently. As the thesis contends, the Court can only influence public policy when a legal challenge arises in the form of a test case.[111] This will only happen when an issue becomes controversial enough that it reaches the Supreme Court's docket. In addition to its dependency to test cases, the Court also needs support from the political elite, and consequently the public, to implement its decisions and enforce compliance to its precedents (both from the Legislative and Executive Branches). In other words, it needs an environment that looks favorable on change. This argument, however, presumes that the Court can never be a true catalyst for social change, and instead merely functions as a majoritarian medium utilizing

[108] Bickel, *The Least Dangerous Branch,* 29-31.
[109] Devins, "Is Judicial Policymaking Countermajoritarian?" 200.
[110] Pildes, "Is the Supreme Court a 'Majoritarian' Institution?," 103-106 and 114-116.
[111] Rosenberg, *Hollow Hope,* 10-12.

societal and governmental opinion as it "interprets, applies, and implements public policy."[112] Despite the fact that the Court issues decisions on controversial and divisive matters, the issue remains that the Court follows instead of leads the public opinion as its decisions would reflect the preferences of the "national governing coalition."[113] In essence, this would mean the that Court cannot make a difference by itself.

However compelling this argument may seem at first glance and how much merit it initially might seem to hold, a fact that has been reflected by the theory's enormous success, on second thought it seems that it overlooks the obvious. It is clear that the Supreme Court can only act when there is already an environment that is favorable to change. An example of where the Court alone cannot be a catalyst for social change as the Dynamic Court paradigm presumes, as it cannot be effective when it is ahead of the curve, was illustrated in the lack of enforcement in the southern states after *Brown* .[114] However, this does not exclude the possibility entirely that the Court might be able to make a difference on its own. Therefore, instead of focusing on relative side-issues, like the continuing battle regarding the possibility that landmark cases such as *Brown* indirectly produced social change, because of their symbolic significance that presumably sparked other societal forces into action, the Dynamic Court discourse should examine this in comparison far more relevant issue as this study contends that it is in fact possible for the Court to make a direct difference on its own.[115]

As a matter of fact, the new perspective this study offers is that there are two different ways in which the Supreme Court can produce significant social reform and lead the public to a new

[112] Berenji, "The US Supreme Court."
[113] Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 105.
[114] Sunstein, "Constitutional Politics and a Conservative Court."
[115] Rosenberg, *Hollow Hope,* 26 and 155-156.

generally accepted compromise on an important a social issue. In this respect the study rejects both the Dynamic Court paradigm, which does not believe the Court faces constrains, and the Constrained Court view, whose supporters all but reject the possibility entirely that the Court can make a difference on its own.

The first possibility is for the Court to utilize its powers when a social challenge is raised that has divided the public, and Congress is either afraid or unable to decide between two alternatives.[116] An example of such a case on the subject of race would be *Loving v. Virginia*, a landmark case in which the Court declared Virginia's anti-miscegenation statute, the "Racial Integrity Act of 1924," unconstitutional, thereby producing significant social change by effectively forbidding all forms of race-based legal restriction on marriage anywhere in the United States, and not solely in the state of Virginia.[117] In these kinds of cases, the Court has the ability to use its own legitimacy and influence public policy by choosing one of the alternatives and therefore lead the country to a new general agreement on an issue.

The second possibility for the Supreme Court to utilize its ability to significantly influence social policies arises when the Court is asked to set new boundaries and limitations on existing policies.[118] The language and definitions used in major pieces of legislation that propose social change are often deliberately vague as Congress is frequently too divided to articulate a clear message even when a compromise is achieved, or the bill passed is so overtly convoluted that it is open to numerous interpretations.[119] The health care debate that continues in the United States and the passage of "Obamacare" is merely one example that has been raised in lower courts and

[116] Devins, "Is Judicial Policymaking Countermajoritarian?" 200.
[117] 388 U.S. 1 (1967). As cited from http://www.oyez.org/cases/1960-1969/1966/1966_395. Mentioned in Lopez, "A Nation of Minorities," 1005.
[118] Dahl, "Decision Making in a Democracy," 294.
[119] This was also the case with existing legislation regarding affirmative action policies. See Anderson, *The Pursuit of Fairness*, 160.

will be heard by the Supreme Court as to its constitutionality. Therefore, when a social challenge is raised, the burden to interpretat how these laws should be implemented falls to the Supreme Court.

Thomas Burke has extensively researched this dynamic, which he named the process of judicial implementation, when he wrote a thesis on the Americans with Disabilities Act (ADA).[120] In an article called "The Judicial Interpretation of Statutes," Burke explains how Justices, driven by their own policy preferences, have the power to interpretat laws in ways that sometimes depart from the orders of the legislative branch. [121] According to him, the judiciary was able to greatly expand the scope of the ADA, thereby going against the expressed intents of the legislators based on the idea of judicial implementation. While judges are typically constrained by the threat of a congressional override, Burke argues that they often realize that passing new legislation is costly, which subsequently enables them to depart on occasion from the wishes of Congress without being overruled.[122] To sum up, courts can sometimes produce social change through the process of judicial implementation when it changes the meaning of certain statutes and sets new boundaries and limitations on existing policies.[123]

In conclusion, the Supreme Court can utilize its ability to produce social change in two different ways as long as the conditions necessary to overcome its constraints are fulfilled. It is even possible for the Court to lead the American people to a climate of public opinion on an issue by

[120] The ADA is a law that was supposed to ensure the civil rights of people with disabilities. Consequently the law permanently prohibited all forms of discrimination. It was intended to be a flexible set of laws that could only be strengthened, not weakened, by future case law. An opportunity some judges took wholeheartedly as they dramatically increased the scope of the law against the expressed wishes of the legislators. *See* T.F. Burke, "The Judicial Implementation of Statutes" in Making Policy, Making Law (George Town University Press: 2004) 123-139
[121] Burke, "The Judicial Implementation of Statutes," 123.
[122] *Ibid.,* 124.
[123] *Ibid.,* 137-138.

choosing between two alternatives, while at the same time setting new boundaries and limitations on existing laws or policies. As will be demonstrated, *Bakke* was an example of such a case.

II. The Emergence of an Environment Favorable for Change

The first part of this study evaluated whether the Supreme Court can produce significant social change. It was eventually concluded that the Court can utilize its ability to propel social change when the constraints that limit its power are overcome.[124] Imperative for this to happen is the emergence for an environment that looks favorable to change. Therefore, this part of the study will analyze the broader political and social context in which *Bakke* took place, as this will give answers as to whether and how this environment came to be in place. To understand the broader political and social context of *Bakke*, the history of affirmative action, starting with the Civil Rights Movement and ending when a majority of Americans changed their opinion on the issue in the mid-1970s, has to be closer examined. Central to this discussion is the narrative of the anti-affirmative action movement and the role it played in generating an environment that looked favorably on change by persuading the public to oppose affirmative action.

A. The Civil Rights Movement

The history of affirmative action is closely intertwined with the origins and achievements of the Civil Rights Movement. It can even be argued that affirmative action was the product of this movement.[125] Consequently, an understanding of the motives and successes of movement is necessary to comprehend the origins of the concept of affirmative action.

The Civil Rights Movement was a major social movement, or more precisely, a movement made up by a number of smaller movements, that strived for the equality of all Americans before the

[124] Rosenberg, *Hollow Hope,* 31.
[125] Anderson, *The Pursuit of Fairness*, 107-109.

law.[126] Its principle aims were the prohibition of racial discrimination against African-Americans, the end of segregation, and the restoration of black voting rights in the Southern states. The roots of the movement can be found as early as the 1890s. [127] Back then, the first national organizations for equal rights emerged to legally challenge the "separate but equal" doctrine, established by *Plessy v. Ferguson* in 1896. A doctrine which had caused racial segregation to increase in almost every sphere of public and private life in the South.[128]

The most prominent of these early organizations was the National Association for the Advancement of Colored People (NAACP). The NAACP was founded in 1910 and would become one of the most important black protest organizations in the twentieth century.[129] The NAACP tried to achieve its goals primarily by making its case for the courts, even to the exclusion of other tactics. A strategy that seemed to pay off on May 17, 1954, when, after some small early legal victories, the NAACP and the black community would celebrate their biggest victory yet, as the Supreme Court issued its landmark ruling in *Brown vs. Board of Education of Topeka.*[130]

Brown was a landmark United States Supreme Court case in which the Court declared that racially segregated schools were unconstitutional. In an unanimous (9–0) decision, the Court, with Earl Warren as Chief Justice, stated that *"…in the field of public education the doctrine of*

---

[126] J.C. Jenkins, "Stirring the Masses: Indigenous Roots of the Civil Rights Movement," Book review of *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* by Aldon Morris, *Contemporary Sociology*, Vol. 15, No. 3 (May, 1986) 354-357: 354.
[127] H. Sitkoff, *The Struggle for Black Equality: 195 4 -1992* (New York: Hill and Wang, 1993) 7-9.
[128] *Plessy v. Ferguson*, 163 U.S. 537 (1896), was a landmark S.C. case that had declared that the "separate but equal" provision of private services mandated by state government was constitutional under the Equal Protection Clause. The ruling consequently legitimated the status quo in the South where blacks where regarded as second-rate citizens. As cited in P.F. Rubio. *A History of Affirmative Action: 1619–2000* (Jackson: University Press of Mississippi, 2001) 55 and 79-81.
[129] Sitkoff, *The Struggle for Black Equality*, 8.
[130] 347 U.S. 483 (1954). As cited from. A.D. Morris, "A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks," *Annual Review of Sociology*, Vol. 95 (1999) 517-539: 521-522.

separate but equal has no place. Separate educational facilities are inherently unequal."[131] With this ruling, the Court overturned more than fifty years of Court sanctioned segregation, and effectively reversed the notorious 'separate but equal doctrine' it had established with *Plessy.* In effect, the decision ruled the *de jure* racial segregation violation of the Equal Protection Clause of the Fourteenth Amendment. As a result, the decision paved the way for racial integration, and later on even for affirmative action as it helped establish the colorblind ideal as will be discussed in detail later.

Nonetheless, despite initial celebration, *Brown* would ultimately prove that the legal strategy of the NAACP by itself was insufficient. The aftermath of the ruling showed that "words were not action," since the Southern society itself was dismissive of the changes that the Supreme Court demanded through its ruling of the case. The federal government was subsequently either reluctant or unable to implement the ruling and to enforce compliance. Moreover, some scholars, such as Gerald Rosenberg, propose evidence that the ruling hardened resistance to civil rights among both the white public and the elite.[132] Rosenberg documented that Southern groups that opposed equal rights started to emerge in full force after the ruling. Some of them, such as the Ku Klux Klan, even used violence and coercion to prevent change. In addition, resistance to change increased in all areas, not just in education, but also in other areas such as voting, public places, and so on.[133] In short, as some people argue, Brown *"unleashed a wave of racism that reached historical proportions."*[134]

---

[131] *Ibid.*
[132] Rosenberg, *Hollow Hope*, 155-156.
[133] Rosenberg, *Hollow Hope*, 155.
[134] A. Fairclough, *To Redeem the Soul of America: The Southern Christian Leadership Conference and Martin Luther King, Jr.* (Athens: University of Georgia Press, 1987) 21. As cited in Rosenberg, *Hollow Hope*, 155.

Consequently, instead of waiting for the judicial route to pay off, the Civil Rights Movement adjusted its strategy. The next phase of the civil rights struggle was characterized by major campaigns of non violent civil disobedience.[135] These non-violent protests, illustrated by the Rosa Parks incident and the Montgomery bus boycott, demonstrate how the Civil Rights Movement took the struggle out of the court room and into the streets. The change of strategy would eventually prove successful. The Civil Rights Movement became a dominant feature in American social, cultural and political life from the mid-1950s until end of the 1960s. Through its new tactics and campaigns, the movement successfully exposed the prevalence and the costs of racism, and subsequently caused the social and legal acceptance for equal rights to increase.[136]

Eventually the movement's efforts to keep pressure on the Kennedy administration and Congress to pass civil rights legislation culminated in "The March on Washington" of August 1963. Many leaders of the black community gathered for the march, as well as 200,000 civil rights supporters.[137] At the end of the march, Martin Luther King, Jr. held his famous "I Have a Dream" address in front of the Lincoln Memorial. The march proved to be such a success that President John F. Kennedy subsequently proposed a new civil rights law.[138] The Civil Rights Movement would sustain its momentum even when confronted with the assassination of President Kennedy, who along with his brother, had come to the forefront of the political struggle to pass civil rights legislation. His successor President Lyndon B. Johnson would subsequently use the assassination of Kennedy as a means to gather support for the Civil Rights Act of 1964 despite strong southern opposition.[139] On Thursday July 2, 1964, a struggle that had

[135] Morris, "A Retrospective on the Civil Rights Movement," 523-527.
[136] Sitkoff, *The Struggle for Black Equality*, 58-64.
[137] E.W. Kenworthy, "200,000 March for Civil Rights," *New York Times* (August 29, 1963) Special.
[138] Rubio, *A History of Affirmative Action*, 142.
[139] Sitkoff, *The Struggle for Black Equality*, 153-154.

spanned decades paid off when blacks, after centuries of legal inequality and suffering, celebrated the passage of the bill. From that day onward, many believed, equal opportunities for African-American were finally ensured as all forms of institutional discrimination would be outlawed. However, others immediately acknowledged that more change was still needed before blacks would have an equal opportunity for their own pursuit of happiness.

B. History of Affirmative Action

The seeds of affirmative action were first conceptualized in the early 1960s, during a time of social and political upheaval. Some leaders of the Civil Rights Movement, such as Dr. Martin Luther King, were already wondering what the future would hold for blacks should they acquire equal rights.[140] King knew that it would take a long time before his dream in which *"people would no longer be judged on the color of their skin, but on the content of their character"* could become a reality.[141]

Moreover, he understood that saying that people are equal does not make them so. Patterns of behavior that had dominated American society for centuries could not be changed overnight. White people therefore had to be forced to adapt. But, before white people would be able to truly accept blacks as their equals without governmental pressure, King argued that the black community itself had to be changed.[142] This was why King was extremely concerned with the position of the black family. In short, he believed that the state of the black family would be the "fundamental weakness" for future attempts by blacks to profit from their newly acquired status. King and other prominent civil rights leaders argued that centuries of slavery followed by

[140] Haney Lopez, "A Nation of Minorities," 1010-11
[141] Excerpt from dr. Martin Luther King's "I have a dream speech." Available at http://www.americanrhetoric.com/speeches/mlkihaveadream.htm.
[142] Haney Lopez, "A Nation of Minorities," 1010-1011.

decades of Jim Crow laws had severely damaged black family life. King actually gave a despairing portrait on the subject in a speech where he stated that the "*shattering blows on the Negro family [that] have made it fragile, deprived and often psychopathic.*"[143] However King also presented a solution to the problem. He believed that protection from further exploitation and above all access to jobs, education and housing would help repair the damages caused by decades of Jim Crow and centuries of slavery. But, to be successful, the government would have to guarantee blacks had a fair opportunity to attain this promise otherwise it would be impossible to ensure the progress of the black community.[144]

President Kennedy also acknowledged these problems early on. He understood that blacks would not have equal opportunities in a society dominated by whites, if the white majority simply would not let them. [145] This meant that forcing whites to accept the equality of black people was the only way to ensure that blacks had equal opportunities. The concept of affirmative action was created in 1963 for this sole purpose of guaranteeing the progress of the black community. The Kennedy administration coined the concept of affirmative action for the first time when it issued Executive Order 10925, which was designed to promote the integration of minorities in the federal workforce by mandating that projects financed with federal funds needed to take "affirmative action," to ensure that hiring and employment practices were free of racial bias.[146] Sadly, because of his assassination, Kennedy could not see this to fruition. However, his successor, President Lyndon B. Johnson followed in his footsteps and also decided to back the movement and advocate affirmative action. Johnson explained his support for the concept by arguing: *"You do not take a person who, for years, has been hobbled by chains and liberate him,*

[143] King, "Address at Abbott House." As cited in Haney Lopez, "A Nation of Minorities," 1010.
[144]Rubio, *A History of Affirmative Action,* 140-141.
[145] Anderson, *The Pursuit of Fairness,* 71-72.
[146] Executive Order No. 10925. As cited in Rubio, *A History of Affirmative Action*, 144.

bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."[147] In this statement, he articulated a sentiment that was rapidly gaining support among the American people.

Affirmative action flourished during the Johnson administration. The support of the new President and the continuing pressures of the Civil Rights Movement would lead to the creation of federal legislation that enforced affirmative action. This culminated when Congress enacted Title VII of the Civil Rights Act in 1964, which banned employment discrimination and created the Equal Employment Opportunity Commission (EEOC). The EEOC became central in enforcing affirmative action policies in employment cases.[148] The support of President Johnson for affirmative action was also reflected by two new Executive Orders on affirmative action in 1965.[149] The orders directed agencies of the federal government to employ a proportionate number of minorities whenever possible. Furthermore, the orders required organizations that received federal funds to take "affirmative action" and increase the employment of members of racial or ethnic minority groups and women.

The consecutive administrations of Nixon, Ford, and Carter were also overall supportive of affirmative action.[150] President Robert M. Nixon adopted Johnson's program of timetables and preferences.[151] He also expanded the scope of affirmative action to encompass affirmative action based on race, ethnicity, disabilities, age, gender, and in some cases even regarding sexual orientation. Consequently, by the end of Nixon's administration, equal opportunity protections

---

[147] L.B. Johnson, "To Fulfill These Rights," *Commencement Address at Howard University,* June 4, 1965. Available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp.
[148] Anderson, *The Pursuit of Fairness,* 74 and 140-141.
[149] U.S. Executive Order 11246 and Executive Order 11375. As cited in Rubio, *A History of Affirmative Action*, 144.
[150] N. Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (Cambridge: Harvard University Press, 1975) vii-viii.
[151] Anderson, *The Pursuit of Fairness,* 124.

had been extended to a majority of Americans, although to the detriment of white males. Nevertheless, it was the Watergate scandal that had caused affirmative action "to spin out of control." The Watergate scandal had distracted the federal government, and provided subsequently cover to the EEOC to depart from its original purpose and adopt a more aggressive enforcement policy.[152] Since the administrations of Ford and Carter were either unable or unwilling to turn this back, the 1970s would become known both socially and politically as the zenith of affirmative action. Yet at the same time a new trend had become undeniable. A backlash occurred among those who were at the other end of affirmative action programs, and broad support was wavering, the consequences of a program which favored some over others based on skin color, ironically the opposite of what King had preached.

C. *Backlash: The Anti-Affirmative Action Discourse*

For the most part, affirmative action received support from both political parties during the late 1960s and the early 1970s.[153] Affirmative action's popularity increased in particular after the policies were expanded to encompass other groups and ethnic minorities besides blacks, such as women and Latino's.[154] Nonetheless, a backlash ensued by the mid-1970s. Although many factors played a role, in particular the influence of the anti-affirmative action discourse would spell the end of the concept's popularity as it was in the early 1970s, when the Civil Rights Movement was still fresh in the minds of the American people.

The concept of race-conscious affirmative action was built on an ambiguous notion. In short, it proposed that it in order to treat people equally, some had to be treated differently.

---

[152] *Ibid.,* 140.
[153] The consecutive administrations of Johnson, Nixon, Ford (although Ford vocally opposed the concept during his failed presidential campaign , affirmative action was not a priority during his short time in office), and Carter were overall supportive of affirmative action, *see,* Anderson, *The Pursuit of Fairness*, 89-90, 119, 125, 137, 145-148.
[154] Anderson, *The Pursuit of Fairness,* 278-279.

Understandably this notion was controversial from the start, since it appeared to be in conflict with the idea that everybody should be treated equally, as articulated in both the Equal Protection Clause of the Fourteenth Amendment and in Title VI of the Civil Rights Act.[155] Consequently, affirmative action needed some form of justification. Originally the concept was justified by the government through the application of two main arguments.[156] The first argument proposed that affirmative action could be perceived as repayment for a history of slavery, racism and black suffering. The second argument used to justify special treatment for African-Americans was based on the existence of institutional racism throughout American society. Consequently, it was believed that blacks would not be able to compete fairly with white people for jobs and education. Furthermore, supporters of affirmative action believed that giving blacks the opportunity to advance in society would change their social status and give the black community the role models it needed until such a time that special treatment would no longer be necessary.[157]

But, advocates of affirmative action were unable to resist the growing influence of activists of the anti-affirmative action camp, despite the merits their justifications possessed. Opponents of affirmative action had formed their own discourse immediately after the concept was introduced. The arguments this discourse produced would eventually counter the salience that both justifications held in the public opinion. The success of the anti-affirmative action discourse

[155] R.A. Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," *The Supreme Court Review*, Issue 1974 (1974) 1-32: 15 and 21-23.
[156] Ball, *The Bakke Case,* 12 and 34.
[157] The role model argument was put forward in some of the amicus briefs in favor of racial quotas and the University of California, filed during the Bakke hearings,. Examples of amicus briefs that mention the role model argument are the "Brief for the American Medical Student Association," "Brief for National Council of Churches of Christ in the United States of America," and the "Brief for the American Bar Association." All to be found at "Summary of Amicus Briefs in University of California v Bakke filed with the U.S. Supreme Court," *The University of Michigan.edu.* http://www.vpcomm.umich.edu/admissions/legal/bakke-sum-amicus.html.

relied a great deal on the persuasiveness of its rhetoric.[158] In short, its contributors argued that affirmative action was nothing more than a form of reverse racism. Moreover, they argued that it went against the ideals of the Civil Rights Movement itself and the ideals proposed by King and other Civil Rights leaders of a colorblind society.[159]

Nonetheless, the anti-affirmative action discourse did more than merely attack the pillars of affirmative action. Some of its contributors proposed an alternative form of affirmative action. This alternative would follow, contrary to race-conscious affirmative action, the use of socio-economic criteria as primary determinants to decide who would qualify for affirmative action programs, and thus circumventing the racial issue completely. An economic-based affirmative action resonated more with the American people who often believed in the idea of affirmative action as a tool to fight poverty and ensure equal opportunities, as the intent of such a program would follow the broader theme of the American Dream: *"in which life should be better and richer and fuller for every man, with opportunity for each according to ability or achievement."*[160] The anti-affirmative action activists turned the argument on its head, that the true goal of the program should be to lift people up out of poverty and not necessarily favor one race or ethnicity over another.[161] In effect, by arguing for a colorblind alternative to race-conscious affirmative action, the discourse was able to broaden its base of support and persuade a greater majority of the public to oppose affirmative action in its then present form.

---

[158] Social change on this issue derived from the S.C., which was successfully persuaded by some of the arguments of the discourse, since the Justices reflected the rhetoric of the discourse, and because of the changing popular opinion *see* Haney Lopez, "A Nation of Minorities," 1029-1046.
[159] Bowen, "Brilliant Disguise," 1211-1213.
[160] The idea of the American Dream as articulated by James T. Adams. J.T. Adams , *The Epic of America* (New York: Greenwood Press, 1931) 404. As cited from http://mankel.free.fr/AmericanDream/adams.html.
[161] For example, Glazer was not offended by the idea that affirmative action was a political tool designed to benefit the weak, but believed it was unethical for policies to favor certain ethnic groups over others. According to his main thesis, the United States was a "nation of minorities" in which whites and blacks were equally vulnerable. Therefore, any special legislation and benefits for blacks would not only be unfair to whites as they failed to benefit them, but in fact "victimize" this group since it provided with an advantage over them in the competition for jobs and college admissions. Glazer, *Affirmative Discrimination*, 201.

Despite the merits of the arguments offered by the anti-affirmative action discourse, it took a while before it was able to counteract the justifications for affirmative action in the opinion of the American public, as painful memories of segregation were still fresh in the 1960s. Consequently, it initially was hard for the anti-affirmative action movement to find popular support for its calls to abolish a program that was developed to benefit the black community. The politically dangerous connotations surrounding the issue of race had to be neutralized before the movement could successfully challenge the concept of affirmative action.[162] In order to achieve this goal, the movement would apply ethnicity theories. However, to create a better understanding on how the anti-affirmative action discourse was able to successfully alter public perception, a closer inspection of the developments in the academic discourse is needed.

D. *Ethnicity Theories and the Emergence of a Colorblind Alternative*

The terminology of colorblindness originated from the discourse used to fight institutional racism towards blacks. Colorblindness had been both a demand and a catchphrase for the liberal movements that fought institutional racism.[163] In fact, then lawyer Thurgood Marshall, one of the staunchest supporters of affirmative action among the Supreme Court Justices during the *Bakke* hearings, argued on behalf of a segregation case in 1948 that *"classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws.*[164] It is ironic therefore that the anti-affirmative action discourse would eventually adapt the same rhetoric that civil rights advocate like Marshall once argued, as

[162] Haney Lopez, "A Nation of Minorities," 1006-1007.
[163] *Ibid.,* 988-989.
[164] *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631 (1948). As cited in Haney Lopez, "A Nation of Minorities," 1000.

opponents of affirmative action framed themselves as advocates of the original ideals of the Civil Rights Movement.[165]

The seeds of the anti-affirmative action discourse were first conceptualized during the 1960s, when the popularity of affirmative action was still on the rise. [166] The early intellectual leaders of this movement were Nathan Glazer and Patrick Moynihan. Glazer and Moynihan, both sociologists, laid the groundwork for a new concept of race relations that would come to dominate *Bakke* in 1963 when they published a history of New York City called *Beyond the Melting Pot*. The book is known as an attempts to reconceptualize race as ethnical differences.[167] Instead of focusing on race, Glazer and Moynihan emphasize the importance of ethnic identities. The two scholars did so with notable success as their theory has come to supplant the focus on structural racism by, as Ian Haney Lopez puts it, *"pushing ethnicity across the color line."*[168]

After the scholars established the prevalence of ethnicity, deemed a cultural issue, over race, Glazer and Moynihan applied their theory to explain the contemporary positions of Jews, Italians, Irish, blacks and Puerto Ricans in New York. The authors argue that all these groups faced racism at one point in their history in New York. However Jews, Italians and the Irish overcame their difficulties over time, while Blacks and Puerto Ricans did not. The two scholars explained this phenomenon and argued that it was a weakness in the groups' own culture, and not racism that had caused their social failure. Therefore, the problem was found to be in "the home, the family life and the community."[169] Glazer and Moynihan subsequently argued that

---

[165] R. Turner, "The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative Action Position: From Bakke to Grutter and Beyond," *Hastings L. Quart.*, Vol. 30 (2003) 445-510: 497.
[166] Haney Lopez, "A Nation of Minorities," 1004.
[167] *Ibid.,* 1007-1009.
[168] *Ibid.,* 1008.
[169] N. Glazer and D, Moynihan , *Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians and Irish of New York City* (Cambridge: MIT Press, 1963) 53.

problems within the community of blacks and Puerto Ricans were the real obstacles to their success. It was these problems, according to the two sociologists, that explained why blacks were unable to advance into higher occupations through making use of the free educational system.[170]

Moreover, these problems explained why the government's efforts to eliminate the massive social problems that troubled the city of New York were unsuccessful. Although Glazer and Moynihan acknowledged that these problems were caused by hundred years of slavery and discrimination, they concluded that race-conscious affirmative action would be an ineffective tool to battle these problems.[171] By reconceptualizing race as an ethnicity, however, Moynihan and Glazer averted the sensitivities surrounding the racial issue and consequently made it possible to effectively criticize the concept of affirmative action without being deemed racists. Nonetheless, the government refused to listen to Moynihan and Glazer's claims. Writing separately, Moynihan and Glazer would continue their crusade by attacking the foundations of the concept in an array of different publications.

One of the most influential of these publications was the "Moynihan Report" from 1965. Moynihan, in his new capacity as Assistant Secretary of Labor in the Johnson Administration, wrote the report as an advice on the course the President should take in regard to the economic underclass in general and blacks in particular.[172] In this report, Moynihan concludes how centuries of black suppression caused chaotic disruptions within the black family structure that manifested themselves in higher rates of unwed mothers, absent fathers, and single-mother households in black families. Moynihan conveyed his beliefs that the lower rates of employment,

[170] Glazer and Moynihan , *Beyond the Melting Pot*, 49-50.
[171] *Ibid.,* 41.
[172] U.S. Department of Labor, "The Moynihan Report: The Case for National Action (1965)." Available on http://www.dol.gov/oasam/programs/history/webid-meynihan.htm.

educational achievement, and financial success found among the black population was correlated to these problems within the black community.[173] He therefore concluded that programs designed to strengthen the black nuclear family would be much more effective than affirmative action policies.

Moynihan also argued in his report that it would be impossible and unwise to meet the increasing demands of the Civil Rights Movement, which had argued that the existing colorblind policies were insufficient, as they did not lead rapidly enough to the entry of large numbers of blacks into good jobs, neighborhoods and schools.[174] Moynihan continued that this upward mobility was impossible because of the "Negro family" and not institutional racism, concluding that it was the lack of a family structure which led to *"the fundamental source of the weakness of the Negro community at the present time,"* and therefore that an expansion of existing policies would not solve anything [175] However, he also argued that it would be unwise to try to meet the increasing demands as it would mean that the government caved to pressure from an interest group and in doing so would place one group's importance over another. Consequently, Moynihan concluded it would be unwise to treat the demands from this particular group as anything more than the demands of one interest group over others, and thus once again the opposite of a colorblind society.[176]

After this initial phase in which Glazer and Moynihan were the most important contributors to the anti-affirmative action discourse, other influential scholars joined the fray against affirmative action. Of these new contributors, two legal scholars stood out in particular: Alexander Bickel

[173] U.S. Department of Labor, "The Moynihan Report."
[174] *Ibid.*
[175] *Ibid.*
[176] Haney Lopez, "A Nation of Minorities," 1012.

and Richard Posner, who both added a fresh perspective to the discourse and were able to make an important contribution.[177]

Alexander Bickel, a prominent legal scholar, published a number of articles in the early 1970s as well as a posthumous book called *The Morality of Consent* on the subject of affirmative action. In his work, Bickel argued against the use of quotas in admission policies, which he deemed unconstitutional.[178] However, Bickel's most important contribution to the discourse would be his moral argument against the concept, which he summarized as the following:

> *The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned… Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.*[179]

Glazer and Moynihan fought affirmative action by blaming it for its inefficiency. They argued that the concept would not solve anything as they were convinced it was an inherited weakness in black culture that was to blame for the group's social failure. Bickel brought a new perspective to the anti-affirmative action discourse as his normative argument against the concept of affirmative action did not condemn it for its inefficiency, like Glazer and Moynihan, but rather attacked it for its lack of morality and constitutionality. Bickel condemned affirmative action for being just another word for discrimination, and called it *"illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."*[180] By means of this argument Bickel was essentially giving the anti-affirmative action discourse the moral high ground in the public discussion about the concept.

---

[177] *Ibid.,* 1013-1021.
[178] A.M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975) 133. As cited in Haney Lopez, "A Nation of Minorities," 1016-1017.
[179] *Ibid.*
[180] *Ibid.*

Richard Posner, regarded as one of the most influential American legal scholars ever, also joined the crusade against affirmative action. [181] Posner's main contribution to this discourse was an article from 1974 called "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities" in which he argued that affirmative action should be declared unconstitutional.[182] This contribution was important to the discourse as Posner was the first legal authority to develop a legal theory under which affirmative action and racism were regarded as equals.[183] Through the application of rational choice theory, Posner made a compelling case for his argument that the Supreme Court should make no distinction between Jim Crow and affirmative action. Posner came to this theory by arguing that the Constitution did not allow legislation that treated one race different from others.[184] Whether blacks were secluded, like they were under Jim Crow laws, or whether they were promoted through the usage of affirmative action policies, it was in Posner's legal perspective the same thing, because both types of legislation singled out blacks and treated them differently.[185]

Although the contributions of Bickel and Posner, with their criticism of the concept of affirmative action, added to its declining popularity, it was Glazer who put the metaphorical nail into the coffin with a book titled *Affirmative Discrimination* (1975).[186] Aside from repeating his old claims, that not structural racism but the insufficiencies of black culture were to blame for the economic gap between the races, Glazer tried to co-opt the Civil Rights Movement's language for his own purposes. Glazer argued that the Civil Rights Movement originally had fought for two primary objectives: the equality of all Americans and the prohibition of racial

[181] F.R. Shapiro, "The Most-Cited Legal Scholars," *Journal of Legal Studies*, Vol. 29 (2001) 409–426: 424.
[182] Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," 21-25 and 30-32.
[183] Haney Lopez, "A Nation of Minorities," 1017.
[184] Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," 22-24.
[185] *Ibid.*, 14, 22-24.
[186] Bowen, "Brilliant Disguise," 1209.

discrimination. Admirable goals that he had supported wholeheartedly.[187] But, in 1964 when the Civil Rights Movement realized its objectives, as the Civil Rights Act re-affirmed the colorblind nature of the Constitution through its anti-classification principle, Glazer contended that this did not end the narrative of creating a colorblind society, for the era of affirmative action was just about to begin. For all of this, Glazer, preeminently, held courts accountable as he argued that instead of defending the fundamental rights for equality, courts were responsible for imposing affirmative action policies on government and businesses that were *"difficult, expensive, disruptive, and very unlikely achievable for all but short periods."*[188] Never in 'recent' years courts had demanded such "massive social change" as with their decisions to impose unequal quotas and racial preferences. [189]

Glazer's moral argument regarding the Civil Rights Movement was compelling to many. However, it was not the most influential argument against affirmative action he made in this book. That was left to his so-called "nation of minorities" thesis that eventually even made it into Justice Powell's deciding opinion on the *Bakke* case.[190] The argument was groundbreaking, because it influenced public opinion, and even the Supreme Court, on a variety of issues. First off, the thesis challenged commonly used conceptions of a dominating white majority that did not need preferential treatment, by dissipating the popular conception of whites as a singular social group into an array of smaller groups, differentiated by ethnical and religious identifications.[191] In other words, the thesis argued that white ethnic groups were also minority groups and as such, equally vulnerable.

---

[187] Glazer, *Affirmative Discrimination,* 43-45 and 66-67.
[188] *Ibid.*, 215 and 217-218.
[189] *Ibid.,* 217-218.
[190] Haney Lopez, "A Nation of Minorities," 1036-1043.
[191] *Ibid.*, 1026.

Moreover, Glazer explained that many of these white minority groups, such as the Irish and Italians, had also faced discrimination in the past and had overcome this challenge without preferential treatment.[192] But, now these groups suffered because they were forced to bear the burden of paying for the sins of a problem that they had not fully participated in.[193] Glazer concludes his book with the following statement: *"We are indeed a nation of minorities; to enshrine some minorities as deserving of special benefits means not to defend minority rights against a discriminating majority but to favor some of these minorities over others."*[194]

This argument was so compelling because it was successful in reversing preconceived notions of race relations. Advocates of affirmative action usually portrayed the policies as tools that strengthened the weaker position of blacks and consequently gave them the opportunity to move forward in a world dominated by whites. Glazer turned this idea on its head. According to his thesis, affirmative action did not just fail to benefit whites, it actually victimized them, and because of it, the United States was divided between favored minorities and disfavored whites.[195] In short, whites had become the new pre-civil rights blacks and affirmative action had become affirmative discrimination.[196] Although the United States had conceivably triumphed over racial domination in the 1960s, Glazer argued that the Supreme Court needed to abolish all racially divisive policies. According to Glazer, these policies had not only resulted in white frustration towards blacks, but they had moved the nation away from the ideal of a colorblind

[192] Glazer refers here in particular to the position if the Jews and the Irish. Both groups initially had to struggle with a long period of systematical discrimination, the Irish up until the 20th century and for the Jews this period even lasted until the 1950s . However both groups eventually overcame these problems on their own, *see* Glazer, *Affirmative Discrimination,* 198.
[193] *Ibid.,* 201.
[194] *Ibid.*
[195] *Ibid.,* 197.
[196] *Ibid.,* 197-201. Also cited in Haney Lopez, "A Nation of Minorities," 1026.

society in which merit trumped racial background; which had been the stated goal of the Civil Rights Movement.[197]

When reviewing all these arguments against the concept it would appear that affirmative action was not as much a reaction to structural inequality and an entrenched racial hierarchy as it was a successful attempt of one ethnic interest group to get ahead of other ethnic groups.[198] Furthermore, the discourse purported the idea that affirmative action actually did more to prevent than produce a national commitment to equality and colorblindness. Affirmative action began to be seen not as a means to compensate for the gross injustices of the past, but as reward to yet another special interest group.[199] Affirmative action was once perceived by many as a move toward greater equality, however, after the arguments of the anti-affirmative action discourse took hold, the moral register of the concept shifted and it became seen by those in the anti-affirmative action camp as an attempt by an ethnic interest group to get ahead of ethnic groups in competition for jobs and higher education. [200]

The general public became susceptible to the arguments of this discourse, because like the original calls from the Civil Rights Movement, it articulated the idea of fairness and justice for all, in a colorblind society, that did not privilege a group by race. In a context of increasing white hostility towards affirmative action, the work of Glazer and the other contributors to the anti-affirmative action discourse fell on fertile grounds. The calls for the government and the judiciary to abolish affirmative action did not go unnoticed. However, in spite of this, the government tried to ignore the changing attitudes towards affirmative action believing the policy

[197] Glazer, *Affirmative Discrimination,* 43-45.
[198] D.P. Moynihan, "The New Racialism" *The Atlantic Monthly,* Vol. 222, Is. 2 (Aug. 1968) 35-40. Available at http://www.theatlantic.com/past/politics/race/moynihan.htm.
[199] Haney Lopez, "A Nation of Minorities," 1012.
[200] Moynihan, "The New Racialism."

would aid the progress of the black community. Nonetheless, it was clear that the old popular opinion on affirmative action was crumbling.

E. Affirmative Action and its Fall of Grace

While the impact of affirmative action policies would reach their peak at the end of the 1970s, their public support was waning. Affirmative action had become to "successful" for its own good.[201] The policies had become so widespread that many white Americans started to notice the consequences. While many initially supported the policy, they gradually changed their minds when the policies started to hurt their own chances on the job market and their children's chances for admission into college. These feelings were amplified by an economic recession that had hit the United States. in the 1970s and subsequently tightened the job market.[202] However, there were also other factors that contributed to the increasing hostility against affirmative action.

For one, there was the stream of public embarrassments generated by agencies that were supposed to enforce compliance to the policies. The EEOC, commonly referred to as the affirmative action watchdog, was especially notorious for embarrassing the government with its inability to properly enforce or regulate the policy. Although this was partly the government's own fault, as a lot of the blame concerns the vagueness of the legislation itself. The language articulated in affirmative action legislation was often too vague, while its definitions too inconsistent.[203] These deficiencies led to a ridiculous number of affirmative action suits to be filed. In fact, more than 5,000 suits were filed annually during the Carter administration.[204] Many of these suits were so ludicrous in the way they exposed the reverse discrimination of the policy

[201] Anderson, *The Pursuit of Fairness*, 159-160.
[202] *Ibid.*, 145 and 159-160.
[203] *Ibid.*, 160.
[204] *Ibid.,* 161.

that popular opinion, specifically among whites, began to change toward the idea of racial quotas and hiring practices.[205]

In addition, the agencies empowered to enforce affirmative action did not always set the best example by demanding extreme measures from companies and other government agencies that were almost impossible to implement.[206] From the perspective of white Americans it seemed that ethnicity always came before merit for these agencies. Even when it was clear there were no adequately trained minority personnel available, these agencies kept demanding that blacks be hired and promoted over whites. Over time, more and more employers complained that in a time of economic recession, they should not have to waste so much time on paperwork and attempts to find under qualified minorities while also facing expensive lawsuits against ridiculous discrimination charges.[207] Consequently, affirmative action became part of the popular Republican discourse against government regulations, intrusion and oppression. These problems, coupled with embarrassing stories in the media, of affirmative action suits supported and paid for by the EEOC, even caused some liberals to lose faith in a program that had become more and more flawed. [208]

[205] To paint a small picture of the idiocy of some of these lawsuits. There is one example of a Hispanic employee who was dismissed by his company after being disciplined 22 times by 11 different supervisors. Nevertheless, the employee charged his company with racial discrimination. Even though the man, who was clearly in the wrong, lost in 5 arbitration attempts, the EEOC decided to accept and continued the suit for another 19 months, thereby saddling both the company and the community with a lot of legal fees, while at the same time arousing public opinion against affirmative action. Another example regards an employee who had filed more than 30 complaints in one year. When a colleague complained about his attitude, he was consequently suit for racial discrimination even though they both had the same ethnicity, *see* Anderson, *The Pursuit of Fairness*, 160.

[206] Glazer, *Affirmative Discrimination,* 36-38.

[207] A research company estimated that a contract compliance review cost a contractor over 20.000, and that such appraisals were costing Fortune 500 companies 1 billion annually. *See* J.K.. Ross, "EEOC v. Union Camp Corp: Fair Employment. Practice. Cases," *Fortune Magazine* (April 19, 1982). Cited from Anderson, *The Pursuit of Fairness*, 167.

[208] Anderson, *The Pursuit of Fairness*, 159-161.

The media also played an important part in the declining popularity of affirmative action by amplifying the negative connotations with affirmative action that were already forming among the American people. By examining the consequences and excesses of the policies, and arousing the people through the use of headlines like: "*We have no openings for you now, we only hire Latino's and blacks," "reverse discrimination; has it gone too far,"* and "*Is equal opportunities turning in to a witch-hunt,"* the media played an important role in making the general public aware of the issue, and in effect turning against it.[209] The media was able to raise doubt in the minds of white America of the need for the program and the value, and white people started to question whether affirmative action was worth it. It should also be mentioned, hat by the late 1970s and early 1980s, the country was becoming more and more removed from the Civil Rights Era, and many whites felt that they had never discriminated anyone, and did not understand why they should have to pay the price for actions of those who did before them.[210] The idea of affirmative action to create fairness became seen as doing just the opposite, and creating unfairness toward whites.

In spite of the importance of all these factors it seems that the anti-affirmative action discourse was the true catalyst for the development of a new public opinion on the subject and for the emergence of an environment favorable to change. Although the media was responsible for raising public awareness about the consequences and the excesses of the policies, and for generating a lot of public outrage, it was the anti-affirmative action discourse that started the discussion in the first place by striking out against the status quo of political correctness that had

[209] C. Ricci, "We have no openings for you now, we only hire Latino's and blacks," *U.S News* (August 23 1976); C. Howard "Is equal opportunities turning in to a witch-hunt," *Forbes* (May 21 1978*)*; P. Roster, "Reverse Discrimination; has it gone to far" *U.S. News and World Report,* Vol. 80 (March 29, 1976) 26-29. All cited from Anderson, *The Pursuit of Fairness*, 149.
[210] *Ibid.*

clouded it from the beginning.[211] Moreover, it was this discourse that shaped the arguments necessary to challenge the concept of race-conscious affirmative action and created a discourse that connected affirmative action and quotas against whites with the Jim Crow laws that had been in place against blacks.[212]

When considering the extent to which the public perception on affirmative action changed between the 1960s and 1970s, it seems impossible to neglect the influence of the anti-affirmative action discourse. The discourse had an enormous influence on the changing attitudes within the public opinion, and a profound influence on the *Bakke* ruling. All of the opinions that the Supreme Court justices formulated for *Bakke* were full of references to language and ideas originally expressed within the context of the anti-affirmative action discourse.[213]

The discourse had also a profound influence on the advocates of affirmative action. The salience of the arguments from the opponents of affirmative action jelled in the public arena and forced the advocates of the policy to reevaluate their positions and transform their arguments. The old justifications for affirmative action, such as the ideas that race-conscious affirmative action could be perceived as a repayment for black suffering and that special treatment to African-Americans was necessary to fight the institutional racism lost their public appeal. It was this increased hostility against the policy that forced advocates of affirmative action to adjust their public strategy. Affirmative action would no longer be justified by seemingly outdated ideas regarding a compensation for gross historical injustices or calls to battle institutional racism, but with a new

[211] Haney Lopez, "A Nation of Minorities," 1062-1063.
[212] Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," 14 and 22-26.
[213] For example, Powell argued that affirmative action equaled racism by referring to Glazer's "nation of minority" thesis. *see* Bowen, "Brilliant Disguise," 1210-1211.

"positive," plea for diversity.[214] The concept of diversity, as will elaborated further in the third part of this study, had come from multicultural discourse in the 1970s. Instead of only demanding justice for blacks, it upheld the idea that diversity benefited everyone, not just blacks, and as such would eventually be implemented by Justice Powell to save the concept of race-conscious affirmative action through the *Bakke* ruling.[215]

F. *The Emergence of a New Climate of Public Opinion*

While the public opinion on the subject of affirmative action had changed, the government did not realize the severity of these changes and tried to ignore it. However, after a Gallup poll in 1976 showed the full extent of the backlash against the policy, the government could no longer do either. The poll signaled, that while 53% of the public supported federal programs to provide free education or vocational courses that would enable minorities to improve their test scores, Americans favored tests scores over preferential treatment 8 to 1, including 82% of women and 64% of non-whites.[216] As Gallup concluded, *"not a single population group supports affirmative action."*[217] The poll was reported nationally and inspired a lot of debate about affirmative action, which now took on a more ominous tone, since it showed a clear sign that the people no longer favored the concept and were ready for social reform.[218]

After the poll, more groups and organizations, even ethnic organizations such as the Italian-American foundation, the Polish-American Affairs Association and several Jewish groups, openly started to argue against affirmative action, calling it reverse discrimination.[219] With the

[214] Jeffries, "Bakke Revisited," 8.
[215] *Ibid*.
[216] Anderson, *The Pursuit of Fairness*, 148-149.
[217] *Ibid.*
[218] C. Steeh and M. Krysan , "Trends: Affirmative Action and the Public, 1970-1995," *The Public Opinion Quarterly,* Vol. 60, No. 1 (Spring, 1996), 128-158: 130-132.
[219] Anderson, *The Pursuit of Fairness*, 153.

growing discontent, the American people began to call on the government to end affirmative action policies. Before the backlash against affirmative action all three branches had openly supported affirmative action on several occasions, however, after the public opinion changed, Congress made sure to avoid a direct vote on the matter.[220] This left the issue, to revaluate the validity and legality of the policies, to the executive and judicial branches. Since President Jimmy W. Carter threw his full support behind the policies, opponents looked to the Supreme Court to bring their desired social change.[221]

In conclusion it can be said that the history of affirmative action is one full of ups and downs. When the concept was first introduced, its reception was lukewarm. Soon, however, this initial weariness diminished as more and more people would change their mind on the matter until its support would encompass members of both political parties.[222] Nevertheless, when the effects of the policies started to take a hold in the 1970s, the support would disintegrate which in turn would shape the context in which *Bakke* would take place. It appears that the role of the anti-affirmative action discourse played was essential in the process of changing the public opinion on the issue of affirmative action. Thus, it is sensible to argue that anti-affirmative discourse functioned as the catalyst for the social change that would come to fruition through *Bakke,* since the discourse was imperative for the emergence of an environment that favored social change, even though the Carter administration still supported it. However, while the discourse may have been the catalyst, as will be argued in the third part of this study, it was the Supreme Court that

[220] *Ibid.*, 157.
[221] For more information on President Jimmy Carter's position on affirmative action, see the amicus brief, filed in support of the University of California during the Bakke trial as interpreted in Ball, *The Bakke Case*, 70-77. For more information on the efforts within the legal community to develop arguments to persuade the S.C. to abolish affirmative action, *see* Haney Lopez, "A Nation of Minorities," 1012-1021.
[222] For example, even the conservative administration of Nixon was initially supportive of affirmative action and significantly enlarged the scope of the policies, *see,* Anderson, *The Pursuit of Fairness*, 119, 125 and 137.; Rubio, *A History of Affirmative Action*, 153 and 155.

eventually produced the subsequent social change by developing a compromise between the wishes of the administration and the hopes of the general public.

III. The Bakke Hearing: Proposing a Compromise

This study contends that the Supreme Court produced social change by proposing the political compromise that would come to be known as *Bakke*. This contention is based on the theoretical assumption that the Court has the ability to make political policy decisions and produce social change. The first part of this study evaluated whether the Supreme Court can produce significant social change. It was eventually concluded that the Court can utilize its ability to propel social change when the constraints that limit its power are overcome, however, for this to happen, the emergence for an environment that looks favorable to change is imperative.[223]

To support the central thesis of this study, it will be shown how *Bakke* was an example of a judicial case in which the Supreme Court led America towards a new climate of public opinion on the issue and successfully produced social change. In this way, the study attacks the pillars of the Constrained Court paradigm, for if the aforementioned social changes were the result judicial effectiveness, instead of public majoritanism, it would mean that the Court is not the weak majoritarian medium Constrained Court paradigm seem to perceive.[224]

A. An Environment Favorable to Change

The Supreme Court can produce social change when the constraints that limit the Court's power are overcome. According to theory, these constraints can be overcome when political, social, and economic conditions become supportive of change.[225] For this to happen, certain conditions have to be met.

[223] Rosenberg, *Hollow Hope,* 31.
[224] *Ibid.,* 429.
[225] *Ibid.*, 3-4.

The first condition required, according to the theory proposed in the first part of the study, is the existence of ample judicial precedence for reform.[226] At first glance this seems to have been lacking with the *Bakke* case. The Supreme Court had been supportive of affirmative action and the use of racial quotas in a wide array of cases, such as *Green v. County School Board*, *Swann v. Charlotte-Mecklenburg Board of Education*, *Griggs v. Duke Power Co* and *Runyon v. McCrary.*[227] Nevertheless, while there may not have been a tremendous amount of judicial precedent in favor of abolishing affirmative action, as the Court had repeatedly reaffirmed the constitutional validity of even the most controversial affirmative action policies, there was some judicial precedence that stated that the Constitution required colorblindness. This precedence, which originated from Justice John M. Harlan's famous dissent in *Plessy v. Ferguson*, from 1896, acquired some weight as a valid concern through *Brown* and other civil rights cases.[228] Moreover, there was considerable support for this interpretation in the legal discourse, where dominant scholars, such as Bickel and Posner, used it to challenge affirmative action.[229] Thus, despite the fact that the court had repeatedly defended the constitutionality of affirmative action policies, there was some judicial precedent in favor of the claim that the Constitution demanded colorblindness.

Nonetheless, the most important condition required was the need for an environment favorable of change, or at least some support from both the government and the public was needed. This

---

[226] *Ibid.,* 181.
[227] 391 U.S. 430 (1968); 402 U.S. 1, 19 (1971); 401 U.S. 424 (1971) all as cited from Haney Lopez, "A Nation of Minorities," 1003-1006. And 427 U.S. 160 (1976) as cited from Anderson, *The Pursuit of Fairness*, 149-150.
[228] In a footnote of this case Justice J.M. Harlan decried the establishment of the "separate but equal doctrine" and argued the following in his famous lone dissent, *"Our constitution is color-blind, and neither knows nor tolerates classes among citizens," see.* 163 U.S. 537 (1896). As cited in Jeffries, "Bakke Revisited," 4.
[229] For examples of works in which prominent legal scholars use this constitutional interpretation to challenge the concept of affirmative action, *See* R.A. Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," *The Supreme Court Review*, Iss. 1974 (1974) 1-32; A.M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975) .

environment was, as previously discussed, partly in place. President Carter was a staunch supporter of affirmative action. In a *New York Times* article from September 1977, Carter strongly endorsed race-conscious affirmative action when asked about the upcoming *Bakke* case. In the article he is quoted saying, *"It is permissible to make minority-sensitive decisions,"* and therefore disadvantaged members of minority groups may constitutionally be given special consideration in university admissions.[230] For this reason it came as no surprise that the government supported the University of California in the case of Bakke by amicus brief, in which the administration spoke of its support for affirmative action programs, while at the same time distancing itself from the politically controversial racial quotas.[231] The majority of Congress, held by Democrats at the time, was in theory also supportive of race-conscious affirmative action. However, a substantial amount of Congressman and women, that supported the policy, were also afraid to openly endorse programs that favored rigid racial quotas. Moreover, many Republicans had specifically campaigned on the promise to abolish race-conscious affirmative action, an issue that had generated a lot of controversy in the years preceding *Bakke*.[232] Consequently, despite the official governmental line, according to which the government supported the University of California in the case of *Bakke*, there was still a substantial amount of political support in Congress to abolish affirmative action entirely.

Support from the public for a change in policy also appeared to have been more than adequate. The previously mentioned Gallup poll had shown that a majority of the public looked favorable to change.[233] The same can be said for the media. While some news organizations, such as the

[230] R. Reinhold, "U.S. Backs Minority Admissions But Avoids Issue of Racial Quotas," *New York Times* (September 20, 1977).
[231] Ball, *The Bakke Case*, 70-77.
[232] Anderson, *The Pursuit of Fairness*, 164-166.
[233] Steeh and Krysan , "Trends: Affirmative Action and the Public, 130-132.

New York Times, had editorialized in favor of University of California, most supported Bakke and his pursuit for fairness.[234]

To sum up, the conditions the Supreme Court required to produce social change were to a certain extent fulfilled. There was some judicial precedent available and the public seemed eager for a change to race-conscious affirmative action programs. The government, on the other hand was divided on the issue. Whereas the President favored the status quo, a substantial part of Congress looked favorably one change. This was important, since the presence of ample congressional support for change made it unlikely for *Bakke* to be ignored. [235]

B. A Court Divided

The ruling of *Bakke* was the product of a divided Court. The Supreme Court was just like the American people deeply divided on the issue of affirmative action. On the one hand there was a group led by Associate Justice John P. Stevens, joined by Chief Justice Warren E. Burger, and Associate Justices Potter Stewart and William H. Rehnquist, who argued that the special admissions program applied by UC Davis was unconstitutional, because it excluded applicants from consideration on the basis of race.[236]

These four argued in favor of the abolishment of affirmative action, as they claimed the U.S. Constitution required colorblindness with no exceptions for any specific remedial justifications. They based their claim primarily on Title VI of the 1964 Civil Rights Act, which prohibits racial discrimination in any institution that receives federal funding.[237] Since that particular statute was

---

[234] Anderson, *The Pursuit of Fairness*, 161.
[235] According to Sunstein the S.C. only plays a subsidiary role in politics. All the important changes in the 1960s and 1970s came directly or indirectly from Congress. Consequently it could be argued that the congressional support for *Bakke* saved it from a similar faith as *Brown*. Sunstein, "Constitutional Politics and a Conservative Court."
[236] Ball, *The Bakke Case*, 115-117, 136.
[237] *Ibid.*, 117 and 136.

construed to follow the Equal Protection Clause of the Fourteenth Amendment, their opinion was perceived as a constitutional interpretation.[238] From Stevens' perspective the case came down to the principles of "individual equality" and "individual fairness."[239] These principles did not allow any exceptions. Affirmative action was consequently deemed unconstitutional, since the Constitution, based on the Fourteenth Amendment, did not allow for any group to be discriminated against based on race, whether that was Blacks and Jim Crow laws or whites and affirmative action.

On the opposite end of the divided court stood a block consisting of Associate Justices William J. Brennan, Byron R. White, Thurgood Marshall and Harry A. Blackmun. This block, led by Justice Brennan, argued that Davis' admission policies were constitutional, because they were used to remedy substantial chronic underrepresentation of certain minorities in the medical profession.[240] The justices contended that these kind of programs were necessary to ensure equal opportunities for all ethnicities. In the words of one of the four justices, Justice Harry Blackmun: *"To get beyond racism, we must first take account of race. And in order to treat some persons equally, we have to treat them differently."*[241] They justified their claim for the Constitutionality of "benign" racial classification in admission policies partly on the precedent from *United States v. Carolene Products Co.* [242] This precedent proposed that the Court had a special judicial role in the protection of "discrete and insular minorities."[243]

---

[238] Jeffries, "Bakke Revisited," 6.
[239] 438 U.S. 265 (1978). Available at http://www.oyez.org/cases/1970-1979/1977/1977_76_811.
[240] Ball, *The Bakke Case*, 135-137.
[241] 438 U.S. 265 (1978). As cited from Ball, *The Bakke Case*, 140.
[242] In a footnote of this case, which concerned the regulation of interstate commerce, Justice H.F. Stone had argued that legislation aimed at discrete and insular minorities, who lack the normal protections of the political process, should be an exception to the presumption of constitutionality, and a heightened standard of judicial review should be applied, *see.* 304 U.S. 144 (1938). As cited from Haney Lopez, "A Nation of Minorities," 1038.
[243] *Ibid.*

Nevertheless, the justices based most of their views on a new legal perspective that had formed in the years preceding *Bakke* when the backlash against affirmative action took shape.[244] This legal perspective, with origins in political process theory, was most effectively shaped by John H. Ely in a series of articles on the issue. It proposed a radical "representation-reinforcing" approach to constitutional law.[245] According to this new approach, the Supreme Court was only allowed, or more specifically mandated by the Constitution, to intervene in the political process on behalf those unrepresented in the process itself.[246] The white majority, however, did not need the Court to intervene on their behalf, since they were already protected by their majority position in the democratic process. Therefore they simply did not need the Court to defend their group rights. To paraphrase Ely, the white majority had the Constitutional right to impose upon itself the cost of affirmative action without going against the Constitution.[247] Thus, by arguing against judicial intervention on behalf of majorities, this legal perspective countered the demands of the anti-affirmative action discourse for the judicial protection of all citizens.

C. Social Change Through Compromise

Caught in between the two opposing sides was Justice Lewis Powell, a conservative man who had lived most of his life uncomplainingly in the South, where racial segregation was still common practice. Surprisingly it would be this southerner whose vote would end up saving affirmative action for future generations. [248]

---

[244] Jeffries, "Bakke Revisited," 5-6.
[245] This series of articles written by John H. Ely was made up by articles such as "Legislative and Administrative Motivation in Constitutional Law," *Yale L J.*, Vol. 79, Iss. 7 (1970) 1205- 1342 and "The Constitutionality of Reverse Racial Discrimination," *The University of Chicago Law Review,* Vol. 41, No. 4 (1974) 723-741. All cited in Jeffries, "Bakke Revisited," 5.
[246] Ely, *Democracy and Distrust,* 102-103.
[247] J.H. Ely. "The Constitutionality of Reverse Racial Discrimination," *The University of Chicago Law Review*, Vol. 41, No. 4 (1974) 723-741: 724-727.
[248] Ball, *The Bakke Case*, 124-125.

The deciding opinion of *Bakke* would be a political compromise between both schools of thought that had dominated the Supreme Court. Justice F. Lewis Powell, the swing vote, stubbornly refused to accept either of the earlier mentioned judicial positions. Instead of considering the judicial merits of the two positions, Powell was concerned with shaping another, coherent and defensible theoretical framework that would enable him to argue for a plausible alternative.[249]

The reason why Powell was looking so desperately for a third way was his fear of the repercussions of either path set out by his colleagues. On the one hand he feared that requiring colorblind admission policies would eliminate almost all blacks from elite institutions of higher education. He consequently believed this path to be bad for educational diversity, feared it would diminish educational and career opportunities for blacks and therefore prolong the economic gap between the races, and he also though it hurtful for race relations in general. In short, he believed it to be a path the Supreme Court should not take.[250]

On the other hand there was the judicial path set out by Brennan and his colleagues, who all approved of racial quotas. Powell feared the consequences of this path too, since he was afraid that maintaining the racial quotas common in admission policies indefinitely would transform affirmative action into a "system of racial spoils" that subsequently would be hard to dismantle in the future. [251] Powell thought affirmative action to be a transitional, temporary departure from the colorblind ideal, only justified by its necessity to battle the direst effects of past societal discrimination, as he believed affirmative action to be both morally and constitutionally wrong, and thought the policies should not last forever.[252] Something he feared would be the case if the

[249] Jeffries, "Bakke Revisited," 7.
[250] Ball, *The Bakke Case*, 124.
[251] Haney Lopez, "A Nation of Minorities," 1036-1037.
[252] Jeffries, "Bakke Revisited," 8.

judiciary would continue to allow racial quotas until all traces of racism were gone, as it would imply commitments and result in permanent set-asides for minorities that could never be reversed.[253]

Powell initially had a hard time finding a coherent, defensible, theoretical framework to justify his own opinion.[254] On the one hand, he endorsed the application of strict scrutiny, a standard which proclaimed that racial preferences were "in principle" unacceptable.[255] Therefore, implementing them would be nothing less than discrimination, which would ensure that there would be sufficient ground for future attempts to curtail or limit affirmative action. However, Powell also endorsed a flexible approach to the application of the level scrutiny, scrutiny, which would therefore allow the practice of racial preferences for the time being even though they were theoretically forbidden. [256]

Powell, ultimately found a defensible, although somewhat incoherent legal framework that would enable him to argue for this compromise. The concept of diversity proved to be the key to reach his objectives. Historically, affirmative action was defended as a matter of compensation for the effects of past societal discrimination.[257] Powell, however, thought that the rational of compensation was no longer enough to justify the price the white majority had to pay for affirmative action. Besides, it would always be unclear how much compensation was enough,

[253] *Ibid.,* 7.
[254] *Ibid.,* 7-8.
[255] Ball, *The Bakke Case,* 122-123.
[256] L.H. Tribe, "Perspectives on Bakke: Equal protection, procedural fairness, or structural justice?" *Harvard Law Review,* Vol. 92, Iss. 4 (February 1979) 864–877: 866-867.
[257] K.B. Nunn, "Post-Grutter: What Does Diversity Mean in Legal Education and Beyond? Diversity as a Dead-End," Pepp. L. Rev. Vol. 35 (2008) 705-742: 709.

so the rational had the potential to last forever. [258] Instead of compensation, which was a divisive and "negative" rational, Powell embraced the new "positive" rational of diversity.

Diversity was a catchphrase with origins in the multicultural discourse that had rapidly claimed a lot of popularity through the 1970 among politically liberal Americans. According to scholars of the multicultural discourse, diversity was good for everybody, not just for favored minorities, since it improved the general educational experience. [259] The diversity theory was built on existing political theories on pluralism that stated that an open competition between diverse and competing groups was the only way to ensure a democratic equilibrium.[260] The diversity theory would work within the educational context, as Powell proposed, in a similar way. The theory stated that schools needed a critical mass of underrepresented students so that all students could engage each other on equal terms, seen as valuable and desirable because promoting communication between people of different backgrounds would lead to greater knowledge, a better understanding and ultimately peaceful coexistence and future stability. [261] The attainment of diversity in the classroom would therefore benefit all students and society in general, which subsequently made it the perfect rational for Powell's purpose. It directed attention to participation rather than compensation for a few preferred minorities.[262] Moreover, the attainment of diversity was a lot easier to achieve than perfect representation, so the temporary nature of affirmative action policies would be ensured.[263]

---

[258] Jeffries, "Bakke Revisited," 7.
[259] *Ibid.*, 8.
[260] P. Gurin and S. Hurtado, "Diversity and Higher Education: Theory and Impact on Educational Outcomes," *Harvard Educational Review,* Volume 72 Number 3 (Fall 2002) 330-366. On the internet page 1-26: 7-9. Available at http://www.temple.edu/tlc/resources/handouts/diversity/Gurin_and_Hurtado.pdf.
[261] Bowen, "Brilliant Disguise," 1199 and 1204-1207.
[262] Haney Lopez, "A Nation of Minorities," 1036-1038 and 1040-1044.
[263] Jeffries, "Bakke Revisited," 7-10.

Nevertheless, the problem of how to attain this educational diversity remained. The easiest way would obviously be admission quotas with race as the primary determinant. Powell, however, refused to endorse quotas, since he believed race could not be the basis for excluding a candidate.[264] That would be unconstitutional. Powell's solution was to argue for absolute diversity.

Only true diversity, he said, the kind of diversity *"that furthers a compelling state interest,"* encompasses qualifications and characteristics beyond just race.[265] According to Powell, *"A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer."*[266] Therefore, according to the true diversity rationale that Powell endorsed, the farm boy and the black student would equally be promoted through affirmative action, not because of the color of their skin, but because their individual experience could benefit all students. Consequently, it would be ensured that race would not be the primary determinant for affirmative action policies, while at the same time the educational and career opportunities for blacks would be protected for the near future.

In order to launch his judicial vision on affirmative action, Powell used two cases to articulate his view: the case of U.C. Davis University whose admission policies were challenged by Bakke and the case Harvard University whose admission policies Powell proposed as an *amicus curia* for how a constitutionally valid affirmative action program should look like.[267] According to Harvard's guidelines, "*race or ethnic background may be deemed a 'plus' in a particular*

[264] Amar and Katyal, "Bakke's Fate," 1751.
[265] 438 U.S. 265 (1978).
[266] *Ibid.*
[267] Jeffries, "Bakke Revisited," 9.

applicants file, yet it does not insulate the individual from comparison with all other candidates for the available seats."[268] As a result, race would simply be another factor taken into consideration, just like geographic background, grades, motivation and other characteristics. Having created these two cases where there actually was only one, as Powell's biographer John Jeffrey puts it, Powell split his vote.[269] He struck down the U.C. Davis admissions program with its use of racial quotas, but upheld the Harvard College admissions policy, which was not before the Supreme Court, but which Powell nevertheless quoted at length.[270] Hereby Powell reached all his goals. Diversity in the classroom so the progress of the black community would be ensured, while addressing the public outcry against race-conscious affirmative action, believing the policies would be temporary and no one would any longer be excluded based on the color of their skin. In this way ,Powell's ruling abolished racial quotas, but without abandoning the ideals behind affirmative action.

D. The Implementation and Impact Of Bakke

Powell's opinion would end up being decisive for the case of Bakke. However it is important to note there were in fact three different opinions on the case. The two opposing 4-person plurality opinions and Justice Powell's own opinion. Each of the 4-person plurality opinions concurred only with parts of Justice Powell's opinion.[271] For this reason Bakke was solely a "judgement of the Court" and not exactly a clear solution to the issue at stake.[272] While the nature of this split opinion originally created some debate about whether Powell's opinion was binding, over time it became clear that *Bakke* had become the new "law of the land."[273]

---

[268] 438 U.S. 265 (1978).
[269] Jeffries, "Bakke Revisited," 9.
[270] Amar and Katyal, "Bakke's Fate," 1751-1753.
[271] *Ibid.*, 1750.
[272] Ball, The Bakke Case, 107.
[273] Jeffries, "Bakke Revisited," 11.

The real reason why *Bakke* would become the new, and widely accepted "law of the land," despite the split decision, the contradictions in Powell's reasoning and the often mentioned lack of constitutional footing, was that it was clearly a political compromise.[274] Although, many criticized the theoretic framework used by Powell to justify his opinion, many also approved the outcome. The *Washington Post* concluded that everybody had won with *Bakke*.[275] On the one hand, the decision was hailed as a victory of the anti-affirmative action discourse as the most despised form of affirmative action policies, the racial quotas, would finally be a thing of the past. Furthermore, Powell had invoked a lot of language and ideas originating from the anti-affirmative action discourse in his opinion, giving them legitimacy, while many of the complaints proposed by the discourse were finally validated.[276] The Supreme Court had recognized that race-conscious affirmative action hurt the chances of the white majority, that dividing the people in preferred and disfavored ethnic groups was a form of discrimination and therefore, in principle, unconstitutional, and finally the Court acknowledged that the United States had become a *"nation of minorities"* in which *"each had to struggle."*[277] In other words, white ethnical groups were officially recognized as equally vulnerable as other minority groups and as such equally deserving of judicial protection, thereby addressing an important concern for white Americans.[278] In short, by abolishing quotas and by validating the concerns of the public, Powell had done anything short of abolishing affirmative action entirely.

---

[274] For examples of critiques of the ruling by contemporaries, *see* V. Blasi, "Bakke as Precedent: Does Mr. Justice Powell Have a Theory?" *Cal L Rev,* Vol. 21 (1979) 21-68*;* J.H. Ely, "Foreword: On Discovering Fundamental Values*," Harvard L. Rev.,* Vol. 92, Issue 1 *(1978)* 5-56*;* A. Scalia, "The Disease as Cure: 'In Order to Get Beyond Racism, We Must First Take Account of Race," *Washington Univ. L. Q.*, Vol.21 (1979) 147-157. All cited in Jeffries, "Bakke Revisited," 10-12.
[275] The Bakke Decision, Washington Post, June 29, 1978, p A26. As cited in Jeffries, "Bakke Revisited," 9.
[276] Haney Lopez, "A Nation of Minorities,"1029-1045.
[277] 438 U.S. 265 (1978).
[278] Anderson, *The Pursuit of Fairness,* 151-155.

In addition, supporters of affirmative action were also content with *Bakke*. By upholding the constitutionality of affirmative action in general, Powell had saved the concept of race-conscious affirmative action for future generations. While they most likely would had preferred the opinion led by Justice Brennan, which was were far more tolerant of racial preferences, they were glad the Supreme Court had at least been prepared to uphold some form of affirmative action, while facing intense political and public scrutiny.[279]

Bakke would eventually come to be regarded as one of those pivotal moments in history where social change was achieved through a judicial decision.[280] It did much more than simply provide a legal framework upon which to consider race and ethnicity in higher education admission. The Supreme Court decision also brought forth a new climate of public opinion on how to define, understand and implement affirmative action programs in general.

A new climate that was reflected in a Gallup Poll from 1979, executed a year after *Bakke.* This opinion poll contrasted greatly with some of the findings of the one performed in 1977. Even among whites there was major support for the compromise proposed by Powell. No less than 73 percent of the questioned stated to favor affirmative action policies as long as there were no racial quota's involved and only 23 percent still wished to abolish the concept.[281]

In the end, the changes brought by *Bakke* would influence the lives of millions. In particular, the government has implemented the guidelines mandated by *Bakke*, to promote the integration of minorities in federal and private workforces through additional legislation and more judicial

[279] Jeffries, "Bakke Revisited," 10-11.
[280] Amar and Katyal, "Bakke's Fate," 1750-1754 and 1770.
[281] Anderson, *The Pursuit of Fairness,* 158.

decisions.[282] Moreover, the changes achieved by *Bakke* have had a lasting influence, since the legal framework it established has only slightly been modified in the last thirty years.[283]

E. Public Majoritanism and Judicial Efficiency

After analyzing the impact of *Bakke,* it is clear that significant social change was achieved. The influence of *Bakke* was huge, since the decision formalized a new general agreement on how to define, understand and implement affirmative action programs.[284] Nevertheless, the question regarding the origins of the judicial decision still remains partly unanswered. Because of this, it is essential for this study to continue the argument of the first chapter and place it in the context of *Bakke* to demonstrate why the influence of the Supreme Court, and of Justice Powell in particular, was crucial in shaping a new way of thinking about affirmative action by the American people.

According to the majoritarian thesis of the Constrained Court paradigm, the Supreme Court merely functions as a medium to interpret and implement societal opinion.[285] This implies that court rulings on controversial issues such as affirmative action are reflections of the public opinion. In the context of *Bakke*, the application of the majoritarian thesis demonstrates how the anti-affirmative discourse was able to bring about social change by compelling a large portion of the American people to oppose affirmative action and thereby shaping a new climate of public opinion on the issue. The contribution of the Court should be seen as a acknowledgement of

[282] At first the guidelines proposed by *Bakke* were only applied to university admission policies. However the Supreme Court eventually ruled in *Adarand Constructors, Inc. v. Peña* (1995) that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under a standard of "strict scrutiny." A ruling that has quite recently been re-affirmed by the S.C. in 2003 through the dual ruling of *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003). Cited from www.oyez.org.
[283] Marin and Horn, *Realizing Bakke's Legacy,* 15.
[284] *Ibid.*, 10-11, 15 and 243.
[285] Berenji, "The US Supreme Court."

these changes in public opinion towards affirmative action, while the decision itself was a mere formality, in which the Court officially recognized the evolving state of affairs.[286]

Current scholarship on the Supreme Court seems to support the perspective proposed by the majoritarian thesis when reviewing the *Bakke* case.[287] Supporters of the dominant Constrained Court paradigm argue that judicial accommodations on controversial and divisive issues are just like the decisions reached through the regular political process, inspired by the will of the people and therefore the result of public majoritarianism, which on a different note is quite ironic since this would be exactly the kind of majoritarianism the Supreme Court is supposed to protect minorities from. Consequently, current scholarship, led by the Constrained Court theory, presumes that the Supreme Court reacted to the diminishing support for affirmative action by changing their views on race-based legal remedies and public policies from one of general endorsement to one of increasing skepticism and disapproval, to one of support for diversity.[288]

At first glance this seems a plausible theory to explain the results of *Bakke,* as it was established in the second part of this study, that it was the anti-affirmative action camp which was responsible for inspiring the debate on affirmative action. Furthermore, it was the success of the anti-affirmative action camp, whose views won the hearts and minds of the public in the 1970s, that created an environment that looked favorable to change. Consequently, it was concluded that the anti-affirmative action discourse had functioned as the catalyst for the reforms that followed *Bakke*.

---

[286] Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 104-105.
[287] Once again, for examples of academic work in which scholars criticize the S.C., and in particular Justice Powell, for their lack of courage to face public scrutiny during the Bakke trial, and for placating the demands of the anti-affirmative action movement through the *Bakke* decision, *see* I.F. Haney Lopez, "A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness," *Stan. L. Rev.,* Vol. 59, Iss. 4 (2007) 985-1064: 1044; D. Bowen, "Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action," *Ind. L. J.*, Vol. 85 (2010) 1197-1277: 1210-1211.
[288] Marin and Horn, *Realizing Bakke's Legacy,* 15.

Nonetheless, the decision and the social change that followed *Bakke* were not brought about by either a change in public preferences or the influence of the anti-affirmative action discourse. Instead, it was established that the presence of an environment favorable to change does not preclude the possibility that the Supreme Court can make a difference on its own and produce significant social change. This suggests that it is possible for the Court to make policy and lead, instead of follow, the American people to a new general agreement on a subject.

Consequently, the main argument of this study is that *Bakke* was not merely the culmination of the public debate regarding affirmative action that current scholarship seems to claim.[289] Nor was the anti-affirmative action solely responsible for the establishment of a new climate of public opinion on the subject; something that becomes obvious when taken into account that *Bakke* was not the clear victory for the colorblind ideal that so many seem to presume.[290] The anti-affirmative action discourse had advocated the abolishment of all affirmative action policies as it was perceived as a form of discrimination against the white majority.[291] Nevertheless, despite the fact that a majority of people supported the goals of the anti-affirmative action movement, the Supreme Court refused to forsake the policy entirely and ended up saving affirmative action for future generations.[292] The Court was attentive to many of the concerns raised by the movement, and also accommodated the direst public scrutiny by limiting the scope of affirmative action policies with regard to college admission policies. Moreover, the ruling reflected a lot of language and arguments originating from the anti-affirmative action discourse.[293] But, the Court

[289] Haney Lopez, "A Nation of Minorities," 1029-1046.
[290] Jeffries, "Bakke Revisited," 9-10.
[291] Glazer, *Affirmative Discrimination*, 197, 201 and 221.
[292] Steeh and Krysan , "Trends: Affirmative Action and the Public," 130-132.
[293] In particular the deciding statement of Powell, *see* Bowen, "Brilliant Disguise," 1211-1213.

failed to abolish the concept entirely, which would imply that the Court did not blindly follow the change in public preference that preceded *Bakke*.

Upon a closer look, it would seem that the Constrained Court paradigm fails to capture the true essence of the relationship between the Supreme Court, the political branches, and American democracy. Although there is definitely merit to the majoritarian thesis and its claim that the Court is usually attentive to congressional and public opinion, this study proposes that *Bakke* was an exception to the rule, since it is clear that *Bakke* is an example of a case in which the Court acted with success independently of public preferences.[294] As previously discussed, the Supreme Court has the ability to propel social change under specific circumstances. It was proposed that this could happen when certain conditions were fulfilled, in particular the presence of an environment favorable to change, and when the case involved two opposing principles that had divided the nation to such an extent that Congress was unable or unwilling to decide between the two alternatives.[295]

With *Bakke* all these conditions were fulfilled. The public was divided, there was an environment that looked favorable to change in place and Congress had empowered the Court to settle the issue by ducking the issue completely. Nevertheless, when faced with the case, the Court, or to be more precisely Justice Powell whose decision was decisive, refused to choose between the two alternatives.[296] Instead of simply determining whether affirmative action was constitutional, Powell decided to propose a political compromise, targeted to satisfy the direst demands of the two opposing viewpoints that had divided the American society on the issue. Consequently, the admission program implemented by Harvard University was proposed by Powell as a guideline

[294] Devins, "Is Judicial Policymaking Countermajoritarian?" 200.
[295] *Ibid.*
[296] Jeffries, "Bakke Revisited," 7.

for what a constitutionally valid affirmative action program should look like.[297] So instead of choosing one of the two alternatives, Powell and with him the Court, produced a political compromise that would become the new popular way of looking at the issue.[298]

Although it is true that the public opinion on affirmative action was already changing in the years preceding *Bakke*, it was the Supreme Court, and Powell in particular, who took the lead on the issue. It was the Court who established new boundaries and limitations on affirmative action and it was the Court who led public opinion to a general agreement on the subject that appeared to have been suitable enough that it has been barely modified over a period of thirty years.

In conclusion, while the Supreme Court was part of an array of social and political forces that sought social change on the subject of affirmative action, it was the Court who independently defined the boundaries and limitations of the aforementioned change, and therefore the Court should be held responsible for the social reforms that followed *Bakke*. Or in other words, the reforms that followed *Bakke* were not merely a consequence of the intricate process of public majoritinanism as current scholarship seems to presume. These reforms were the result of judicial efficiency instead.

[297] Marin and Horn, *Realizing Bakke's Legacy*, 27.
[298] A Gallup Poll from 1979 polled that 72% of the American people supported affirmative action after the Bakke reversal, which would subsequently imply that Bakke had become the new public consensus on the issue, *see* Anderson, *The Pursuit of Fairness*, 186.

CONCLUSION

The Constrained Court paradigm suggests that the Supreme Court is unlikely to produce any significant social change. Its advocates argue that the widespread belief in the Court as a beacon of hope where the wronged can turn to attain their constitutional rights is both naive and unfounded.[299] This belief originates from a popular misconception, supported by the Dynamic Court paradigm, which states that the Court can act when other branches cannot, because the Court is free from electoral pressures.[300] Thereby ignoring the merits of the Constrained Court theory which makes a well-argued case that Courts cannot and will not stray off too far from the preferences of the general public, because the Justices realize that it would be ineffective, as the Court has neither the power of the purse or the sword, and ultimately would hurt the Court's own legitimacy. The Constrained Court paradigm perceives the Court as a majoritarian institution that is unlikely to cause social change as its decisions reflect the preferences of the "national governing coalition."[301]

At first glance the Constrained Court paradigm seems to offer a perfectly plausible perspective on how to study landmark Supreme Court cases. It gives us a clear, historically grounded framework to analyze landmark Court decisions which, as the theory implies, either act as clear indicators of the public opinion at the time or otherwise become ineffective errors of judgment.[302] However, just like so many systematical approaches in other disciplines, the Constrained Court theory seems to have become too dominant. Although it is true that the theory

[299] Rosenberg, *Hollow Hope*, 429.
[300] Ely, *Democracy and Distrust*, 11-12..
[301] Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" 104-105.
[302] Dahl, "Decision Making in a Democracy," 291-295.

can be very useful perspective on how to study these cases, the paradigm does not accurately predict or explain every single landmark judicial decision.

The Supreme Court can in some specific cases, as this study indicates, lead public opinion to a new agreement on an issue and subsequently produce social change. When reviewing the examination of the case of Bakke it would appear that the Supreme Court, or more precisely Justice Powell, was able to influence public policy by championing a political compromise on affirmative action that satisfied the direst demands of both the opposing sides. Instead of choosing between alternatives, Powell formulated his own views on the affirmative action and proposed the admission program of Harvard University as a new alternative in order to reach a new majority of opinion on the issue.[303] While it is true that popular opinion on affirmative action was already changed in the years preceding *Bakke*, it is equally true that Powell, and thereby the Supreme Court, took the lead on the issue by establishing new boundaries and limitations on affirmative action. The views formulated by Powell eventually became the leading statement on the legality of affirmative action policies in the years that followed.[304]

This study demonstrated that that the general public was divided on the issue before *Bakke*, although a majority was intent on abolishing the concept altogether. Powell's surprising decision satisfied the most important demands of the two opposing viewpoints that had divided the American society on the issue and consequently led the public to a new majority of opinion. This new majority agreement on this issue stood so strong it would not face another serious judicial challenge until the dual ruling of *Grutter v. Bollinger* and *Gratz v. Bollinger*, in which the Court

[303] Jeffries, "Bakke Revisited," 9.
[304] Nunn, "Diversity as a Dead-End," 710.

quite recently re-affirmed the compromise proposed by *Bakke*.[305] Consequently it would be no stretch of the imagination to argue that the Court was largely responsible for the social reforms that followed *Bakke.*

Although it is true that research on a single case is not sufficient to imply that the Constrained Court paradigm should be dismissed as a model to explain the impact of landmark Supreme Court decisions, it does indicate that the Constrained Court paradigm, which has been the dominant paradigm on court theories for years, fails to capture the essence of the relationship between the Court, the political branches and the American democracy, and subsequently unjustly diminishes the Court's ability to produce social change. Whether this means that the Constrained Court paradigm needs to be revised to the challenges raised with this study or whether the theory should be reconciled with its rival, the Dynamic Court paradigm, is a question to be examined later.

What can be argued in conclusion is the following: when there is sufficient judicial precedence and there is an environment that looks favorable to change in place, the Court can be, for all those that seek out their constitutional rights, the titular beacon of hope that so many people seem to believe it to be.

[305] *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), were challenges against the admission policies of the University of Michigan. In a dual ruling, the S.C. reaffirmed with a 5-4 majority Powell's initial decision that race could never be the sole determining factor in admission policies, however, giving special consideration to certain racial minorities does not violate the Fourteenth Amendment. As cited from www.oyez.org.

LITERATURE

Books:

Anderson, Terry H. *The Pursuit of Fairness: A History of Affirmative Action* (Oxford: Oxford University Press, 2005).

Ball, Howard. *The Bakke Case: Race, Education, and Affirmative Acti*on (Lawrence: University Press of Kansas, 2000).

Bickel, Alexander M., *The Least Dangerous Branch* (Indianapolis: Bobbs-Merill, 1962).

Ely, John H., *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

Glazer, Nathan, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (Cambridge: Harvard University Press, 1975).

Glazer, Nathan and Moynihan, Daniel, *Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians and Irish of New York City* (Cambridge: MIT Press, 1963).

Marin, Patricia and Horn, Catherine L. eds., *Realizing Bakke's Legacy: Affirmative Action, Equal Opportunity, and Access to Higher Education* (Sterling: Stylus Publishing, 2008).

Mayhew, David, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974).

Rosenberg, Gerald N., *Hollow Hope: Can Courts bring about Social Change*? (Chicago: University of Chicago Press: 2008).

Rubio, Philip F., *A History of Affirmative Action: 1619–2000* (Jackson: University Press of Mississippi, 2001).

Sitkoff, Harvard, *The Struggle for Black Equality 1954 -1980* (New York: Hill and Wang, 1981).

Journal Articles:

Amar, Akhil R. and Katyal, Neal K., "Bakke's Fate," *UCLA Law Review*, Vol. 43 (1996) 1745-1770.

Bowen, Deirdre M. "Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action," *Indiana Law Journal,* Vol. 85 (2010) 1197-1277.

Dahl, Robert, "Decision Making in a Democracy: The Supreme Court as National Policy Maker," *Journal of Public Law*, Vol. 6 (1957) 279-295.

Ely, John H., "The Constitutionality of Reverse Racial Discrimination," *The University of Chicago Law Review,* Vol. 41, No. 4 (1974) 723-741.

Graber, Mark A. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development*, Vol. 7, Iss. 1 (1993) 35-72.

Haney Lopez, Ian F. "A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness," *Stan. L. Rev.*, Vol. 53, Iss. 4 (2007) 983-1032.

Jeffries, John C. "Bakke Revisited," *The Supreme Court Review,* Iss. 2003 (2003) 1-25.

Jenkins, John C., "Stirring the Masses: Indigenous Roots of the Civil Rights Movement," Book review of *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* by Aldon Morris, *Contemporary Sociology*, Vol. 15, No. 3 (1986) 354-357.

Morris, Aldon D. "A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks," *Annual Review of Sociology*, Vol. 95 (1999) 517-539.

Nunn, Kenneth B., "Post-Grutter: What Does Diversity Mean in Legal Education and Beyond? Diversity as a Dead-End," *Pepp. L. Rev.* Vol. 35 (2008) 705-742.

Pildes, Richard H., "Is the Supreme Court a 'Majoritarian' Institution?" *The Supreme Court Review,* Vol. 2011, Iss. 1 (2011) 103-158.

Posner, Richard A. "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," *The Supreme Court Review*, Iss. of 1974 (1974) 1-32.

Schweitzer, Thomas A., "The Supreme Court and Judicial Review: Two Views," *Touro Law Review*, Volume 27, No. 1 (2011) 1-33.

Shapiro, Fred R. "The Most-Cited Legal Scholars," *Journal of Legal Studies*, Vol. 22 (2000) 409–426.

Steeh, Charlotte and Krysan, Maria, "Trends: Affirmative Action and the Public, 1970-1995," *The Public Opinion Quarterly*, Vol. 60, No. 1 (Spring, 1996) 128-158.

Tribe, Lawrence H., "Perspectives on Bakke: Equal protection, procedural fairness, or structural justice?" *Harvard Law Review*, Vol. 92, Iss. 4 (February 1979) 864–877.

Turner, Ronald "The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative Action Position: From Bakke to Grutter and Beyond," *Hastings Law Quarter*, Vol. 30 (2003) 445-510.

Book Articles:

Burke, Thomas F. "The Judicial Implementation of Statutes" in M.C. Miller and J. Barnes (eds.), Making Policy, Making Law (George Town University Press: 2004) 123-139.

Devins, Neal. "Is Judicial Policymaking Countermajoritarian?" in M.C. Miller and J. Barnes (eds.), Making Policy, Making Law (George Town University Press: 2004) 189-201.

Newspaper Articles:

Kenworthy, Edward W., "200,000 March for Civil Rights," *New York Times,* (August 29, 1963) Special.

Reinhold, Robert, "U.S. Backs Minority Admissions But Avoids Issue of Racial Quotas," *New York Times* (September 20, 1977).

Historic Documents:

Jefferson, Thomas, "Thomas Jefferson letter to Abigail Adams." As cited from "Thomas Jefferson on Politics & Government," *Famguardian.org*. http://www.famguardian.org/Subjects/Politics/ThomasJefferson/jeff1030.htm.

Hamilton, Alexander, "The Judiciary Department," *Independent Journal* (June 14 1788) Federalist No. 78. Available at http://www.constitution.org/fed/federa78.htm.

Government Documents:

U.S. Department of Labor, "The Moynihan Report: The Case for National Action (1965)." Available at http://www.dol.gov/oasam/programs/history/webid-meynihan.htm.

Internet Articles:

Berenji, Shahin, "The US Supreme Court: A 'Follower, not a Leader' of Social Change," *Lethbridge Research Journal*, Volume 3, No. 1 (2008). Available at http://www.lurj.org/article.php/vol3n1/supreme.xml.

Gurin, Patricia and Hurtado, Sylvia, "Diversity and Higher Education: Theory and Impact on Educational Outcomes," *Harvard Educational Review,* Volume 72, No. 3 (Fall 2002) 330-366. Available at http://www.temple.edu/tlc/resources/handouts/diversity/Gurin_and_Hurtado.pdf.

Rosenberg, Gerald N., "Ideological Preferences and Hollow Hopes: Responding to Criticism," *University of Chicago Press*. Available at http://www.press.uchicago.edu/books/rosenberg/index.html#note5.

Sunstein, Cass R. "Constitutional Politics and a Conservative Court," *The American Prospect,* December 26, 2000. Available at http://prospect.org/article/constitutional-politics-and-conservative-court.

Speeches:

Johnson, Lyndon B., "To Fulfill These Rights" Commencement Address at Howard University, Washington D.C. (June 4, 1965). Available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp.

King, Martin L., "I Have a Dream ," Delivered at the Lincoln Memorial, Washington D.C. (August 27, 1963). Available at http://www.americanrhetoric.com/speeches/mlkihaveadream.htm.

Court Cases:

438 U.S. 265 (1978). Available at http://www.oyez.org/cases/1970-1979/1977/1977_76_811.

Other sources:

The cited court case summaries are available at http://www.oyez.org/.

The cited amicus briefs send during the trial of Bakke can be found at http://www.vpcomm.umich.edu/admissions/legal/bakke-sum-amicus.html.

American Dream reference page to be found at http://mankel.free.fr/AmericanDream.