Correction: CUB Younger Than It Looks

The Wisconsin Citizens Utility Board (CUB) is celebrating its 45th anniversary in 2024, not its 54th anniversary as mistakenly reported in the article "54 Years and Counting: Citizens Utility Board of Wisconsin" (97 Wis. Law. 20, April 2024).

While we corrected the error in the article online, we are unable to correct the print publication.

The editors regret the error. **WL**

Forge New Paths to Achieve Educational Equity and Opportunity

In this tumultuous period of racial division, my coauthor and I applaud the *Wisconsin Lawyer* in publishing our article, "Race Conscious Admissions in Colleges" (James A. Johnson & Jeanette L. Esbrook, 97 Wis. Law. 26, March 2024).

Race – the biological distinction. Race – the durable singular social preoccupation of the United States throughout its history. Race – the constitutional Continental Divide.

The Preamble to the United States Constitution provides that "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

We are now in the third decade of the 21st century and the country continues to recognize that the matter of equity, including race and color, is still a problem. Society and colleges have benefited from race conscious admissions, including Harvard and the University of North Carolina. Now that the Supreme Court has limited the use of affirmative action in admissions by universities, the country must forge new paths to achieve educational equity and opportunity. Higher education institutions have challenging work to achieve equal educational opportunities, including having a diverse student body. I have provided permissible equity action suggestions toward these goals in our article. I respectfully submit that admission officials of colleges and universities should continue to look beyond grades and test scores in their commitment to diversity and inclusion to transform America into a more perfect union.

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Misstatement in Race Conscious Article?

Editors' Note: A reader, Atty. Eric Finch, wrote to us about concerns with a possible misstatement in the article by James A. Johnson and Jeanette L. Esbrook in "Race Conscious Admissions in Colleges" (97 Wis. Law. 26, March 2024). Atty. Finch shared his concerns with the authors and suggested a correction is warranted because it might risk misinforming Wisconsin's legal community about civil rights history.

Atty. Finch wrote, "The statement 'The Supreme Court first considered race in university admissions in 1978 in *Regents of the University of California v. Bakke*' is not accurate. Perhaps the authors meant to qualify this statement further, narrowing it to cases on certain types of admissions practices or using some other qualifier. But to let this statement stand would be erasure of significant SCOTUS jurisprudence, including seminal cases like *Sweatt v. Painter* (1950)."

The response from the article's authors follows. Atty. Finch sent a clarifying letter, which is included below their response.

Article Authors Respond

This is in response to Eric Finch's comment on "Race Conscious Admissions in Colleges" regarding *Regents of the Univ. of California v. Bakke* (1978).

Bakke is the first major case addressing *quotas, affirmative action and preferential treatment for minorities in college admissions* (emphasis added).

The Wisconsin legal community or any reader will not be misled or confused that *Bakke* is the first civil rights case as stated by Mr. Finch.

Sweatt v. Painter (1950) addresses the separate but equal doctrine that violated the 14th Amendment's Equal Protection Clause. This is a civil rights case.

However, before *Painter* comes *Missouri ex rel. Gaines v. Canada*, 305 U.S 337 (1938). This is the seminal civil rights case under the separate but equal doctrine that violated the Equal Protection Clause of the 14th Amendment in the modern era.

Although Mr. Finch means well, he is overreacting in

believing the reader will be misled. Race conscious admissions is not about civil rights history as that phrase implies.

In our opinion no Wisconsin lawyer or any reader would think *Bakke* in 1978 is the first civil rights case. We believe no correction or additional information is needed based on the above information.

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Atty. Finch Clarifies His Concern

Without having performed the necessary due diligence to know for certain, I would be inclined to concur with Mr. Johnson that *Bakke* is the first major case addressing quotas, affirmative action, and preferential treatment for minorities in college admissions. That's in line with my initial communication: that the misstatement from the article could be corrected by limiting it to cases on certain types of admissions practices or using some other qualifier. I appreciate Mr. Johnson providing such qualifiers.

However, I am disappointed by Mr. Johnson's misstatement of my concern. I did not state that anyone would "be misled or confused that *Bakke* is the first civil rights case" as Mr. Johnson erroneously indicates. I would generally agree with Mr. Johnson that no reader would be confused that *Bakke* was the first civil rights case before the Supreme Court. However, this does not address the actual concern expressed; I expressed concern that a reader would be confused that *Bakke* was the first time the Supreme Court considered race in university admissions. I went on to state that such confusion would represent an "erasure" of significant cases in civil rights history, perhaps leading to Mr. Johnson's confusion. I apologize for any lack of clarity in my words.

The article contains a false statement. It is false to say, "[t]he Supreme Court first considered race in university admissions in 1978 in *Regents of the University of California v. Bakke*."

Sweatt v. Painter was a case about race in university admissions over a quarter century before *Bakke*. The holding of the case explicitly orders university admission in the opinion delivered by Chief Justice Vinson: "We hold that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School. The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion." In *Sweatt*, the Equal Protection Clause applied because of race.

Sweatt is not alone. *Missouri ex rel. Gaines v. Canada* (1938) is a race in university admissions case, *Sipuel* (1948) was about race in university admissions as well, and there's a decent argument that *McLaurin* (1950) is about race in university admissions too. There may be others – it's been a long time since I was in a history classroom. Just because these are considered civil rights cases doesn't make them any less about admissions. It's also noteworthy that these cases are mentioned within the *Bakke* opinion. But rather than assume that readers will dive into the third section of [Justice] Powell's opinion in *Bakke* to find those cases and understand the history of SCOTUS race in admissions jurisprudence, I believe that *Wisconsin Lawyer* should recognize those cases as part of its ongoing mission to keep Wisconsin attorneys informed.

I would ardently disagree with Mr. Johnson's statement that "race conscious admissions is not about civil rights history as that phrase implies." Given that *Bakke* cites the civil rights cases in question, it seems that SCOTUS agrees with me. A complete understanding of race conscious admissions jurisprudence therefore requires a degree of awareness of civil rights cases – and thus a correction to the article.

I would propose a correction along the following lines:

The line that appeared in the March 2024 article, "Race Conscious Admission in Colleges" included the statement, "The Supreme Court first considered race in university admissions in 1978 in *Regents of the University of California v. Bakke*." While *Bakke* is widely considered to be the first major Supreme Court case addressing quotas, affirmative action, and preferential treatment for minorities in college admissions, the Supreme Court previously considered race in university admissions in cases such as *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948), and *Sweatt v. Painter*, 339 U.S. 629 (1950).

The communications contained in this and my previous comments represent my personal views and are not intended to be made on behalf of my employer or any other government entity.

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