# The Death of the Remedial Rationale and the Birth of Diversity in *Bakke*

In 1978, the Supreme Court ruling in *Bakke* declared the University of California Davis Medical School’s admissions program, which reserved sixteen spots for minority students out of a class of one hundred, invalid. Despite disqualifying Davis’s specific affirmative action program, Justice Lewis Powell, in a plurality opinion, approved the use of race in admissions if necessary to promote a “compelling state interest.”[[1]](#footnote-1) Applying a strict scrutiny test to cases of racial discrimination, Justice Powell questioned which state interests would qualify as sufficiently compelling. He acknowledged that “[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.”[[2]](#footnote-2) However, he distinguished between the legitimate narrow interest in “redress[ing] the wrongs worked by specific instances of racial discrimination” and the illegitimate objective of “remedying of the effects of ‘societal discrimination,’ an amorphous concept of injury that may be ageless in its reach into the past.”[[3]](#footnote-3) Justice Powell determined that the interest in remedying past discrimination would be compelling only if a university could identify specific instances of institutional discrimination, thus excluding broader social discrimination. Consequently, his narrowing of the remedial logic made this rationale impractical for use in the context of higher education.[[4]](#footnote-4)

As an alternative compelling interest to remedying past institutional discrimination, Justice Powell offered the diversity rationale. “[T]he attainment of a diverse student body,” he held, is “of paramount importance” to the University’s mission and “compelling in the context of a university’s admissions program.”[[5]](#footnote-5) The diversity justification has, to some extent, been evident for over a century,[[6]](#footnote-6) but the diversity rationale embraced by Justice Powell in *Bakke* first appeared in an amicus brief submitted by Harvard in an earlier case that was dismissed and forgotten.[[7]](#footnote-7) Justice Powell positioned diversity as the primary justification for upholding race-conscious admissions policies, thereby shaping future legal discourse and public debates around the diversity interest.

For Justice Powell, diversity was, first and foremost, a pedagogical value.[[8]](#footnote-8) His primary focus was on “educational benefits that flow from an ethnically diverse student body.”[[9]](#footnote-9) “[T]he right to select those students who will contribute the most to the ‘robust exchange of ideas” follows from the academic freedom of the university, according to Justice Powell.[[10]](#footnote-10) According to his plurality decision, the compelling state interest of diversity is divorced from the history of the civil rights movement that gave birth to these practices and, instead, engages with the utilitarian benefits of diversity. Thus, for Justice Powell, diversity is not a good in itself but an instrument to achieve other, pedagogical and market-driven, goals: “[A] student with a particular background,” Powell writes, “whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”[[11]](#footnote-11) Following this instrumental logic, diversity, according to Justice Powell, is not necessarily or even dominantly about race; rather, it “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”[[12]](#footnote-12) And, as John Jeffries observed, for Justice Powell, diversity involves improving the pedagogical experience of *all* students, rather than any specific group in society.[[13]](#footnote-13) Thus, following Justice Powell’s rationale, diversity may be pursued by universities due to its pedagogical values.

Justice Thurgood Marshall, who, twenty-four years earlier, as a civil-rights lawyer, had spearheaded the *Brown* litigation to dismantle racial segregation in public schools, joined the *Bakke* plurality. However, he offered a different rationale behind affirmative action, one deeply rooted in history:

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society…. I do not believe that the Fourteenth Amendment requires us to accept that fate…. It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation’s past treatment of Negroes…. There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination.[[14]](#footnote-14)

The forceful language in Justice Marshall’s opinion was largely forgotten until recently.[[15]](#footnote-15) Instead, it was Justice Powell’s sole-authored opinion that had paramount influence over affirmative action and the discourse that surrounding it. As Stanford Levinson described, it was as if the Court in *Bakke* had ordered: stop talking about rectifying past social injustice and start talking about diversity.[[16]](#footnote-16) Although not in the context of higher education, in *City of Richmond* v. *J.A. Croson Co.* (1989), the Court further distanced affirmative action from the project of remedying past wrongs.[[17]](#footnote-17) In *Croson*, the Court declared unconstitutional an ordinance that gave preference to minority-owned firms in awarding municipal construction contracts. While acknowledging that addressing specific instances of past discrimination, supported by statistical evidence, was valid, the *Croson* court, echoing the *Bakke* decision, prohibited remedying “societal discrimination.”[[18]](#footnote-18) The constraints and limitation established in *Bakke* and reiterated in *Croson* pushed educational institutions toward embracing diversity, not remedying past injustice, as a compelling interest. Indeed, diversity has been the controlling rationale behind affirmative action policies ever since.

Critics of *Bakke* and the diversity rationale mourn the loss of the remedial rationale. Charles R. Lawrence wrote that “Powell’s restriction on backward-looking affirmative action incorporates the big lie into affirmative action doctrine,” explaining that “[d]espite overwhelming evidence of continuing racial discrimination, the Court tells us our nation has overcome its racism.”[[19]](#footnote-19) Derrick Bell explained that diversity was disconnected from the moral grounds that originally justified affirmative action, and that without a more sound justification, minorities are left vulnerable, dependent on the grace of the universities and their benefits.[[20]](#footnote-20)

But as I have shown elsewhere, diversity has never been a fixed term. Its meaning has been subject to contestation, renegotiation, and resignification.[[21]](#footnote-21) Going beyond the narrow doctrinal analysis of the Court’s opinions, this article builds on both a qualitative analysis of the amicus and other briefs filed with the Court in subsequent cases that challenged affirmative action. It shows that the value assigned to diversity and, with it, the justifications for applying affirmative action measures, were actually not set by the Court in *Bakke* but evolved over time in lengthy debates among universities, social movements, and the Court.

1. *Id.* at **287, 320** (plurality opinion). [↑](#footnote-ref-1)
2. *Id* at **307.** [↑](#footnote-ref-2)
3. *Id.* [↑](#footnote-ref-3)
4. Richard A. Posner, *The Bakke Case and the Future of “Affirmative Action,”* 67 Calif. L. Rev. 171, 178- 80 (1979) (asserting that according to Justice Powell, remedial actions should only rely on legislative determinations of previous unlawful discrimination). [↑](#footnote-ref-4)
5. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-314 (1978) (plurality opinion). [↑](#footnote-ref-5)
6. David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, 25 Va. J. Soc. Pol’y & L. 158, 174 (2018)/.‏ [↑](#footnote-ref-6)
7. *Id.* at 169. [↑](#footnote-ref-7)
8. Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. Rev. 1613, 1624 (2007) (explaining how Powell’s articulation of diversity was rooted in the unique mission of the university as an educational institution). [↑](#footnote-ref-8)
9. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978) (plurality opinion). [↑](#footnote-ref-9)
10. *Id*. at 312-13. [↑](#footnote-ref-10)
11. *Id. at* 314. [↑](#footnote-ref-11)
12. *Id.* at 315. [↑](#footnote-ref-12)
13. John C. Jeffries, Jr., *Bakke Revisited*, 2003 Sup. Ct. Rev. 1, 7 (2003). [↑](#footnote-ref-13)
14. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396-400 (1978) (Marshall, J., dissenting). [↑](#footnote-ref-14)
15. As I will discuss later, it was recently brought back to life by Justice Sotomayor in the SFFA case, *see* *generally* Students for Fair Admissions v. Harvard, 600 U.S. 9, 140-208 (2023) (6-2 decision) (Sotomayor, J., dissenting). [↑](#footnote-ref-15)
16. *See* Sanford Levinson, Wrestling with Diversity 16 )Duke Univ. Press, 2003(; *see also* Asad Rahim, *Diversity to deradicalize*, 108(5) Cal. L. Rev. 1423, 1457 (2020).‏ [↑](#footnote-ref-16)
17. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 511 (1989). [↑](#footnote-ref-17)
18. *Id.* at ??? [↑](#footnote-ref-18)
19. Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F.L. Rev. 757, 767-8 (1997); *See also* Ronald Dworkin, *The Bakke Decision: Did It Decide Anything?*, 25(13) New York Rev. Books 20, 21-25 (1978). (Diversity “*does not supply a sound intellectual foundation for the compromise the public found so attractive.*”) [↑](#footnote-ref-19)
20. Derrick A. Bell, Jr., *Introduction: Awakening after Bakke*, 14 Harv. C.R.-C.L. L. Rev. 1, 5 (1979) (“[*P*]*ost-Bakke minorities must rely on the interest of schools in exercising their discretion to admit a small number of minority students whose numbers will be dictated by the school’s interest in diversity, rather than on either the magnitude of past racial wrongs or on the minority students’ potential for future achievement.*”). [↑](#footnote-ref-20)
21. *See* Ofra Bloch, *Diversity Gone Wrong: A Historical Inquiry into the Evolving Meaning of Diversity from Bakke to Fisher*, 20 U. Pa. J. Const. L. 1145 (2017). [↑](#footnote-ref-21)