# 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, as invalid. Despite disqualifying Davis's specific program, Justice Powell, in a plurality opinion, approved the use of race in admissions if necessary to promote a "compelling state interest”.[[1]](#footnote-1) Employing strict scrutiny, Justice Powell questioned which state's 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, Justice Powell 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 only be compelling if a university could identify specific instances of institutional discrimination, excluding broader social discrimination. Consequently, Justice Powell's narrowing of the remedial logic made it impractical for use in the context of higher education.[[4]](#footnote-4)

As an alternative compelling interest, Justice Powell provided 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) Diversity, to some extent, has been evident for over a century,[[6]](#footnote-6) but the diversity rationale embraced by Justice Powell in *Bakke* was born 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, constructing the legal discourse and public debates to the diversity interest.

Diversity for justice Powell 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" followed, according to Justice Powell, from the academic freedom of the university.[[10]](#footnote-10) The compelling state interest of diversity, in Powell’s plurality, was divorced from the history of the civil rights movement that give birth to these practices, and engaged with a the utilitarian benefits of diversity. Diversity for him was not a good in itself, but an instrument to achieve other, pedagogical and market driven goals. He conveyed that a "student with a particular background-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 that instrumental logic, diversity for Justice Powell was not necessarily or even dominantly about race, but 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 was about improving the pedagogical experience of *all* students, rather than any specific group in society.[[13]](#footnote-13) For Justice Powell, diversity could be pursued by universities, for its pedagogical values.

Justice Thurgood Marshall, who twenty-four years earlier led the *Brown* litigation to dismantle racial segregation in public school as a civil rights lawyer, joined the *Bakke* plurality. But for him, the rationale behind affirmative action was 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 of Justice Marshall opinion was, until recently, mostly forgotten.[[15]](#footnote-15) It was Justice Powell’s sole-authored opinion that had an overreaching influence over affirmative action and the discourse that surrounding it. As Stanford Levinson described, it was as if the Court ordered in Bakke: stop talking about rectification of past social injustice and start talking about diversity.[[16]](#footnote-16) Though not in the context of higher education, in *City of Richmond v. Croson* (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. In so doing, it acknowledged that addressing specific instances of past discrimination, supported by statistical evidence, was valid. However, much like in *Bakke*, the court prohibited remedying "societal discrimination.”[[18]](#footnote-18) The constrains and limitation established in Bakke and reiterated in Corson, pushed educational institutions towards using diversity as a compelling interest. And Diversity has been the controlling rationale behind affirmative action ever since.

Critics of *Bakke* and the diversity rationale mourned 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 justified affirmative action in the first place, and that without a more sound justification, minorities are left vulnerable, depended on the grace of the universities and their benefits.[[20]](#footnote-20)

But as I showed elsewhere, diversity was never a fixed term. The meaning of diversity has been subject to contestation, renegotiation and resignification.[[21]](#footnote-21) Going beyond the narrow doctrinal analysis of the Court opinions, this article builds on both a qualitative analysis of the briefs and the amicus briefs filed to the Court in the subsequent cases in the cases challenging affirmative action, this article shows that the value assigned to diversity and with it the justifications for preforming affirmative action, was actually not set by the Court in Bakke , but evolved over time in long conversation between 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. Openheimer, *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) (“*post-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)