

# Affirmative Action and the Boundaries of Discrimination

*Regents of the University of California v. Bakke* (1978)

## Regents of the University of California v. Bakke

- 438 U.S. 265 (1978)
- Decided: June 28, 1978
- Vote: 5–4
- Opinion of the Court: There were multiple opinions filed by several justices, of which the most important was that of Lewis F. Powell, whose views represented ‘the majority with regard to the description of the facts in the case and the remedy.

The Supreme Court’s decision in *Brown v. Board of Education* (1954, 1955) ended the practice of “separate but equal” treatment for blacks and whites in the United States and heralded a new age in constitutional law, but a decade passed before Congress addressed the question of how to broaden legal protections against discrimination. As President John F. Kennedy noted before his death in 1963, “Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.” The Civil Rights Act of 1964 turned Kennedy’s words into a legal legacy.

President Lyndon B. Johnson, a Texan elevated to the nation’s highest office following the assassination of Kennedy, made passage of the Civil Rights Act a priority for his administration. Johnson cajoled and arm wrestled previously hostile southern Democrats to join with their liberal northern counterparts to enact the legislation, the most significant in the nation’s history. Its most important provision, Title VI, ended legally sanctioned discrimination and specifically prohibited preferences based on race, ethnicity, or national origin in programs supported by federal funds. Another provision prohibited discrimination based on sex.

Simply stating that discrimination would no longer be tolerated did not translate into bringing new opportunity to those people who had suffered prejudicial treatment. The question became how to overcome the tension between an individual’s claim to equal treatment by a state, and that state’s responsibility to foster equality among its citizens. In June 1965, President Johnson spoke to the graduating class of Howard University about the need to bring the ideal of equal opportunity into balance with equality of results. For Johnson the answer was with what he termed “affirmative action” programs. Johnson noted that “You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with others’ and still justly believe that you have been completely fair.” Johnson went on to explain that “[i]t is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates.”

Affirmative action policies awarded public contracts, jobs, admission to

higher education, and other social benefits on the basis of membership in designated groups, or protected classes as the law calls them, who were victims of past discrimination. Affirmative action is premised on the idea of group rather than individual rights, and emphasizes equality of results rather than equality of opportunity. The racial and gender preferences inherent in affirmative action have been repeatedly challenged by individuals, often white males, who are not members of a protected class. They claim what is called reverse discrimination. The “reverse” in reverse discrimination means discrimination directed against white people. The problem, critics of the policy argue, is that discrimination is discrimination, no matter who it is directed against, white or black.

These critics insist that the government should never chose sides based on race and ethnicity. Affirmative action is a retreat from the goal of a color-blind society in which each individual is judged on his or her merit. People opposed to affirmative action assert that any preferences based on race or gender violate the equal protection clause of the Fourteenth Amendment, which orders that “No State shall...deny to any person within its jurisdiction the equal protection of the laws.” They also argue that affirmative action flies in the face of the words of Title VI itself, which provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Clearly, values were in conflict. Title VI of the Civil Rights Act of 1964 encouraged greater opportunity for people of all races; it also sought to remedy past racial bias by spending federal funds in ways that would benefit particular racial or other minority groups. A private institution, such as a university or college, was not required to practice affirmative action as long as it did not accept federal funds. If it did, however, then it was required to adopt and follow an affirmative action plan. The Supreme Court has addressed affirmative action in such diverse matters as voting rights, housing sales and rentals, employment, contracts for public works projects, and university admissions and financial aid. It has considered not only the use of race but also sex as a basis on which to distribute certain benefits. At the center of the Court’s deliberations has been the hotly contested issue of whether an affirmative action program can specify a quota for any group, such as a racial minority or women, to receive a particular benefit. A sharply divided Court has generally accepted affirmative action programs and the limited use of quotas, although it struggled to do so.

Nowhere is the clash of competing values more apparent than in admissions to college. A college degree has become economically valuable; a college graduate will earn on average one million dollars more than the average high school graduate in his or her lifetime. Historically people from certain minority groups have been denied admission to higher education. Beginning in the 1970s, many universities adopted programs that were intended to make it easier for minorities to gain admission. That goal came into sharp conflict with the aspirations of white, majority candidates who, according to the traditional tests for admission, were often as well qualified or better qualified than the minority candidates.

The medical school of the University of California at Davis, which accepted federal funding, adopted an affirmative action program in 1970. The faculty decided to address the longstanding absence of Latino, African American, and Native American students through a special admissions policy. Of its one hundred annual slots for admission, the school designated sixteen— a quota—to be filled

through a special admission process. Individuals claiming special admissions had to come from one of these historically underrepresented groups, and they could present much lower grade point averages and test scores than those candidates admitted through the regular process. Admission to the medical school was a highly competitive process; about 2,600 candidates applied annually for the one hundred places.

Allan Bakke, a white male aerospace engineer in his mid-thirties, applied in 1973 and 1974. He was rejected for admission twice even though his grades and admission scores were significantly better than those of the sixteen people who filled the minority slots. Bakke filed suit in state court claiming “reverse discrimination.” Bakke’s legal counsel insisted that the Davis program violated Title VI because it used race as a basis by which to admit some students and not others. Bakke’s counsel also argued that the Davis policy violated the equal protection clause of the Fourteenth Amendment, once again noting that the state of California through its university system had discriminated against him because he was white.

The Regents of the University of California agreed that using racial designations as criteria for admissions was inappropriate because they had no relevance to the actual performance of medical students or doctors. But they argued that the Davis program was directed toward “disadvantaged citizens” and minorities. In theory, they argued, a white person could be admitted through the special program. The university defended its special program, noting that simply because some of the minority applicants had lower scores than the general pool of candidates it did not mean that they were unqualified. The university also stressed that although historically it had not discriminated, it had an obligation to address the effects of past and continuing societal discrimination. Bringing about such justice was a legitimate and compelling concern of the state. The policy would also, they argued, have other benefits. It would create a richer and more diverse environment for all medical students, improve medical services to minority communities, and provide role models for the next generation of minority youths. The university lost in both the state trial court and on appeal to the California Supreme Court. It then turned to the U.S. Supreme Court for relief.

Bakke’s case sparked extensive national attention. The Supreme Court received fifty-seven *amici curiae* (friends of the court) briefs, an extraordinarily large number, from both supporters and opponents of Bakke. These briefs vividly demonstrated how divisive the affirmative action debate had become. Hundreds of people lined up at dawn outside the Supreme Court in order to hear the oral arguments, and demonstrators marched in front of the building.

Several minority organizations tried to stop the university from appealing the case. They believed that it was a poor vehicle with which to test the constitutionality of affirmative action, in large measure because the policy of the UC Davis Medical School itself was suspect. Though directed at “disadvantaged citizens,” the special admissions program, they noted, had admitted only nonwhite applicants. Groups representing Asian Americans had another concern. They complained that the affirmative action policy at Davis worked against them, as they had among the highest grade point averages and test scores, yet were not admitted in numbers commensurate with their academic success.

Reynold Colvin argued Bakke’s case before the Court. He was the senior member of a small general practice law firm in San Francisco, and most observers concluded that Colvin was in over his head. Colvin’s oral argument did little

to assuage their concerns. Several of Bakke's supporters had urged Colvin to allow University of Chicago law professor Phillip B. Kurland, an experienced high court litigator and distinguished constitutional scholar, to do some or all of the argument. Colvin refused, and simply pounded home one message: "to the extent that the preference is on the basis of race, we believe that is an unconstitutional advantage." The sixteen slots set aside for "disadvantaged citizens" amounted to nothing more than a racial quota, an act of reverse discrimination that should be held unconstitutional under the equal protection clause of the Fourteenth Amendment. Colvin insisted that any quota was illegal under Title VI of the Civil Rights Act.

The Regents of the University of California retained Archibald Cox, a Harvard law professor and one of the most distinguished figures in American law. Cox was a former solicitor general who had argued more than sixty cases before the Supreme Court.

Cox sketched his case in epic terms. He observed,

The answer which the Court gives [in this case] will determine, perhaps for decades, whether members of these minorities are to have the kind of meaningful access to higher education in the professions, which the universities have accorded them in recent years, or are to be reduced to the trivial numbers which they were prior to the adoption of minority admission programs.

The special admissions program, he noted, had the welcome benefit of bringing greater numbers of minorities into medical education. More diversity in the classroom would promote more diversity in the profession, which would in turn mean the better delivery of health services.

Cox also argued that the sixteen slots reserved for "disadvantaged citizens" did not create a quota, an assertion that encountered immediate, skeptical questioning from the justices. Cox replied that any program that did not take race into account would not work and the state had, in any case, a compelling interest in addressing in society the wrongs of past discrimination, even if the UC Davis Medical School had not itself engaged in racial discrimination.

The Court that Cox addressed had become consistently more conservative on a host of issues, including race, but it was also seriously fractured internally. The court voted 5 to 4 to admit Bakke to the UC Davis Medical School. It held further that a university may consider racial criteria as part of the admissions process but that it cannot do so through fixed quotas and in such a way that made race the determining factor in the process.

The justices reached this conclusion through six separate opinions. Draft opinions circulated among the justices for eight months, but none of these was capable of commanding a majority. Finally, on June 28, 1978, at the end of the term, the Court rendered its decision. In announcing that decision, Justice Lewis F. Powell Jr. said, "we speak today with a notable lack of unanimity."

The *Bakke* decision is best understood as two decisions. One part of the Court preferred to consider only the statutory, not the constitutional, basis of the issues; that is, they addressed only the question of whether Title VI prohibited the kind of policy adopted at Davis. Four of the justices ( John Paul Stevens, Warren Burger, Potter Stewart, and William H. Rehnquist) agreed that, in the words of Justice Stevens, the "plain meaning" of Title VI and its "broad prohibition against the exclusion of any individual" from a federally funded program based on race was enough to order Bakke admitted. A second bloc of the Court,

also composed of four justices (William J. Brennan Jr., Thurgood Marshall, Byron White, and Harry Blackmun) believed that the issue should be addressed as a constitutional matter. It was possible to use race as a basis for helping groups that had suffered discrimination as long as there was an important public purpose in doing so. Race could be used, these four insisted, as long as it did not put the weight of the government behind policies that either stigmatized an individual or fostered hatred and separation.

Powell cast the deciding vote, and he sided with different justices in doing so. Powell's opinion stated, "On the first question—whether the special admission program is invalid...there are five votes to affirm the judgment invalidating the special program. Under this judgment, Bakke will be admitted to the medical school." Powell wrote, "When classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. There are serious problems of justice," he continued, "connected with the idea of preference." "[C]ourts may be asked, to validate the burdens imposed upon individual members of a particular group in order to advance the group's general interest. Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups."

In answering the second issue, whether race may be considered as a factor in an admissions program, Powell said that some programs can legally take race into account. This approach meant, given previous Court decisions on issues such as contracts set aside for minority business people, that race could be used as a basis upon which to rest state policy, but such policies would be subject to the most intense review. Powell concluded by drawing on Justice Brennan's separate opinion, which argued for less scrutiny to be applied to the affirmative action programs: "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice."

Powell concluded that the state's goal of educational diversity was the only constitutionally permissible justification. Universities had the power to exercise affirmative action based on the academic freedom granted them under the First Amendment.

An otherwise qualified medical student," he wrote, "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.

Powell, perhaps with an eye to Archibald Cox's arguments, cited the Harvard admissions program as an example in which "race is considered in a flexible program designed to achieve diversity, but it is only one factor—weighed competitively—against a number of factors deemed relevant."

In separate opinions, Justices Marshall and Blackmun expressed their support for affirmative action and their displeasure at the narrow holding. "After several hundred years of class-based discrimination against Negroes," Marshall observed, "the Court is unwilling to hold that a class-based remedy for that discrimination is permissible." Blackmun wrote of his desire that affirmative action would be only a temporary fix and would become unnecessary within a decade. However, he conceded that "in order to get beyond racism, we must first

take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.”

Judicial division fueled public confusion. The *New York Times* summarized the decision in a headline that read: “No One Lost.” Perhaps no one won either. Attorney General Griffin Bell hailed the decision as “a great victory for affirmative action”; the civil rights leader Jesse Jackson declared it “a devastating blow to our civil-rights struggle.” The divisions in the courts reflected divisions in society. Two of the nation’s largest states, California and Florida, passed ballot initiatives to prohibit the use of race as a consideration in college admissions. The issue was far from settled.

In 2003, the Court returned to the issue of affirmative action in college admissions when it decided, by votes of 5 to 4, two cases involving the University of Michigan, *Grutter v. Bollinger* and *Gratz v. Bollinger*. As in the Bakke case, friends of the court piled on a record number of briefs. More than one hundred amicus briefs were filed in the two cases in support of the University of Michigan and its president, Lee Bollinger, who had vigorously pushed affirmative action. Corporate and military leaders filed briefs arguing that the increasingly diverse racial make-up of the nation and the globalization of business and national defense required universities to educate leaders of the next generation drawn from all segments of society. Diversity, in their view, was essential to America’s national security and economic competitiveness. Another fifteen amicus briefs were filed in support of the plaintiffs, Jennifer Gratz and Barbara Grutter.

*Grutter* involved the admissions policy of the University of Michigan Law School; *Gratz* considered the admissions policy for the university’s undergraduate program. The goal of the university’s admissions policy in both instances was to achieve greater racial diversity, but these two different schools attempted to accomplish this in different ways. The law school’s policy required that admissions officers evaluate each applicant individually based on his or her undergraduate grade point average, law school admissions test scores, a personal statement, letters of recommendation, and an essay describing the way in which the applicant would contribute to the life and diversity of the law school. The program aimed to “achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.” To achieve this goal, admissions officers were directed to give special attention to students from groups historically discriminated against, such as African Americans, Hispanics, and Native Americans. Without such attention, the program assumed, students in these groups would never be admitted in meaningful numbers. What was that critical number? The answer was a “critical mass” sufficient to “ensure their ability to make unique contributions to the character of the Law School.”

The undergraduate policy operated differently. Applicants were evaluated using a point system, in which one hundred points were needed to gain admission. Every applicant from a minority group was automatically given twenty points, more points than were assigned to any other attribute, such as high school class standing.

In *Grutter*, the Court approved the law school’s “narrowly tailored” approach and reiterated the Bakke finding that fostering diversity in higher education was a compelling state interest. As Justice Sandra Day O’Connor explained in her opinion for the Court, “The Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all

the ways an applicant might contribute to a diverse educational environment.” Justice O’Connor, however, also believed that such a policy could and should not continue indefinitely. “We expect that twenty-five years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

In *Gratz*, the Court reached the opposite conclusion. With Justice O’Connor now on the other side of the issue, the Court held that the undergraduate admissions policy was not narrowly tailored to meet the goal of promoting diversity and failed to provide for a “meaningful individualized review of applicants.” The automatic assignment of twenty points to each minority applicant meant that race became the decisive factor rather than one of many factors used to settle on who was admitted.

Four members of the Court, Chief Justice William Rehnquist and Justices Antonin Scalia, Clarence Thomas, and Anthony Kennedy, would have voted to hold both policies unconstitutional. The chief justice described the law school’s policy as a “sham” to cover a scheme of racially proportionate admissions. Both Scalia and Thomas insisted that the equal protection clause prohibited any consideration of race in admissions. Quoting the antislavery orator Frederick Douglass, Thomas, himself African American, denounced negative stereotyping as the inevitable outcome of using race to decide who is admitted to prestigious colleges.

The debate over affirmative action remains unsettled. In *Bakke* the high court recognized that a definitive ruling on the matter would create a powerful political backlash from one end of the political spectrum or the other. Though the decision has come under fire in recent years for failing to come to grips with the issue, this case serves as an important reminder that, often, precise resolutions of constitutional matters by the high court do not necessarily best serve the public interest. The *Grutter* and *Gratz* decisions affirmed by a narrow margin that diversity should be upheld as a matter of diversity but race should not be the deciding factor in awarding social benefits.

The unprecedented support that corporate America and the military gave to the University of Michigan and its admissions policies provided a reminder that diversity was not just a social justice issue but a necessity for a strong national economy and defense. And, yet, while affirmative action stands on firmer legal ground, the Court’s work in *Bakke* and the Michigan cases also leaves mixed messages and considerable uncertainty about whether the Constitution values more highly equality of opportunity or equality of results. Critics of affirmative action also continue to complain that the real differences in American life result from the unequal distribution of income and wealth, matters not covered by diversity policies. Most likely, the constitutional debate over affirmative action and the troubling conditions that it attempts to address will linger well beyond Justice O’Connor’s quarter-century deadline.

---

## “Equal Opportunity is Essential but Not Enough”



*Dissenting in Plessy v. Ferguson (1896) Justice John Marshall Harlan declared, “Our Constitution is color-blind and neither knows nor tolerates classes among citizens.” Yet by the 1960s some observers had concluded that it was insufficient to remove prior legal barriers for racial minorities. They insisted that affirmative steps were required to rectify past racial discrimination and to ensure greater economic opportunities for minorities. President Lyndon B. Johnson articulated this view in a 1965 commencement address at historically black Howard University. The speech’s title was “To Fulfill These Rights.” Johnson was the first President to suggest that the government had a duty to provide for equality of outcomes, not just of opportunities. First used to assist disadvantaged racial minorities, affirmative action programs were subsequently extended to women.*



Freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

You do not take a person who, for years, has been hobbled by chains and liberate him, 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.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

For the task is to give 20 million Negroes the same chance as every other American to learn and grow, to work and share in society, to develop their abilities—physical, mental and spiritual, and to pursue their individual happiness.

To this end equal opportunity is essential, but not enough, not enough. Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in—by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.

---

## Racial Preferences Are Always Unconstitutional



*In Grutter v. Bollinger the Court upheld the University of Michigan Law School's use of race, along with other factors, to evaluate applicants in an attempt to foster a diverse educational community. Justice Sandra Day O'Connor, writing for a 5–4 majority, endorsed the diversity rationale first set forth by Justice Powell in Bakke. Justice Antonin Scalia, however, issued this biting dissent (with which Justice Clarence Thomas concurred), which summed up the argument against affirmative action.*



The University of Michigan Law School's mystical "critical mass" justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.

I find particularly unanswerable [this] central point: that the allegedly "compelling state interest" at issue here is not the incremental "educational benefit" that emanates from the fabled "critical mass" of minority students, but rather Michigan's interest in maintaining a "prestige" law school whose normal admissions standards disproportionately exclude blacks and other minorities. If that is a compelling state interest, everything is.

The "educational benefit" that the University of Michigan seeks to achieve by racial discrimination consists, according to the Court, of "cross-racial understanding," and "better prepar[ation of ] students for an increasingly diverse workforce and society," all of which is necessary not only for work, but also for good "citizenship." This is not, of course, an "educational benefit" on which students will be graded on....For it is a lesson of life rather than law....If properly considered an "educational benefit" at all, it is surely not one that is either uniquely relevant to law school or uniquely "teachable" in a formal educational setting. And therefore: If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a "critical mass" that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, *particularly* appropriate—for the civil service system of the State of Michigan to do so. There, also, those exposed to "critical masses" of certain races will presum-

ably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized—indeed, should be praised—if they also "teach" good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring. The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.

Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation.... [S]uits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass." . . . The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.