Regents of U.C. v. Bakke (1978)

Is Affirmative Action Constitutional?

President Lyndon Johnson signed the historic Civil Rights Act of 1964. Right behind him was Martin Luther King Jr.

No state shall . . . deny to any person within its jurisdiction the equal protection of its laws.
—Equal protection clause of the 14th Amendment

The 14th Amendment was adopted in 1868, following the Civil War. Its equal protection clause was intended primarily to prevent racial discrimination against blacks. It would take almost 100 years, however, before the equal protection clause was enforced to prevent racial discrimination.

After the Civil War, federal troops occupied the South. Following a 12-year occupation, Southern states were left to govern themselves. These states began enacting Jim Crow laws, which made racial segregation legal. Blacks and whites had to use separate schools, hospitals, libraries, restaurants, hotels, bathrooms, and even drinking fountains. In 1896 in *Plessy v. Ferguson*, the U.S. Supreme Court ruled that these laws did not violate the equal protection clause of the 14th Amendment as long as the separate facilities were equal.

With the backing of the court's "separate but equal" doctrine, Jim Crow laws spread throughout the South. They stayed in effect until the 1950s and 1960s, when the civil rights movement launched an all-out campaign against them. In a series of court cases, the U.S. Supreme Court, beginning with *Brown v. Board of Education*, declared that racial segregation laws were "inherently unequal" and violated the equal protection clause. The U.S. Congress bolstered the equal protection clause by passing the 1964 Civil Rights Act, ensuring equal rights for all citizens.

irmative-Action Programs

)wing the successes of the civil rights move-
t, concern arose that simply making discrimi-
)n illegal would not achieve equality of oppor-
y in the United States. President Lyndon
son expressed this concern in a speech in 1965:
'ou do not wipe away the scars of centuries
)y saying: "Now, you are free to go where you
vant, do as you desire, and choose the leaders
'ou please." You do not take a man who for
'ears has been hobbled by chains, liberate
iim, bring him to the starting line of a race,
aying, "You are free to compete with all the
)thers," and still justly believe you have been
ompletely fair . . . This is the next and more
)rofound stage of the battle for civil rights.
We seek not just freedom but opportunity—
iot just legal equity but human ability—not
ist equality as a right and a theory, but
quality as a fact and as a result.

dent Johnson issued an executive order
.ring government contractors to "take affir-
ve action" to hire minority employees. Soon
overnment, industry, and educational insti-
ns developed affirmative-action programs.
e programs were designed to offer extra
)rtunities to disadvantaged minorities who
)uffered discrimination in the past. Their
was to increase the percentage of minorities
gher education, in professional schools, and
)per-level business positions.

result of affirmative-action programs is that
times a minority applicant for a job or
)l admission will be preferred over white
cants with similar or even better qualifica-
. It is argued that this preference of minority
cants is justified, since the idea behind affir-
ve action is to make up for past disadvan-
suffered by these minority groups.

1 a person is admitted or hired because he
e is a member of a minority group, a classi-
on has been made based on race or ethnic
ground. In such a case, a person has been
)minated against because he or she is not a
ber of a minority group. This favoring of
minority applicants over others is sometimes called reverse discrimination.

Reverse discrimination poses a constitutional question: Does the equal protection clause outlaw it? The *Bakke* case was the first reverse discrimination case decided by the U.S. Supreme Court. It was a landmark decision that affected the rights of both minority and non-minority groups all over the country.

Regents of the University of California v. Allan Bakke

Allan Bakke, a white engineer, applied to the University of California's medical school at Davis in 1973 and 1974. The school turned him down both times. Angered, Bakke sued the U.C. Regents in California Superior Court demanding admission to the Davis medical school. He claimed he had been turned down only because the school set aside 16 of the 100 spots in each first-year class for minority students. Had the 16 spots not been saved, he said, he would have gained admission both times, as he was in the top 16 of those whites who were turned down and ahead of those minority students in the special program. These "special admissions programs," Bakke argued, constitute reverse discrimination and are illegal.

The trial court found that the medical school's special admissions program violated both the 14th Amendment's equal protection clause and Title VI of the 1964 Civil Rights Act. Because of the importance of the issue, the California Supreme Court heard the appeal directly from the trial court. In September 1976, the California Supreme Court agreed with Bakke's claims. Basing its ruling on the 14th Amendment, the court held that the equal protection clause required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race." The University of California appealed this decision to the U.S. Supreme Court.

The Divided Court

The Supreme Court was deeply divided on the case. Two opposing camps of four justices each issued opinions. The court's decision was written by Justice Lewis Powell, a member of neither camp. He got justices from both camps to concur with and even join in parts of his opinion. They dissented from other parts.

The Brennan Opinion

Writing for one camp was Justice William Brennan. Joining Justice Brennan were Justices Marshall, White, and Blackmun.

Justice Brennan argued that the Davis program did not violate the equal protection clause. The equal protection clause demanded that the court carefully examine any government program that makes decisions based on race. To be permissible under the equal protection clause, the program must serve an important government purpose. Brennan concluded that the Davis program's "purpose of remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions programs" to overcome "substantial and chronic" minority underrepresentation in the medical profession.

The Stevens Opinion

The other camp of four justices included Chief Justice Burger and Justices Stewart, Stevens, and Rehnquist. Justice John Paul Stevens wrote the opinion for this group.

Justice Stevens pointed out that even though the *Bakke* case presented an important constitutional issue, "Our settled practice . . . is to avoid . . . a constitutional issue if a case can be fairly decided on a statutory ground." Stevens stated that the decision should be based on Title VI of the 1964 Civil Rights Act. This law provided:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in . . . any program or activity receiving Federal financial assistance.

Stevens cited congressional sponsors of the legislation. They said that the law was meant to be "color-blind" and ban all discrimination based on race.

Stevens noted that the Davis medical school received federal financial assistance and the school "excluded Bakke from participation in its program of medical education because of his race." He therefore concluded that the school's special program violated this law.

The Opinion of the Court

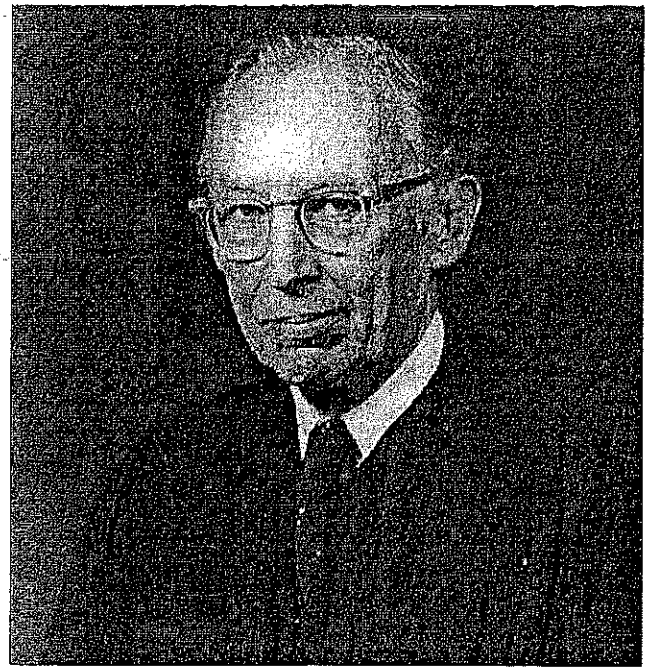
Justice Lewis Powell wrote the opinion of the court. He disagreed with Brennan's opinion that the Davis program met the requirements of the equal protection clause. But he also disagreed with Stevens' conclusion that admissions programs could never consider a person's race.

He first addressed Stevens' claim that Title VI specifically banned giving preferential treatment to disadvantaged minorities. Powell argued (as did Brennan) that Title VI simply meant that those receiving federal funds could not violate the limits of the 14th Amendment. Powell cited statements from many members of Congress during the debate on the bill. One of the sponsors of the bill stated: "Basically, there is a constitutional restriction against discrimination in the use of Federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction."

Justice Powell next turned to the Constitution's equal protection clause. This clause makes any program using racial distinction "inherently suspect." To be upheld, the program must be "precisely tailored to serve a compelling governmental interest."

The University of California cited four purposes for its program. Powell examined each to see if it was a "compelling government interest," and if so, whether it was "precisely tailored" to serve that interest.

The first goal was to increase the number of "traditionally disfavored minorities in medical schools and in the medical profession." Powell rejected this goal as unconstitutional: "Preferring members of any one group for no reason other



Lewis Powell Jr. (1907–1998) was a justice of the Supreme Court from 1972 to 1987. He wrote the opinion of the court in the *Bakke* case.

than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

The second goal was to counter the effects of "societal discrimination." Powell rejected that goal as too "amorphous a concept of injury." He stated that the court had "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals" without "findings of constitutional or statutory violations."

The third goal of the program was to increase the number of doctors who will practice medicine in underserved communities. Powell agreed that this could be a compelling state interest. But he found "virtually no evidence in the record indicating that [the] special admissions program is either needed or geared to promote that goal."

The fourth and final goal of the program was to create "an ethnically diverse student body." Powell found diversity a compelling interest for public universities. He agreed that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." But he found the Davis program "flawed" in creating a diverse student body:

> The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Powell argued that it was improper to set aside a certain number of seats for members of minority groups. This type of program does not let all the applicants compete against one another. But Powell stated that a public university could consider race or ethnicity as a "plus" factor. He explained:

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Thus Powell's opinion affirmed the California Supreme Court's judgment that the Davis program was invalid under the 14th Amendment. But it reversed the California court's ruling that the 14th Amendment's due process clause prevented the school from ever considering an applicant's race.

Aftermath

Allan Bakke was admitted to the Davis medical school. The legal results of the case, however, were unclear for many years. The court was so divided that many legal observers believed

Powell's opinion meant little. But in 2003, the Supreme Court decided two affirmative-action cases using Powell's reasoning. It struck down in *Gratz v. Bollinger* the University of Michigan's admissions program that automatically gave members of minority groups added points toward admission (assuring every qualified minority of admission). But in *Grutter v. Bollinger* it upheld the university's law school admissions program, which allowed race as one of many "plus" factors.

For Discussion

1. What is the equal protection clause? What was its original purpose? Why was it not used for this purpose for almost 100 years?

2. What are affirmative-action programs? What do you think of President Johnson's justification for such programs in his 1965 speech (see page 75)?

3. What was the affirmative-action program in the *Bakke* case? Why did Bakke believe it was unfair? What were the decisions of the California trial court and California Supreme Court?

4. The U.S. Supreme Court was deeply divided in the case. What was the dissenting opinion of Justice Brennan? The concurring opinion of Justice Stevens? How did Justice Powell get to write the opinion of the Supreme Court?

5. What were the four compelling interests that the University of California cited for its affirmative-action program? Which did Justice Powell believe were actually compelling interests? Do you agree with him? Explain.

6. How did Powell justify a program that uses race only as a "plus" factor? Do you agree that such a program is constitutional? Explain.