

Handout C: *Regents of the University of California v. Bakke* (1978) – Opinions

Justice Thurgood Marshall’s Memo, 1978

Note: This memo was circulated while the Justices were considering the case.

The decision in this case depends on whether you consider the action of [UCD Medical School] as admitting certain students or excluding certain other students.

1. What two approaches to the *Bakke* case does Justice Marshall identify?

Regents of the University of California v. Bakke (1978)–Plurality Decision (5-4)

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit. ...The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal... Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake...

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of “societal discrimination” does not justify a classification that imposes disadvantages upon persons like [Bakke], who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered...

[A] diverse student body ... clearly is a constitutionally permissible goal for an institution of higher education. ...Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body...

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats.

In enjoining petitioner [UC-Davis] from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court’s judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

1. Of the two approaches identified by Marshall (above), which does the Court appear to have adopted?

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2. How does the Court define terms such as “equal” and “protection” in this ruling?

***Regents of the University of California v. Bakke* (1978)–Justice Thurgood Marshall’s Separate Opinion**

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner’s admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution, as interpreted by this Court, did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier...

The position of the Negro today in America is the tragic but inevitable consequence of centuries of

unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro... It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person’s skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors...

1. In what way does Marshall agree with the majority decision? How does he depart from it?