

■ Justice Thurgood Marshall's Dissent in the *Bakke* Case

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Author: Justice Thurgood Marshall

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Summary Overview

Thurgood Marshall is widely regarded as a pioneering figure in the fight for civil rights and a symbol of liberal progress in the United States. As the first African American Supreme Court Justice, appointed in 1967 by President Lyndon Johnson, Marshall dedicated his career to advancing racial equality, justice, and civil liberties.

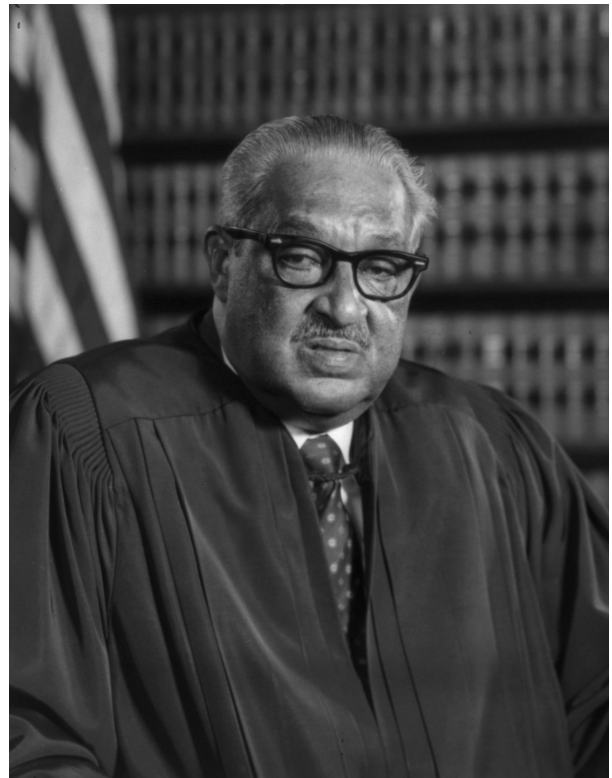
The civil rights era witnessed the first efforts by the United States government to redress racism since Reconstruction. Supreme Court cases like *Brown vs. Board of Education* (1954) and congressional laws like the 1964 Civil Rights Act and 1965 Voting Rights Act, dismantled the legal architecture of American segregation and racial disenfranchisement. Yet the question emerged whether removing legal obstacles to equality was enough to undo the damage of slavery and Jim Crow.

In order to remedy the effects of centuries of discrimination and ongoing disadvantages, government and private institutions in the 1960s and 1970s implemented “affirmative action” plans, which actively sought to recruit and promote minorities and women. Some institutions used set quotas to increase recruitment. The University of California Medical School at Davis reserved sixteen of one hundred openings each year for minority and economically disadvantaged groups.

After being rejected twice, a white applicant named Alan Bakke took the University of California Medical School to court, arguing the university’s quota system violated his constitutional rights of “equal protection” under the 14th Amendment. By 1978, Bakke’s case wound its way to the United States Supreme Court, which ruled 5–4 that racial quotas to remedy past discrimination were unconstitutional, but that race could be used as one of several factors on a case-by-case basis to promote the goal of diversity.

Defining Moment

President John F. Kennedy was the first to use the term “affirmative action” when in 1961 he ordered federal contractors to take positive steps to employ and promote minorities. At a speech given to students of Howard University in 1965, President Lyndon B. Johnson declared “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 you have been completely fair.”



Thurgood Marshall. Photo via Wikimedia Commons. [Public domain.]

President Richard M. Nixon expanded affirmative action in 1969 with the Department of Labor's "Philadelphia Plan," which established "goals and timetables" to hire minorities for the notoriously racist Philadelphia construction trades. The formula of "goals and time tables" was used as a model for other businesses and unions in the 1970s.

The expansion of affirmative action in the 1970s came at a time of growing white backlash against Black advances of the 1960s. High unemployment made many white men even more antagonistic to programs to hire minorities and women. Meanwhile, the liberal Supreme Court under Chief Justice Earl Warren gave way to a more conservative Court under Chief Justice Warren Burger.

The Court's ruling in *Bakke* infuriated Thurgood Marshall, the first African American on the Supreme Court. Marshall was the architect of the NAACP's legal strategy in the 1940s and 1950s which opened up graduate and professional schools in the South to African Americans and then overturned *Plessy v. Ferguson*'s "separate but equal" doctrine in the 1954 *Brown* case. As an NAACP lawyer and U.S. solicitor general, Marshall had won 29 of 32 cases he had argued before the Supreme Court, including *Brown*, when Johnson nominated him to the bench in 1967.

Marshall saw the *Bakke* decision as a retreat from the fight for equality. Marshall's dissent was a refutation of the idea that racial quotas represented reverse discrimination against whites and that affirmative action was no longer needed to assure equality.

Author Biography

Thurgood Marshall was born on July 2, 1908, in Baltimore. In 1930, he graduated from Lincoln University and in 1933 received his law degree from Howard University, graduating first in his class. Marshall was one of a dedicated group of African American law students under the tutelage of Howard's Charles Houston, who used their law degrees to fight for racial justice. By 1940, Marshall was chief counsel for the NAACP's Legal Defense and Education Fund. There, Marshall won historic cases. He opened up graduate and law schools to African Americans; facilitated, in a 1944 Supreme Court decision, a ban on a whites-only primary in Texas; and helped determine a 1948 ruling that racially restrictive real estate covenants were unconstitutional. Marshall's most historic victory was the 1954 *Brown vs. Board of Education* case, in which the Supreme Court overturned the "separate but equal" doctrine in education. In 1961, President Kennedy appointed Marshall to the U.S. Court of Appeals for the Second Circuit, and in 1965 President Johnson appointed him U.S. solicitor general. In 1967 Johnson nominated Marshall to be the first African American on the Supreme Court. Marshall served on the Court until his retirement in 1989. Marshall died on January 24, 1993. Marshall was married to Vivien Burey from 1929 until her death in 1955 and, in that year, married Cecilia Suyat with whom he had two sons.



Historical Document

Justice Thurgood Marshall's Dissent in the Bakke Case

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.¹

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child.² The Negro child's mother is over three times more likely to die of complications in childbirth,³ and the infant mortality rate for Negroes is nearly twice that for whites.⁴ The median income of the Negro family is only 60% that of the median of a white family,⁵ and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.⁶

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites,⁷ and the unemployment rate for Negro teenagers is nearly three times that of white teenagers.⁸ A Negro male who completes four years of college can expect a median annual income of merely \$110 more than a white male who has only a high school diploma.⁹ Although Negroes represent 11.5% of the population,¹⁰ they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.¹¹

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death, the impact of the past is reflected in the still disfavored position of the Negro.

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.

III

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

A

This Court long ago remarked that “in any fair and just construction of any section or phrase of these Civil War amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy....” *Slaughter-House Cases*, 16 Wall. at 72.

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. The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes. Act of July 16, 1866, ch. 200, 14 Stat. 173; *see supra* at 391. Although the Freedmen's Bureau legislation provided aid for refugees, thereby including white persons within some of the relief measures, 14 Stat. 174; *see also* Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, the bill was regarded, to the dismay of many Congressmen, as “solely and entirely for the freedmen, and to the exclusion of all other persons....” Cong.Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Taylor). *See also id.* at 634–635 (remarks of Rep. Ritter); *id.* at App. 78, 80–81 (remarks of Rep. Chandler). Indeed, the bill was bitterly opposed on the ground that it “undertakes to make the negro in some respects... superior... , and gives them favors that the poor white boy in the North cannot get.” *Id.* at 401 (remarks of Sen. McDougall). *See also id.* at 319 (remarks of Sen. Hendricks); *id.* at 362 (remarks of Sen. Saulsbury); *id.* at 397 (remarks of Sen. Willey); *id.* at 544 (remarks of Rep. Taylor). The bill's supporters defended it not by rebutting the claim of special treatment, but by pointing to the need for such treatment:

“The very discrimination it makes between ‘destitute and suffering’ negroes and destitute and suffering white paupers proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection.” *Id.* at App. 75 (remarks of Rep. Phelps)

Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. *Id.* at 421, 688. President Johnson vetoed this bill, and also a subsequent bill that contained some modifications; one of his principal objections to both bills was that they gave special benefits to Negroes. Messages and Papers of the Presidents 3596, 3599, 3620, 3623 (1897). Rejecting the concerns of the President and the bill's opponents, Congress overrode the President's second veto. Cong.Globe, 39th Cong., 1st Sess., 3842, 3850 (1866).

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed

the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. It would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color, *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 94 (1945), to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.

B

As has been demonstrated in our joint opinion, this Court's past cases establish the constitutionality of race-conscious remedial measures. Beginning with the school desegregation cases, we recognized that, even absent a judicial or legislative finding of constitutional violation, a school board constitutionally could consider the race of students in making school assignment decisions. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971). We noted, moreover, that a "flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann*, the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful as starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green v. County School Board*, 391 U.S. 430 (1968), that all reasonable methods be available to formulate an effective remedy." *Board of Education v. Swann*, 402 U.S. 43, 46 (1971). As we have observed, "any other approach would freeze the *status quo* that is the very target of all desegregation processes." *McDaniel v. Barresi*, *supra* at 41.

Only last Term, in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), we upheld a New York reapportionment plan that was deliberately drawn on the basis of race to enhance the electoral power of Negroes and Puerto Ricans; the plan had the effect of diluting the electoral strength of the Hasidic Jewish community. We were willing in *UJO* to sanction the remedial use of a racial classification even though it disadvantaged otherwise "innocent" individuals. In another case last Term, *Califano v. Webster*, 430 U.S. 313 (1977), the Court upheld a provision in the Social Security laws that discriminated against men because its purpose was "the permissible one of redressing our society's longstanding disparate treatment of women." *Id.* at 317, quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 n. 8 (1977) (plurality opinion). We thus recognized the permissibility of remedying past societal discrimination through the use of otherwise disfavored classifications.

Nothing in those cases suggests that a university cannot similarly act to remedy past discrimination.¹² It is true that, in both *UJO* and *Webster*, the use of the disfavored classification was predicated on legislative or administrative action, but in neither case had those bodies made findings that there had been constitutional violations or that the specific individuals to be benefited had actually been the victims of discrimination. Rather, the classification in each of those cases was based on a determination that the group was in need of the remedy because of some type of past discrimination. 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.

IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that, for several hundred years, Negroes have been discriminated against not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone, but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the *Civil Rights Cases*, *supra*, the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." 109 U.S. at 25; *see supra* at 392. We cannot, in light of the history of the last century, yield to that view. Had the Court, in that decision and others, been willing to do for human liberty and the fundamental rights of American citizenship what it did... for the protection of slavery and the rights of the masters of fugitive slaves, 109 U.S. at 53 (Harlan, J., dissenting), we would not need now to permit the recognition of any "special wards."

Most importantly, had the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must

remember, however, that the principle that the “Constitution is colorblind” appeared only in the opinion of the lone dissenter. 163 U.S. at 559. The majority of the Court rejected the principle of color blindness, and for the next 60 years, from *Plessy* to *Brown v. Board of Education*, ours was a Nation where, by law, an individual could be given “special” treatment based on the color of his skin.

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. I do not believe that anyone can truly look into America’s past and still find that a remedy for the effects of that past is impermissible.

It has been said that this case involves only the individual, Bakke, and this University. I doubt, however, that there is a computer capable of determining the number of persons and institutions that may be affected by the decision in this case. For example, we are told by the Attorney General of the United States that at least 27 federal agencies have adopted regulations requiring recipients of federal funds to take “*affirmative action* to overcome the effects of conditions which resulted in limiting participation... by persons of a particular race, color, or national origin.” Supplemental Brief for United States as *Amicus Curiae* 16 [emphasis added]. I cannot even guess the number of state and local governments that have set up affirmative action programs, which may be affected by today’s decision.

I fear that we have come full circle. After the Civil War, our Government started several “affirmative action” programs. This Court, in the Civil Rights Cases and *Plessy v. Ferguson*, destroyed the movement toward complete equality. For almost a century, no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative action programs. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California.

Notes

1. The history recounted here is perhaps too well known to require documentation. But I must acknowledge the authorities on which I rely in retelling it. J. Franklin, *From Slavery to Freedom* (4th ed.1974) (hereinafter Franklin); R. Kluger, *Simple Justice* (1975) (hereinafter Kluger); C. Woodward, *The Strange Career of Jim Crow* (3d ed.1974) (hereinafter Woodward).

2. U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 65 (1977) (Table 94).
3. *Id.* at 70 (Table 102).
4. *Ibid.*
5. U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 107, p. 7 (1977) (Table 1).
6. *Id.* at 20 (Table 14).
7. U.S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, January, 1978, p. 170 (Table 44).
8. *Ibid.*
9. U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 105, p. 198 (1977) (Table 47).
10. U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract, *supra*, at 25 (Table 24).
11. *Id.* at 407-408 (Table 662) (based on 1970 census).
12. Indeed, the action of the University finds support in the regulations promulgated under Title VI by the Department of Health, Education, and Welfare and approved by the President, which authorize a federally funded institution to take affirmative steps to overcome past discrimination against groups even where the institution was not guilty of prior discrimination. 45 CFR § 80.3(b)(6)(ii) (1977)



Document Analysis

In the first part of his dissent (omitted here), Marshall traces the history of American racism from the first slave ships to land in North America. He chronicles Supreme Court cases that made preferential treatment for whites and discrimination against Black people the law of the land, including the infamous *Dred Scott* decision of 1857 which declared Black people were not citizens and had “no rights the white man was bound to respect,” and the 1896 *Plessy v. Ferguson* ruling. Marshall argues the Supreme Court’s history of supporting white supremacy made it incumbent upon the Court to support remedies such as the quota program it had just overturned in the *Bakke* case.

Marshall then turns to statistics (included here) which demonstrated the huge racial disparities persisting in 1978. Marshall declares, “The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death, the impact of the past is reflected in the still disfavored position of the Negro.”

Marshall believes that an admissions policy that takes no notice of race would benefit whites who have predominantly enjoyed educational and financial advantages passed down from generation to generation. Correcting the “devastating impact” of racism, Marshall asserts, “should be a state interest of the highest order.” Marshall argues that, without strong measures, racial inequality would continue to reproduce itself and “ensure that America will forever remain a divided society.”

Marshall contests the Court’s interpretation that the Fourteenth Amendment’s “equal protection” clause prohibited race conscious policies designed to remedy past discrimination. He argues that the Congress, which passed the Fourteenth Amendment in 1867 was the same Congress that, in 1866, had overridden President Andrew Johnson’s veto of the bill creating the Freedmen’s Bureau, designed primarily to assist the newly freed slaves. Marshall notes that many of the arguments used against quotas in the *Bakke* case were the same as those made against the Freedmen’s Bureau, yet the majority in Congress at that time saw no contradiction between race-specific

policies to remedy past discrimination and the equality clause of the Fourteenth Amendment.

The dissent goes on to cite several recent Supreme Court decisions by the Burger Court, which permitted race-specific policies “in making school assignment decisions” as well as “enhanc[ing] the electoral power of Negroes and Puerto Ricans.”

Marshall does acknowledge and “applaud” the Court’s ruling that race could be one criterion among many in school admissions policies, provided it was for the purpose of enhancing educational quality by promoting diversity. Yet he expresses his frustration that after decades of “class-based” discrimination, a “class-based remedy” was ruled unconstitutional.

Marshall concludes, “If we are ever to become a fully integrated society... we must be willing to take steps to open those doors of opportunity.”

Essential Themes

The Supreme Court’s ruling in *Bakke*, while not completely forbidding affirmative action, was a bitter blow to Marshall, whose life’s work had been dedicated to equalizing access to education for African Americans. As a young lawyer in the 1930s, he had accompanied his mentor, Charles Houston, throughout the South to document the gaping inequality in state expenditures between educating white and Black children. One of Marshall’s first victories was a 1935 Court of Appeals case, *Murray v. Pearson*, challenging the University of Maryland Law School’s whites-only policy. For Marshall, the *Bakke* case represented a demoralizing step back.

In the decades after *Bakke*, the Supreme Court continued to narrow and refine the legal parameters of affirmative action. Two milestone cases involved the University of Michigan in 2003. In *Gratz v. Bollinger*, the Court ruled the university’s undergraduate admissions’ use of a points system, in which race was one of several categories, was unconstitutional. But in *Grutter v. Bollinger*, involving the University’s law school, the Court ruled the law school’s narrow use of racial considerations on an individual basis met the Court’s “strict scrutiny” requirement and was constitutional.

A backlash against affirmative action gathered steam. In 1997, Californians passed Proposition 209 which forbids public institutions from using any form of affirmative action. Michigan passed a similar law which the Court upheld in *Schutte v. Coalition to Defend Affirmative Action* in 2013. In this ruling the Court did not end affirmative action, but declared voters of a state could choose to end it. The same year the Court tightened its “strict scrutiny” requirement in *Fischer v. University of Texas*. The Court ruled that race could still be used, but only if “race-neutral” alternatives did not exist.

—Robert Surbrug, PhD

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