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Foreword: *Bakke* at 40: The Past, Present, and Future of Affirmative Action

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In 2018, the UC Davis Law Review hosted the "*Bakke* at 40" conference. The day was devoted to the exploration of the past, present, and future of *Regents of the University of California v. Bakke*,[1] the 1978 U.S. Supreme Court decision that for a generation has shaped the consideration of race in admissions programs at American colleges and universities. Bringing together influential scholars from across the United States to commemorate the iconic decision's fortieth anniversary, the symposium shed light on the lasting impacts of *Bakke*.

It unquestionably is a most appropriate time to examine the affirmative action framework established by *Bakke*. On the day of the live symposium event, affirmative action literally was on trial in an

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[1] 438 U.S. 265 (1978).

action challenging Harvard University's race-conscious admissions program on the grounds that it unlawfully discriminates against Asian American applicants.[2] The Harvard case is simply the latest challenge to *Bakke*,[3] which is symptomatic of the fact that the decision fits uneasily into the Supreme Court's increasingly color-blind constitutional jurisprudence.[4]

The truth of the matter is that *Bakke*'s days may be numbered. The Supreme Court, with two new Justices appointed by President Trump,[5] is poised to revisit the constitutionality of affirmative action. Although reaffirming the core of *Bakke* in 2003, Justice O'Connor, writing for a majority of the Court, stated out of the blue that the nation should expect to no longer need to consider race in admissions in twenty-five years.[6] Nonetheless, *Bakke*, at least for now, remains good law.

The University of California, Davis was a most appropriate venue to hold a symposium examining four decades of *Bakke*. Allan Bakke, a White man, claimed that the UC Davis School of Medicine's "quota" for students of color violated his rights under the Equal Protection Clause of the Fourteenth Amendment.[7] In ruling in his favor, a

[2] *See* Carrie Jung, *Harvard's Affirmative Action Policy Goes on Trial*, NPR (Oct. 14, 2018), https://www.npr.org/2018/10/14/657341910/harvard-s-affirmative-action-policy-goes-on-trial.

[3] *See, e.g.*, Fisher v. Univ. of Texas, 136 S. Ct. 2198 (2016); Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291 (2014); Fisher v. Univ. of Texas, 570 U.S. 297 (2013).

[4] *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (rejecting the consideration of race in public elementary and secondary school assignments). It has been contested whether affirmative action is, as a matter of policy, beneficial to minorities. *Compare* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) (contending that race-conscious affirmative action can in fact result in a "mismatch" between minorities and laws schools in which they enroll), *with* David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005) (challenging the study and its conclusions), *and* Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools,"* 7 AFR.-AM. L. & POL'Y REP. 1 (2005) (to the same effect).

[5] *See* Alvin Chang, *Brett Kavanaugh and the Supreme Court's Drastic Shift to the Right, Cartoonsplained*, VOX (Sept. 14, 2018), https://www.vox.com/policy-and-politics/2018/7/9/17537808/supreme-court-brett-kavanaugh-right-cartoon.

[6] *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (O'Connor, J.) ("We expect that 25 years from now, the use of racial preferences will longer be necessary. . . ."); *see also* Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 23 CONST. COMM. 171 *passim* (2004) (analyzing the implications of Justice O'Connors' statement in *Grutter* about the sun-setting of affirmative action).

[7] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 277-78 (1978) (opinion of Powell, J.). For background about Allan Bakke and his desire to become a doctor,

splintered Supreme Court held that rigid quotas violate Equal Protection but that a narrowly-drawn race-conscious admissions program in pursuit of a diverse student body, a compelling state interest, might survive constitutional scrutiny.[8] Holding out the Harvard admissions program as an example of the appropriate consideration of race in admissions decisions, Justice Powell's opinion[9] came to govern the law of affirmative action.

The *Bakke* decision directly impacted admissions at UC Davis School of Law, which hosted the "*Bakke* at 40" symposium. In *DeRonde v. Regents of the University of California*,[10] the California Supreme Court in 1981 applied *Bakke* to the case of Glen DeRonde, who was one of approximately 2,200 applicants for admission to the Law School. Claiming that the denial of his application was because he was White, DeRonde asserted state and federal constitutions claims. The California Supreme Court held that, because the law school's narrowly-tailored admission scheme considered race among many factors, it complied with the strictures of *Bakke* and thus was constitutional.[11]

As discussed throughout the symposium, admissions programs at virtually all institutions of higher education have been influenced by the framework laid out by *Bakke*. Now four decades later, conference participants in the following articles carefully examine the status of affirmative action in higher education as well as the workplace. Besides revealing some previously unknown facts surrounding the *Bakke* case,[12] the contributions analyze subsequent developments as well as the future of affirmative action.

The conference was composed of three panels. The first panel focused on the history of the *Bakke* decision, and included the following panelists:

- Ashutosh Bhagwat, UC Davis (moderator)
- Devon Carbado, UCLA

see Robert Lindsey, *White/Caucasian — and Rejected*, N.Y. TIMES, Apr. 3, 1977, at 209.

[8] *See supra* note 6 (citing cases following *Bakke*); *see also* Joelle A. Marty, Comment, *Affirmative Action in Higher Education: Federal Circuit Split over* Bakke's *Diversity Rationale* 36 U.C. DAVIS L. REV. 505 *passim* (2003) (analyzing division in lower courts over diversity rationale).

[9] *See Bakke*, 438 U.S. at 269, 316-19 (opinion of Powell, J.).

[10] 625 P.2d 220 (Cal. 1981).

[11] *See id.* at 226-27.

[12] *See generally* Rachel F. Moran, Bakke's *Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 UC DAVIS L. REV. 2569 (2019).

- Mario Barnes, University of Washington
- Rachel Moran, UCLA

A lunchtime discussion focused on the *Bakke* case from a variety of perspectives. Panelists included

- Lisa Pruitt, UC Davis (moderator)
- Russell Robinson, UC Berkeley
- Michal Kurlaender, UC Davis, School of Education
- Justice Melissa Hart, Colorado Supreme Court
- Katharine Bartlett, Duke University

The third panel focused on *Bakke* as the decision is applied today. Panelists included

- Carlton F.W. Larson, UC Davis (moderator)
- Meera Deo, Thomas Jefferson School of Law
- William Kidder, UCLA Civil Rights Project
- Nancy Chi Cantalupo, Barry University
- Lauren Edelman, UC Berkeley
- Brent Nakamura, Boies Schiller Flexner LLP

The concluding panel predicts what might happen with *Bakke* and the future of race-conscious affirmative action. The panelists were

- Brian Soucek, UC Davis (moderator)
- Yuvraj Joshi, Yale University
- Cheryl Harris, UCLA
- Jonathan D. Glater, UC Irvine

This symposium offers a panorama of perspectives on forty years of the Supreme Court's decision in *Regents* of the *University of California v. Bakke*. The contributions shed important light on the consideration of race in affirmative action programs in higher education and employment. They also provide guidance to educators, employers, lawyers, and judges in seeking to promote diversity in universities and the workplace.