The Supreme Court’s Previous Dodge

By Kenneth Lee

In *Bakke v. Regents of the University of California*, four members of the U.S. Supreme Court held that colleges that receive federal funds could not consider race in admissions decisions. Four of their brethren argued that racial preferences could be used broadly, to remedy "societal discrimination." Justice Lewis Powell held the decisive ninth vote.

Indecisive and conflicted, Justice Powell opted for a politically palatable but practically unfeasible approach. Offering a paean to the virtues of diversity in higher education, he said that universities could consider race as one of many factors, like geographic or intellectual diversity. In short, Powell attempted to have it both ways by allowing schools to select by race but without the taint of racial quotas. His opinion, however, was based on the naïve assumption that universities would consider race merely as a tie-breaker.

In reality, race plays an enormous role—as indicated by stark statistics on disparate admission rates. Race is not like any other "diversity" factor. When Berkeley’s Boalt Law School had only one incoming black student a few years ago, it made national headlines. Would there have been similar media coverage if the incoming class had included only one student raised on a farm in the heartland? Or if the freshmen class at the University of Michigan had no Orthodox Jews? Or only two students who could play the cello?

The fact that Justice Powell’s broad conception of diversity has become a code word for race is nowhere more apparent than at Harvard Law School. As made famous in movies like *The Paper Chase*, each first-year class at the law school is divided into several sections, with students in each section taking classes together with the same professors. In the spirit of diversity, Harvard uses computer algorithms to ensure that each of these class sections represents a cross section of the entire school. But Harvard’s registrar does not consider any of the diversity factors mentioned in *Bakke*—such as the student’s geographic origin, academic major, or socioeconomic background. Race, and to a lesser extent gender, are the only factors that constitute "diversity" at Harvard.

If diversity promotes "speculation, experiment, and creation" in the classroom as Justice Powell suggested in his opinion, then Harvard Law School should take factors like religion and family origin into account as much as race. An evangelical Christian student may have a unique viewpoint on First Amendment jurisprudence concerning the separation of church and state. A student from rural Kansas will likely have had different experiences than an affluent San Francisco native.

The Supreme Court can no longer hide behind the wishful thinking of *Bakke*. Too much empirical evidence has been amassed over the past quarter century demonstrating that "diversity" as practiced at universities means only race. At least five members of the current Supreme Court have expressed dis­taste for race-conscious policies. It remains to be seen whether they, unlike Justice Powell, will finally outlaw "benign" discrimination by skin color.

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