

Affirmative Action — 2003

May 27, 2010

I

ON JUNE 23, 2003, THE SUPREME COURT OF THE UNITED STATES held that the law school admissions policy of the University of Michigan was constitutional but its undergraduate school admissions policy was not. The ruling in effect affirmed the lone dictum of Justice Lewis Powell's (*University of California Regents v. Bakke*, 1978) assertion of twenty-five years ago that "race matters" and now had it speak for the majority of the court. The ruling states that race could be one element in a complex of many elements — such as SAT scores and class standing — but it could not be a definitive element, unlike the terminated policy of the undergraduate admissions system which awarded a numerical weight to race and was considered a quota by the court. Moreover, the court envisioned a 25 year time limit to its ruling and expected that a future court would look unfavorably on extending that deadline.

The opinion, the second most important education decision by the Supreme Court (after *Brown v. Board of Education*, 1954) in the past hundred years, was immediately and critically commented on by pundits throughout the land both positively and negatively. "Thanks to Sandra Day O'Connor, affirmative action is still alive," said Andrew Hacker in the *New York Review of Books*. "In one of its most important cases in decades, the Supreme Court . . . upheld the prerogative of colleges and universities to give preference to members of minority groups in admissions," editorialized *The Nation*. On the other hand, Professor Pedro Noguera of Harvard University cautioned that "the court's decision does not provide clear guidance on how to admit students, but it does make clear race can be taken into consideration." Charles Willie, professor emeritus of Harvard was equally cautious: "Whether affirmative action procedures will be necessary a quarter of century from today will depend upon the will of colleges and universities to do what is fair to all applicants." And many voices were openly hostile. Michael Kinsley in the *Washington Post* said, "The court's message to universities . . . is: We have fudged this dangerous issue. You should do the same." And Robert Samuelson, the economist, asserted flatly: "Most Americans detest racial and ethnic preferences. People . . . should advance on individual effort and merit." Peter Wood, professor of anthropology at Boston University, said he was "appalled. This Supreme Court decision may well transform American society — for the worse."

II

TO BEGIN TO UNDERSTAND THIS wide divergence of opinion and vigorous dissent we must go back to the social climate that prevailed in American before *Brown v. Board of Education*. In 1954, just nine years after World War II ended, the United States faced a world that was dramatically changing. The United Nations was founded in 1945. The colonial empires of Britain and France were demanding freedom. And one million black GIs were being discharged from the segregated American armed forces and coming home to face the same segregation they had fought against in "The War for Democracy."

The United States was emerging from a strictly apartheid society. Its institutions, both north and south, were mostly segregated — armed forces, schools, jobs, universities — and in the southern states, blacks could not vote. The United States could not present itself, under these circumstances, as it would like to as the world's leading democracy. Harry Truman desperately integrated the armed forces in 1948 and openly sought black votes in his tight race for the presidency. It was in this climate that the *Brown* decision desegregating public schools was rendered.

The beginning of the modern civil rights movement coincided with this decision and certainly influenced the Supreme Court in its deliberations. In 1955 Rosa Parks refused to give up her seat on a bus in Montgomery, Alabama to a white man, and was arrested and jailed. A young Martin Luther King became the leader of the Montgomery Improvement Association in Alabama shortly thereafter. However, few anticipated the massive outcry and resistance to the *Brown* decision by both north and south. From Little Rock to Boston, the school systems found various subterfuges of resistance.

In addition, these were several laws enacted shortly before World War II, while ostensibly improving the economic circumstances of the population as a whole, served in actuality to further increase the poverty of black workers while enriching white workers and increasing racial isolation. The Social Security Act in the mid-1930s for example, excluded, at the insistence of southern congressmen, domestic and agricultural workers where most blacks were concentrated. The Federal Housing Authority explicitly stated in 1936 that "properties shall continue to be occupied by the same social and racial classes." Thus, neighborhoods became more isolated racially while minorities, left in central cities, were given unfavorable mortgage loans if they were given loans at all. The unemployment compensation system excluded black women domestic workers from coverage and forced many of them to go on welfare. Black workers were eventually covered by these policies in the 1960s but whites had by this time become entrenched in the suburbs, in better-paying jobs and in better housing. Ghettos do not just happen; they are created by explicit and conscious policies.

III

IN SCHOOLING, THE *BROWN* DECISION and subsequent court orders had desegregated some schools despite the protests and resistances. Substantial research has shown that desegregation of elementary and secondary schools results in a positive effect on reading and mathematics scores of minority children and, in later life, influences biracial friendships and improves graduation rates.

Although desegregation peaked in 1972, since that time schools have slowly re-segregated to nearly pre- *Brown* levels. The linchpin of that decision was the Supreme Court ruling in *Milliken v. Bradley* in 1977. That Detroit decision stated that the suburbs could not be included in cross-district busing since the suburbs had not intentionally (as could be documented for the cities) participated in segregation. But the suburbs had intentionally been created through racially restricted housing policies. The court ignored that fact. An example of the effect of that decision is what occurred in Hartford, Connecticut. In 1970, the school system was 71 percent white; in 1990, 93 percent of the enrollment was African-American or Hispanic. Before 1950 no major city's population was more than 50 percent black; in 1992 there were nine cities which were majority black. Richard Fossey, (*Readings on Equal Education*, 1998) has said it most starkly: "*Brown's* promise has been broken in the inner cities and may not be fulfilled in our lifetime."

The promise of *Brown* has been broken in elementary and secondary education and has begun to affect higher education in several ways. Already most white students are coming to college from nearly all-white high schools and all-white neighborhoods. Surveys have shown that this distorts their perception of societal reality. For example, a survey commissioned by the *Washington Post*, the Henry Kaiser Foundation and Harvard University found that the majority of whites believed "that blacks are as well off as whites in terms of their jobs, income, schools and health care." It is not surprising that substantial numbers of white college students feel that affirmative action gives black and Hispanic students unfair advantages in college admissions.

IV

WE COME TO HIGHER EDUCATION with the understanding that it builds on the unequal foundation described in the history of public schooling in this country. The universities and colleges have a

similar history of exclusion but with the caveat that they are institutions of choice rather than compulsion. One volume critical of the present university says, "The university is an institution shaped by and for a small fraction of American society" (*Whitewashing Race*, 2003). And that has been its admission practice throughout history. But more so than "a small fraction," read a small, mostly white, mostly upper- and middle-class, mostly Protestant, fraction. The tale has been too often told of the restrictions placed on Jews and Catholics for much of their history, but the near exclusion of people of color, especially blacks, from entry into their hallowed halls by euphemistic strategies such as "qualified," "elite," "selective" and "prestigious" were legion. The colleges in the north admitted a small number of blacks and other minorities, while colleges in the south exclusively relegated blacks to historically black colleges with the benign acquiescence of the national government and the Supreme Court through much of the nation's post-Civil War history.

This was dramatically changed with the struggles of the civil rights movement in conjunction with other social and political events which produced the Civil Rights Act of 1964, the Executive Order 11246 of 1965, the *Adams* decision of 1973, and the *Bakke* decision of 1978. These rulings resulted in a surge of black and Hispanic enrollments in predominately white colleges and universities. Black enrollment, for example, increased from 4.9 percent in 1955 to 11.3 per cent in 1990. But this figure is masked somewhat by the 47 percent of blacks and the 56 percent of Hispanics enrolled in two-year colleges, from which transfer to four-year colleges and attainment of a bachelor's degree is more problematic.

Moreover, the *Adams* case, which was brought by the NAACP on behalf of black parents, was necessitated by the southern states virtually ignoring the Civil Rights Act, and the federal government's reluctance to insist on their obeying it. With a favorable decision in the case, the white southern public colleges were mandated to increase their black student enrollment and black faculties. From 1973, when the decision was rendered, to 1985, when most states were released from the court order, *none* of the states had achieved their self-imposed goals. Yet, the courts released them from the order because "they had made a good faith effort."

Lyndon Johnson's affirmative action executive order and the *Bakke* decision of 1978 gave impetus to black and Hispanics enrollments in public and private colleges and seemed to convince many of these institutions that, astonishingly, this seemed to be the right thing to do! But the Achilles' heel of Judge Powell's decision in *Bakke* was that it rested on a voluntary and nebulous "diversity" initiative rather than a directive to explicitly begin to overcome America's racist history in college admissions. The weak reed of diversity allowed the ruling to be attacked and narrowed over the years from viewing race as a "suspect" category requiring "a compelling state interest" and "strict scrutiny" to even be considered. Justice Ruth Bader Ginsburg, in her rousing dissent in the *Gratz* case stated her disagreement in plain English: "[these rulings] would be fitting were our Nation free of the vestiges of rank discrimination . . . But we are not far distant from an overtly discriminatory past and the effects of centuries of law-sanctioned inequality [that] remains painfully evident in our communities and schools . . . In the wake 'of a system of racial caste only recently ended' . . . large disparities endure."

Justice Sandra Day O'Connor's majority opinion in the *Grutter* case however, found the law school's admission strategy more comfortable, and she seemed to be greatly influenced by the strong briefs submitted by business and the armed forces in favor of affirmative action. Writing for the majority she said: "these benefits are not theoretical but real, as major American businesses have made clear . . . what is more, high ranking retired and civilian leaders of the United States military assert that [they need] a highly qualified, racially diverse officer corps . . . to provide national security."

It is clear that the needs of corporate and business America to present a racially diverse face to

an increasingly global and non-white world carried greater stress with Justice O'Connor than the arguments for racial justice and equality.

Quite frankly, the undergraduate admission policy of assigning points for various attributes (race, legacy, athletes, music, academics and so on) seemed much more straightforward and honest in quantifying what the university was actually doing rather than the nebulous and complex policy of the law school which will surely be immediately subject to attack. Already the opponents have been successful in attacking affirmative action through the state petition process. They have passed Proposition 209 in California and Proposition 200 in Washington state outlawing affirmative action statewide. They are threatening to do the same in Michigan and Illinois.

V

THE AFFIRMATIVE ACTION DECISION of 2003 rests on the tangled and racist record of the past just described. America is a divided society and promises to become even more so. The Supreme Court in its long history has rendered decisions that are mostly compatible with the majority of white Americans and rarely goes beyond them. It upheld slavery, it upheld racial restriction, it upheld segregated schools, it sanctioned the denial of black voting, etc. When it does render decisions that upset the prerogatives of whites, it soon modifies them in subsequent decisions to make them more palatable — the school desegregation decisions, the suburban exclusion decision, the southern segregated colleges' decisions and so on. The consequence is that the symbolism of equal rights is on the books but the fact of white privilege is relatively undisturbed.

The impact of the affirmative action decision of 2003 will mostly affect the admission policies of about 150 selective public and private universities out of 3500 universities and colleges. Its symbolic impact is much wider. It tells the world, as did the *Brown* desegregation decision, that the United States is aware of its racial problems and is doing something to solve them. However, in the "real" United States, black infant mortality is twice as high as whites and worsening; Latinos and blacks account for 75 percent of active cases of tuberculosis; the black and Latino poverty rate is nearly 25 percent and increasing; and blacks are the most segregated of all racial groups in housing and schools.

When asked, the majority of white Americans say they believe in the usual symbols of democracy — racial equality and integrated neighborhoods. But in a 2001 report from the Russell Sage Foundation, the majority of whites say they would prefer to live in same race neighborhoods while the majority of blacks showed a strong preference for integrated neighborhoods. In the 2003 PDK Poll of the Public's Attitudes Toward the Public Schools, when asked, "the public continues to believe that closing the achievement gap between white students and black and Hispanic students is important but blames the gap on factors unrelated to the quality of schooling . . . 97 percent point to home life and upbringing." Moreover, in the same poll, 58 percent of the public believes "narrowing the achievement gap does not require spending more money on low achieving students." In other words, the majority of whites say they believe in integration as long as it doesn't happen in their neighborhoods. They hope the school achievement gap between whites and minorities can be closed, but minorities need to do the work themselves and, by the way, don't ask them to spend any money on the effort.

The decision of 2003 does not speak to the resegregation of schools to almost pre-Brown levels. It does not speak of warehousing in ghettos of the black and Latino population. It does not speak of public schools that are comparable to those in a Third World country. Jonathan Kozol describes Morris High School in New York City in his book, *Savage Inequalities* (1991): "Blackboards at the school . . . are so badly cracked that teachers are afraid to let students write on them for fear they'll cut themselves. Some mornings, fallen chips of paint cover classrooms like snow . . . teachers and

students have come to see humor in the waterfall that courses down six flights of stairs after a heavy rain." The school student body is black and Latino. Likewise, the role of universities in fiercely restricting the admissions of minorities except to its lower precincts has kept the number of educated minorities artificially low, and ironically, has limited the opportunity of lower-class whites, but they are silent because it maintains their caste distinction. Lower class whites have acquiesced in their own disenfranchisement to satisfy their racial superiority. There are few voices speaking out in the white community for universal access to higher education and to first class primary schools for lower class and working class whites and, thus for everyone. As in the Civil War, the majority of southern white soldiers did not own slaves, nevertheless they fought and died defending the existence of a system which exploited them, but gave them a greater gift — white superiority.

The role of public education is fundamental to the distribution of educational benefits and consequent employment opportunities and leadership access that should be the right of everyone in a democratic society. That will never happen in the present system because the educational benefits like the economic rewards are distributed primarily to the upper and middle classes and severely restricted to the lower classes regardless of race.

With the United States as the wealthiest country in the world, only 25 percent of whites possess a bachelor's degree or higher and only about 15 percent of minorities do so as well. Yet, millions more Americans are capable of achieving a higher education but are prevented from doing so by artificial barriers of costs, inferior primary schools and other impediments: testing, tracking, lack of advanced placement classes, etc.

Higher education, especially in elite schools, is increasingly the province of the rich and middle classes regardless of race. It is not about the ability to do the work. A recent study by Anthony Carnevale and Stephen Rose for the Century Foundation found that students "with quite modest SAT scores of about 1000 are virtually identical [in graduation rates] to students with SAT scores as high as 1200." The significant question they ask is "who is deserving" not "who is qualified." Upper middle class students admitted to top colleges tend to believe they are where they are because they deserve to be there. Indeed, the Carnevale and Rose study found the "fully 74 percent of the students [admitted to the 146 most competitive colleges in 1995] came from the top quarter of the nation's social and economic strata."

Bowen and Bok, in their 1998 book, *The Shape of the River*, found that "nearly nine of ten African-American students admitted to the most competitive colleges had come from families in the top two tiers of the social and economic ladder." These are the colleges which are most particularly affected by the affirmative action decision. In fact, Kermit Hall, president of Utah State University, says "the best affirmative action that we can practice . . . is to ensure that every student seeking higher education can afford it, and that colleges have the resources to give them the quality education that they deserve." Would that this were true. Over four million qualified high school graduates will be prevented from attending college this decade due to lack of funds alone. Tuition is on the rise and public colleges are raising admission criteria to limit access.

The symbolism of affirmative action was affirmed by the decision of 2003 and, to be sure, it was worth the long and difficult struggle despite its limited impact. The majority of people of color, however, are barred from access to quality schooling before they are born by the twin evils of this society — race and class, which are byproducts of the capitalist system, but operate independently from it. In spite of undeniable progress, the majority of people of color are burdened by life long oppression, poverty and racism. Derrick Bell, professor of law at New York University, and author of *Faces at the Bottom of the Well* (1992), believes that racism is a permanent part of American society. Yet, he goes on to say, "It is not a matter of what we do, or an idealism based on a long-held dream of attaining a society free of racism. Rather, it is a question of both/and. *Both* the recognition

of the futility of action — where action is more civil rights strategies destined to fail — *and* the unalterable conviction that something must be done, that action must be taken." A grim but realistic assessment of the present and plan of action for the future.

Footnotes