THE EVOLUTION OF AFFIRMATIVE ACTION AND THE NECESSITY OF TRULY INDIVIDUALIZED ADMISSIONS DECISIONS

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Affirmative action was an unexpected, but also inevitable, byproduct of the Black freedom struggle of the 1960s. It was unexpected by the presidents, legislators, and activists who shaped the initial civil rights policy responses of the federal government between 1961 and 1965. But it also was an inevitable result of the fair employment policies that those actors fervently sought. Once the major building block of their efforts—Title VII of the Civil Rights Act of 1964[1]—became law, the absence of any clear consensus on the outer parameters of how to define racial discrimination guaranteed that a gradual and often subtle evolution in the implementation of federal anti-discrimination policies would eventually give the word "affirmative" a substantive import far beyond what its earliest uses had suggested.

The most thorough historical accounts of the earliest origins of affirmative action trace its roots to the efforts of Interior Secretary Harold L. Ickes and his aides in the 1930s to insure that Public Works Administration contractors hired some percentage of Black employees in areas that had an "appreciable Negro population."[2] The actual phrase itself first appeared in a nonracial context in the Wagner National Labor Relations Act of 1935,[3] and was then first used with regard to race in New York's 1945 Law Against Discrimination.[4]

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1. Pub. L. No. 88-352, Title VII, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e-4, et seq. (2000)).

2. An Act of January 3, 1935, ch. 372, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C § 151, et seq. (2000)). *See* TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 12, 46 (2004).

3. ANDERSON, *supra* note 2, at 15; HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 33 (1990). *See also* PAUL D. MORENO, FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA 1933-1972 (1997).

4. 1945 N.Y. Laws 457; GRAHAM, *supra* note 3, at 34, 487–88. *See also* MORROE BERGER, EQUALITY BY STATUTE: THE REVOLUTION IN CIVIL RIGHTS (1967); Arthur Earl Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 IOWA L.

Many summary accounts, however, understandably date the birth of affirmative action as March 6, 1961, when President John F. Kennedy issued Executive Order 10,925.[5] The 4,500-word Order created the President's Committee on Equal Employment Opportunity and directed the committee to "consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination"[6] in government employment. It also mandated that all federal contracts henceforth include a provision binding each contractor to "not discriminate against any employee or applicant for employment because of race, creed, color, or national origin."[7] In addition, each "contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."[8]

Hobart Taylor, Jr., a young Black attorney from Texas who Vice President Lyndon B. Johnson recruited to help draft the Order, recalled in a 1969 oral history interview that he "was searching for something that would give a sense of positiveness to performance under that executive order, and [he] was torn between the words 'positive action' and the words 'affirmative action.'"[9] He chose "'affirmative' because it was alliterative," Taylor explained.[10]

Historians of affirmative action have rightly highlighted how modest a meaning those words carried at the time of Kennedy's Order. The late Hugh Davis Graham, noting that the phrase appeared only once and "rather casually" in the lengthy Order, observed that right "from its inception the notion of affirmative action in civil rights was ambiguous."[11] On one hand, it represented "classic nondiscrimination," for the suggestive sentence, Graham emphasized, stated that "affirmative action was required to ensure that citizens were treated *without regard* to race, color, or creed."[12] But in using "positive new rhetoric," the Order also "seemed self-defined to require more aggressive recruitment in hiring, and special training for minorities to encourage their advancement."[13]

Graham recognized that "from the beginning the concept of affirmative action

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REV. 1043, 1071–73 (1967).

5. Exec. Order No. 10,925, 26 C.F.R. 1977 (1961), *available at* http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-10925.html.

6. *Id.*

7. *Id.*

8. *Id. See also* Anthony Lewis, *Kennedy Orders Equal Job Rights In Federal Work*, N.Y. TIMES, Mar. 7, 1961, at 1, 27; Bonfield, *supra* note 4, at 1081–82.

9. ANDERSON, *supra* note 2, at 60–61.

10. *Id. See* Interview by Stephen Goodell with Hobart Taylor, Jr. (Jan. 6, 1969). *See also* GRAHAM, *supra* note 3, at 33; *Hobart Taylor Jr., 60, Past Trade Bank Head And Law Firm Partner*, N.Y. TIMES, Apr. 4, 1981, at 20.

11. GRAHAM, *supra* note 3, at 28. *See also* Stacy K. Sewell, *The 'Fashionable' End to Discrimination: The Development of Affirmative Action in the Kennedy-Johnson White House*, 4 WHITE HOUSE STUD. 355, 358 (2004) (calling the phrase "flexible, vague, and ill-defined").

12. GRAHAM, *supra* note 3, at 42.

13. *Id. See also* W.S. Price, *The Affirmative Action Concept of Equal Employment Opportunity*, 16 LAB. L.J. 603 (1965). Price observed that "the affirmative action requirement" in the Order "represents a significant departure from" previous federal anti-discrimination efforts. *Id.* at 603.

was somewhat open-ended,"[14] but Terry Anderson, in his comprehensive history of the policy, likewise agreed that at the time of Kennedy's 1961 Order, "all the administration seemed to be advocating was racially neutral hiring to end job discrimination."[15] A second Kennedy mandate, Executive Order 11,114 of June 22, 1963, also declared that it was federal policy "to encourage by affirmative action the elimination of discrimination" in all federally-funded activities,[16] and a third such decree, Executive Order 11,246, issued by President Lyndon B. Johnson on September 24, 1965, "used the exact same words as Kennedy had in 1961" in again invoking the phrase "affirmative action."[17]

Johnson's 1965 Order, Anderson explains, "became the standing rule for affirmative action for future decades,"[18] but fourteen months prior to Johnson's repetition of Kennedy's (or Hobart Taylor's) enigmatic declaration, the new president had signed into law the landmark Civil Rights Act of 1964.[19] Title VII enacted into statutory law the anti-discrimination commands of Kennedy's Executive Orders, expanded their reach to all employers with twenty-five or more employees, and created the Equal Employment Opportunity Commission as a new executive branch enforcement agency.[20] Yet as Anderson correctly underscores, Section 703(j) of Title VII also mandated that "[n]othing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group" on account of "race, color, religion, sex, or national origin."[21] Thus, the new law prohibited discrimination but also appeared to bar any government-ordered preferential action on behalf of "any group who had suffered discrimination."[22]

But the most important indicator of what would happen with federal anti-discrimination policy implementation in the mid- to late-1960s came not in any statute or Executive Order, but in a commencement address that President Johnson delivered at historically Black Howard University in Washington D.C. on June 4, 1965. "We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result," Johnson declared toward the halfway point of his address.[23]

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14. GRAHAM, *supra* note 3, at 34.

15. ANDERSON, *supra* note 2, at 61.

16. *Id.* at 72; Exec. Order No. 11,114, 28 C.F.R. 6485 (1963), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=59053. *See also* Marjorie Hunter, *Negroes Inform Kennedy Of Plan For New Protests*, N.Y. TIMES, June 23, 1963, at 63; Tom Wicker, *Kennedy Prohibits Job Discrimination At Federal Projects*, N.Y. TIMES, June 5, 1963, at 22.

17. ANDERSON, *supra* note 2, at 92; Exec. Order No. 11,246, 30 C.F.R. 12319 (1965), *available at* http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-11246.html. *See also Johnson Orders Reorganization of Federal Civil Rights Program*, N.Y. TIMES, Sept. 25, 1965, at 1.

18. ANDERSON, *supra* note 2, at 92.

19. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000, et seq. (2000)).

20. Pub. L. No. 88-352, Title VII, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e-4, et seq. (2000)).

21. ANDERSON, *supra* note 2, at 92.

22. *Id.*

23. President Lyndon B. Johnson, Address at Howard University: To Fulfill These Rights (June 4, 1965), *available at* http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/

That latter pair of phrases would in time become the most quoted passage of Johnson's speech, but further along the president added, in words that qualified if not undercut his first invocation of "opportunity," that "equal opportunity is essential, but not enough, not enough."[24] What had to happen for Black Americans, Johnson continued, was "to move beyond opportunity to achievement."[25]

The uncertainties and indeed confusion over what "opportunity," "equality," and "affirmative action" all might mean or require were brought home even more starkly by Edward C. Sylvester, Jr., the first director of the Johnson Administration's newly-created Office of Federal Contract Compliance. Speaking at an early 1967 conference, Sylvester frankly acknowledged that "[t]here is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything that you have to do to get results. But this does not necessarily include preferential treatment. The key word here is 'results.'"[26]

Sylvester was echoing President Johnson's own word-choice, but it is crucial for 21st-century readers and policy-makers to appreciate just how deeply obscure and muddled was the 1960s' emergence of "affirmative action" as a civil rights policy concept. Historian Thomas Sugrue rightly notes that "between 1963 and 1969, affirmative action moved from obscurity to become the single most important federal policy for dealing with employment discrimination."[27] Indeed it was only at the very close of the Johnson years, and in the earliest months of the new administration of the ostensibly conservative Republican President Richard M. Nixon, that the tangible implications of Johnson's and Sylvester's formulations suddenly came to full flower.

Equally important, though, is how this slow progression and emergence of federal policy took place at what in truth was a considerably great distance from the protest activism of the era's most important African American freedom fighters. Dr. Martin Luther King, Jr., the 1960s' most heralded civil rights activist, observed in early 1964 that "[s]ome kind of compensatory crash program" was needed "to bring the standards of the Negro up and bring him into the mainstream of life."[28] King previously had called publicly for "some concrete, practical preferential program, . . . a crash program of special treatment," but, following the advice of Clarence B. Jones, one of his top Black advisors, King soon explained that what he desired was in no way racially exclusive.[29] King wrote,

> Any "Negro Bill of Rights" based upon the concept of compensatory

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24. *Id.*

25. *Id.*

26. ANDERSON, *supra* note 2, at 103 (quoting REPORT OF THE 1967 PLANS FOR PROGRESS FIFTH NATIONAL CONFERENCE 73–74 (1967)).

27. Thomas J. Sugrue, *The Tangled Roots of Affirmative Action*, 41 AM. BEHAV. SCIENTIST, 886, 895 (1998). *See also* Price, *supra* note 13, at 603 (noting presciently in 1965 that the "significance" of the affirmative action concept "extends well beyond the sphere of employment.").

28. DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 310 (1986).

29. *Id.* at 680 n.20.

> treatment as a result of the years of cultural and economic deprivation resulting from racial discrimination . . . must give greater emphasis to the alleviation of economic and cultural backwardness on the part of the so-called "poor white." It is my opinion that many white workers whose economic condition is not too far removed from that of his black brother, will find it difficult to accept a "Negro Bill of Rights" which seeks to give special consideration to the Negro in the context of unemployment, joblessness, etc.[30]

The simple truth of the matter is that federal anti-discrimination policy developed and evolved inside a handful of government office buildings in downtown Washington, D.C., not in the streets of Birmingham or Chicago or within the movement's own councils.[31] The lack of close or detailed contact between the movement's own leaders and activists, on the one hand, and relevant executive branch officials like Edward Sylvester, on the other, may seem somewhat surprising. However, anyone who can fully appreciate just how frantically busy the pace of daily life was for activists like King in those years must also understand that the absence of any substantive policy input from the movement to government officials was simply one more inevitable result of the nonstop challenges and demands those leaders confronted.[32]

It may seem historically underwhelming or disappointing that federal anti-discrimination policies were much more the handiwork of little-remembered officials like Ed Sylvester than marquee names like Martin Luther King, Jr., but that fact underscores the extent to which meaningful political change is the result of efforts by a wide variety and large number of historical actors, heralded and unheralded.[33] As Roger Wilkins, a knowledgeable student of the movement who worked in the Johnson Administration observed at the time of Ed Sylvester's death, "We were allies of the civil rights movement," and "[p]art of what we did

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30. *Id.* at 312. See JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 31–33 (1996) for similar analysis of the thinking of Whitney M. Young, executive director of the National Urban League. *See also* NANCY J. WEISS, WHITNEY M. YOUNG, JR. AND THE STRUGGLE FOR CIVIL RIGHTS (1989) (giving background on Young).

31. *See* Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945-1969*, 91 J. AM. HIST. 145, 173 (2004). "The protesters," Sugrue writes, "were not, in a strict sense, the architects of affirmative action. They did not draft executive orders and federal regulations." Instead, he acknowledges, "Affirmative action was the distinctive product of Johnson and Nixon administration policy makers." *Id. See also* PAUL BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL 90 (1985); JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 5, 329 (2002); Mark Brilliant, *"Without Anyone Noticing At All": The (Silent) Minority Rights Revolution*, 33 REV. AM. HIST. 278, 284 (2005) (concluding that Skrentny's book highlights "the central role that federal policy makers played in advancing the minority rights revolution").

32. See David J. Garrow, *Where Martin Luther King, Jr. Was Going: Where Do We Go From Here and the Traumas of the Post-Selma Movement*, 75 GA. HIST. Q. 719, 734 (1991) for King's difficulty in generating a specific and substantive policy agenda.

33. *See* BURSTEIN, *supra* note 31, at 68, 94–96, 122–24, 180–81, 186. *See also* TIMOTHY J. MINCHIN, HIRING THE BLACK WORKER: THE RACIAL INTEGRATION OF THE SOUTHERN TEXTILE INDUSTRY, 1960-1980 (1999).

was carry out the legislation that the civil rights movement had started."[34] Sometimes, as with affirmative action, "carry out" carried with it a significant, and indeed dramatic degree of initiative and innovation.

The most important and influential turning point in the history of federal anti-discrimination policy came in 1968–69 with a decisive battle over what was called "the Philadelphia Plan."[35] Federal regional administrators intent upon integrating several virtually all-white building trade unions crafted the initial approach in late 1967.[36] "Although affirmative action is criticized as ambiguous, the very lack of specific detail and rigid guideline requirements permits the utmost in creativity, ingenuity, and imagination," the lead official wrote.[37] The goal, he explained, was to "achieve equal opportunity results"—three familiar words, but now conjoined.[38]

In practice, as Terry Anderson recounts, "[t]he 'Philadelphia Plan' demanded that contractors' bids 'must have the *result of producing minority group representation* in all trades and in all phases'" of each federally-funded construction project.[39] This step forward in giving tangible meaning to "affirmative action" certainly advanced the "result" that President Johnson had called for in 1965. But as Anderson observes, a focus upon results, "even if that meant hiring *with regard* to race," "clashed with the original intent of Title VII, which only demanded employment *without regard* to race."[40]

Opposition from the General Accounting Office and the Comptroller General stymied any actual implementation of the Philadelphia Plan throughout the waning months of the Johnson Administration. The decision thus passed to Johnson's successor, Richard M. Nixon, and more particularly to Nixon's new Secretary of Labor, George P. Shultz, who strongly endorsed the policy.[41] After several months of highly incongruous legislative tussling in which utterly unlikely alliances had most liberal Democrats lining up alongside organized labor in opposition to the Philadelphia Plan, and most congressional Republicans siding with their president in support of a policy that Shultz and his top aides energetically championed, the program won an unexpected vote of confidence from both houses of Congress in December 1969.[42]

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34. Matt Schudel, *Labor, Hill Official Edward Sylvester Dies*, WASH. POST, Feb. 18, 2005, at B6. *See also* GRAHAM, *supra* note 3, at 284–87 (describing Sylvester's role in the 1960s).

35. *See* GRAHAM, *supra* note 3, at 287–90.

36. *Id.*

37. *Id.* at 290 (citation omitted). For a unique and rich background on the administrative roots of the Philadelphia Plan, the essential source is James E. Jones, Jr., *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341, 359–61, 364–73, 378–79, 381–96 (1970).

38. GRAHAM, *supra* note 3, at 290.

39. ANDERSON, *supra* note 2, at 105. *See also* SKRENTNY, MINORITY RIGHTS, *supra* note 31, at 89, 132.

40. ANDERSON, *supra* note 2, at 108.

41. *See* Paul Delaney, *Shultz Defends Minority Hiring*, N.Y. TIMES, Aug. 7, 1969, at 23; *U.S. Plans Formula to Get Contractors to Hire Minorities*, N.Y. TIMES, June 28, 1969, at 61. *See also* Donald Janson, *Construction Job Rights Plan Backed at Philadelphia Hearing*, N.Y. TIMES, Aug. 27, 1969, at 24.

42. *See* ANDERSON, *supra* note 2, at 108–09, 115–24; GRAHAM, *supra* note 3, at 290–97, 322–40; GARY ORFIELD, CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE 84–87 (1975); SKRENTNY, THE IRONIES, *supra* note 30, at 137–39, 177–78, 193–209; Jones, *supra*

The evolution toward an executive branch focus on "results" may have been an inescapable progression during the Kennedy and Johnson years, but nothing could have been more politically unexpected than for a conservative Republican administration to embrace and champion the most aggressively demanding pursuit of results yet articulated. Once again, the story of how this came to pass is a densely-complicated, inside-Washington piece of policy history with strikingly few connections whatsoever to the most publicized aspects of the Black freedom struggle.[43]

The upshot of this unexpected turn of events, however, was that "[t]he Philadelphia Plan eclipsed Title VII and became the official policy of the U.S. government."[44] Then, in relatively quick succession, two further significant policy events reinforced and expanded the reach of this decisive shift. First came the U.S. Supreme Court's 1971 ruling in *Griggs v. Duke Power Co*.[45]

Prior to the enactment of Title VII, Duke Power had explicitly limited the job prospects of its Black employees.[46] Once the 1964 law was enacted, however, the company added new education and testing requirements for any employee seeking transfer to a better job.[47] Those preconditions held back Blacks who had endured segregated schools, and when their challenge to the new prerequisites reached the Supreme Court, the Justices unanimously agreed.[48]

Title VII, the Court observed, "does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[49] Instead, the opinion continued, "[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[50]

"[T]ests or criteria for employment or promotion may not provide equality of opportunity,"[51] the Court observed, and Title VII requires that "the posture and condition of the job-seeker be taken into account."[52] In other words, the law "proscribes not only overt discrimination but also practices that are fair in form,

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note 37, at 396–98; Dean J. Kotlowski, *Richard Nixon and the Origins of Affirmative Action*, 60 HISTORIAN 523 (1998); Sugrue, *Affirmative Action from Below*, *supra* note 31, at 170–72. *See also* J. Larry Hood, *The Nixon Administration and the Revised Philadelphia Plan for Affirmative Action: A Study in Expanding Presidential Power and Divided Government*, 23 PRESIDENTIAL STUD. Q. 145 (1993).

43. *See* Terry H. Anderson, *The Strange Career of Affirmative Action*, 22 S. CENT. REV. 110, 116–19 (2005); Hugh Davis Graham, *The Origins of Affirmative Action: Civil Rights and the Regulatory State*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 57–59 (1992).

44. ANDERSON, *supra* note 2, at 124.

45. 401 U.S. 424 (1971).

46. *Id.* at 426–27.

47. *Id.* at 427–28.

48. *See id.*

49. *Id.* at 430–31.

50. *Id.* at 431.

51. *Id.*

52. *Id.*

but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[53]

Griggs gave judicial endorsement to the enforcement policies that had evolved within the executive branch agencies and, as such, "defined affirmative action for the next two decades."[54] Terry Anderson asserts that in practice, *Griggs* "basically made fair employment more a group than an individual right,"[55] a development that could be seen as wholly in keeping with the explicit demand for "results" that reached back to Lyndon Johnson's 1965 speech at Howard University.[56]

But the second major occurrence that followed in the wake of the Philadelphia Plan's acceptance involved the wholesale extension of the anti-discrimination policies that had developed for the industrial workforce to the new arena of educational institutions. Given how much of the nationwide debate about affirmative action would revolve in later years around hiring practices and admissions policies in higher education, it is utterly amazing how little scholarly attention has ever focused on the 1972 decision by the federal Office for Civil Rights (OCR) to expand equal employment enforcement efforts to colleges and universities holding federal contracts.

The earliest and most influential entreaties seeking to broaden enforcement to encompass higher education came from women's groups spurred by repeated reports of deep and widespread sex discrimination in faculty hiring.[57] Public debate and controversy over the incipient federal expansion burgeoned rapidly in late 1971 and early 1972,[58] and in the spring of 1972, the Department of Health, Education, and Welfare ("HEW") Secretary Elliot L. Richardson, whose cabinet department encompassed OCR, publicly upbraided unhappy academics by reminding them that colleges and universities, as federal contractors and employers, "incur the obligations of other contractors and other employers."[59]

Richardson told reporters that "the primary responsibility for finding methods to increase the numbers of women and minorities must come from the universities themselves,"[60] but at the very same time that his department was preparing to issue a formal mandate, Congress passed and President Nixon signed into law the Equal Employment Opportunity Act of 1972, which amended Title VII in such a way as

53. *Id.*

54. ANDERSON, *supra* note 2, at 129.

55. *Id.*

56. *Id. See also* SKRENTNY, THE IRONIES, *supra* note 30, at 166–71.

57. *See* Linda Greenhouse, *Columbia Accused of Bias on Women*, N.Y. TIMES, Jan. 11, 1970, at 55; Harold Orlans, *Affirmative Action in Higher Education*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 144, 150 (1992); SKRENTNY, MINORITY RIGHTS, *supra* note 31, at 242–49; ANDERSON, *supra* note 2, at 142–45.

58. *See, e.g.*, Paul Seabury, *HEW and the Universities*, COMMENT., Feb. 1972, at 28.

59. Elliot L. Richardson, *To the Editor of Commentary*, COMMENT., May 1972, at 10. A similar letter from OCR's assistant director for public affairs stated that "in order to overcome the discrimination of the past, we have no alternative at this point in time but to use the race factor as a means of restoring equal opportunity." Robert E. Smith, *To the Editor of Commentary*, COMMENT., May 1972, at 10, 11.

60. Joyce Heard, *Richardson: Women and the Ivory Tower*, HARV. CRIMSON, Apr. 24, 1972, *available at* http://www.thecrimson.com/article.aspx?ref=495266.

to make all colleges and universities, not just those holding government contracts, subject to federal anti-discrimination policies.[61]

Initial press coverage of the new statute was spotty and incomplete,[62] but within a few weeks word quickly spread about what a significant increase in the scope of enforcement the unheralded new statute promised.[63] But OCR was moving forward irrespective of the statutory change, and on October 1, 1972, OCR Director J. Stanley Pottinger formally issued the office's Higher Education Guidelines.[64]

"The premise of the affirmative action concept," Pottinger explained, "is that unless positive action is undertaken to overcome the effects of systemic institutional forms of . . . discrimination, a benign neutrality in employment practices will tend to perpetuate the 'status quo ante' indefinitely."[65] Then, echoing clearly and directly the Supreme Court's language in *Griggs*, the document stated that

> the affirmative action concept does not require that a university employ or promote any persons who are unqualified. The concept does require, however, that any standards or criteria which have had the effect of excluding women and minorities be eliminated, unless the contractor can demonstrate that such criteria are conditions of successful performance in the particular position involved.[66]

That mandate brought federal anti-discrimination enforcement into the world of higher education with dramatic effect. Some leading colleges and universities had already initiated race-conscious admissions policies with an acknowledged goal of increasing the number of racial minority students,[67] but even as early as the fall of 1971, the first legal ruling disallowing those policies was handed down by a Washington state trial court.[68] Oddly, that case was brought by a rejected law school applicant who sought preferential treatment for in-state as opposed to out-of-state applicants.[69] The trial court ordered his admission after uncovering racially-disparate admissions standards, but by the time the case reached the U.S.

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61. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e, et seq. (2000)).

62. *See, e.g.*, *Job Unit Widens Women's Rights*, N.Y. TIMES, Mar. 31, 1972, at 1, 17. *See also* ORFIELD, *supra* note 42, at 88–90.

63. *College Group to Tell Members of New Hiring-Bias Regulations*, N.Y. TIMES, Apr. 9, 1972, at 44.

64. Nondiscrimination Under Federal Contracts—Higher Education Guidelines, 37 Fed. Reg. 24,686 (Nov. 18, 1972).

65. *Id.* at 24,687.

66. *Id. See also* J. Stanley Pottinger, *The Drive Toward Equality*, CHANGE, Oct. 1972, at 24, 26–29; Seth A. Goldberg, *A Proposal for Reconciling Affirmative Action with Nondiscrimination Under the Contractor Antidiscrimination Program*, 30 STAN. L. REV. 803, 811–21 (1978); SKRENTNY, MINORITY RIGHTS, *supra* note 31, at 249–51.

67. *See* Joseph O. Jewell, *An Unfinished Mission: Affirmative Action, Minority Admissions, and the Politics of Mission at the University of California, 1868–1997*, 69 J. NEGRO EDUC. 38, 43 (2000); SKRENTNY, MINORITY RIGHTS, *supra* note 31, at 166–73.

68. *See* David J. Garrow, *Lessons From Affirmative Action's Past*, L.A. TIMES, Mar. 31, 2003, at B11.

69. *Id.*

Supreme Court, the law student was on the verge of graduating, thus allowing the Justices to dismiss the case as moot.[70]

Dissenting from that judgment, liberal icon Justice William O. Douglas wrote that admissions decisions must be made "on the basis of individual attributes, rather than according a preference solely on the basis of race."[71] Each applicant, Douglas said, "had a constitutional right to have his application considered on its individual merits in a racially neutral manner."[72]

But "racially neutral" did not mean simply "colorblind." Instead, Douglas explained, distinct treatment based on race or a similar attribute could pass legal muster if "[t]he reason for the separate treatment of minorities as a class is to make more certain that racial factors do not militate *against an applicant or on his behalf.*"[73] Douglas was envisioning how to counterbalance factors such as standardized tests which might disadvantage entire groups of applicants, and instead evaluate each applicant's individual merits, including racial and ethnic identity, without according such identities any systematic advantage.

Four years later, in *Regents of the University of California v. Bakke*,[74] the preferential admissions issue again reached the Supreme Court. Speaking for a closely-divided Court, Justice Lewis F. Powell, Jr. found that the challenged admissions program at the Medical School of the University of California at Davis had indeed used an unconstitutional racial quota. At the same time, however, Powell stated that admissions officers could properly consider applicants' racial identities pursuant to colleges' and universities' First Amendment right to select student bodies that possess "genuine diversity."[75] That compelling interest, Powell explained, "is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups."[76] Instead, true diversity "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[77]

In admissions decisions, Powell wrote, "race or ethnic background may be deemed a 'plus'" for "particular" applicants, "without the factor of race being decisive."[78] Policies had to be "flexible enough to consider all pertinent elements of diversity," and "on the same footing."[79] So long as "race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process," affirmative action admissions could pass constitutional muster.[80]

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70. DeFunis v. Odegaard, 416 U.S. 312 (1974).
71. *Id.* at 332 (Douglas, J., dissenting).
72. *Id.* at 337.
73. *Id.* at 336.
74. 438 U.S. 265 (1978).
75. *Id.* at 315.
76. *Id.*
77. *Id.*
78. *Id.* at 317.
79. *Id.*
80. *Id.* at 318.

Justice Harry A. Blackmun, one of the four colleagues who voted with Powell to authorize race-conscious admissions policies, nonetheless confessed, "I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most."[81] He quickly added that the history of school desegregation suggested "that that hope is a slim one," but he went on to say:

> At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.[82]

Powell's one-Justice, but nonetheless definitive, opinion served as a practical matter to remove affirmative action admissions from the political front-burner for most of the ensuing two decades. But soon after *Bakke* was decided, it became clear that some readers were quite unwilling to accord Powell's statement that race could serve only as "simply one element"[83] in a multifaceted evaluation of student diversity "without . . . being decisive"[84] the plain meaning of those words.

Paul J. Mishkin, the senior author of the University of California's Supreme Court brief, observed in 1983 that "[t]he experience following the *Bakke* decision was that the vast range of race-conscious programs of special admission to universities continued in full force and effect."[85] Mishkin thought that was wholly in keeping with what he believed was the underlying meaning of Powell's opinion. He praised Powell's decision as "a wise and politic resolution,"[86] a "masterful stroke of diplomacy,"[87] but at the same time he asserted that Powell's position could not be "supported by articulated principle."[88]

That was because, in Mishkin's view, Powell's "academic diversity justification once accepted could, and should, sustain all forms of special admissions programs designed to achieve that objective," including the very one that the *Bakke* ruling had held unconstitutional.[89] In other words, all Powell's opinion had articulated was "a matter of form over substance,"[90] and in no way really precluded admissions officers from continuing to admit minority students in whatever numbers they might choose. Using Powell's "plus," programs considering "the size of the plus will set that size in terms of the number of minority students likely

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81. *Id.* at 403 (Blackmun, J., concurring in part and dissenting in part).

82. *Id.*

83. *Id.* at 318 (majority opinion).

84. *Id.* at 317.

85. Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 922 (1983).

86. *Id.* at 929.

87. *Id.* at 930.

88. *Id.* at 929.

89. *Id.* at 929 n.78.

90. *Id.* at 926.

to be produced at the level set."[91]

Mishkin passingly acknowledged that Powell's opinion "tended to equate race with other variables,"[92] but otherwise Mishkin did not address Powell's seeming effort to describe "genuine diversity" as encompassing a host of nonracial elements "on the same footing."[93] Instead, Mishkin opined that "wise and effective government may at times require indirection and less-than-full-candor" so as to "avoid such visibility in its operations."[94]

If that was a forced and indeed troubling way in which to parse Powell's opinion, Mishkin's strategic interpretation received a decisive boost a decade later when John C. Jeffries Jr., a former Powell clerk, propounded that same reading in his authorized biography of the Justice. Baldly asserting that "diversity was not the ultimate objective but merely a convenient way to broach a compromise,"[95] Jeffries contended that Powell had been guilty of "pure sophistry"[96] in concluding that there was any meaningful difference between the admissions process he condemned and the admissions policies he embraced.[97] The multifaceted approach Powell described and approved, Jeffries claimed, was "in reality" no different than the program he held void except "without fixed numbers."[98] Powell's real meaning, Jeffries said, "simply penalized candor. . . . [T]he message amounted to this: 'You can do whatever you like in preferring racial minorities, so long as you do not say so.'"[99]

A decade later, Jeffries implicitly abandoned much of his position and admitted the need "to curtail or eliminate racial 'plus' factors as soon as possible."[100] But in the interim, other influential voices adopted his and Mishkin's claims. Commenting on this development in 1996, Akhil Reed Amar and Neal Kumar Kaytal tellingly observed that "[a]t some point, when a racial plus looms so much larger than other diversity factors, an admissions scheme would, it seems, violate the letter and spirit of *Bakke*."[101] Their acute criticism was echoed by others who noted how readings of *Bakke* that "ignored key aspects" of Powell's analysis allowed proponents to advance "racial preferences that were plainly inconsistent with the very language in Justice Powell's opinion" and thus "defied the Court *sub silentio*."[102]

The realization that widespread dishonesty and disobedience had characterized much of the implementation, or nonimplementation, of Powell's standard did not,

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91. *Id.*
92. *Id.* at 924.
93. *Id.* at 926 n.70 (quoting *Bakke*, 438 U.S. at 315).
94. *Id.* at 928.
95. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 500 (1994).
96. *Id.* at 484.
97. *Id.*
98. *Id.*
99. *Id.*
100. John C. Jeffries, Jr., Bakke *Revisited*, 2003 SUP. CT. REV. 1, 20 (2003). *See also* David J. Garrow, *How Much Weight Can Race Carry?*, N.Y. TIMES, May 19, 2002, § 4, at 4.
101. Akhil Reed Amar & Neal Kumar Kaytal, Bakke*'s Fate*, 43 UCLA L. REV. 1745, 1777 n.142 (1996).
102. Alan J. Meese, Bakke *Betrayed*, 63 LAW & CONTEMP. PROBS. 479, 482 (2000).

however, end all efforts to extend the interpretive argument that Paul Mishkin had pioneered. Indeed, writing in 2007, prominent Yale law professor Robert Post and a younger colleague reviled "the eccentric and slippery logic of Powell's distinction between constitutional and unconstitutional affirmative action programs."[103] Powell had only propounded a "largely fictional system of 'individualized consideration,'" Post claimed, which "would produce virtually the same 'net operative results' as the explicit 'set-aside' plan" *Bakke* had struck down.[104]

But Post, like Mishkin before him, was laboring on behalf of an ultimately futile cause. Historian Terry Anderson terms the years from 1969 to 1980 "the zenith of affirmative action," for soon after *Bakke* the winds began to change.[105] In 1980, in *Fullilove v. Klutznick*,[106] the Supreme Court narrowly upheld Congress' power to include a ten percent set-aside provision for minority business enterprises in the Public Works Employment Act of 1977,[107] perhaps the ultimate political high watermark for the sort of race-conscious "results" President Johnson had called for in 1965.[108]

But, as Anderson notes, "public support was always tenuous" for affirmative action.[109] The presidential administrations of Ronald Reagan and George H. W. Bush signaled a major shift in executive branch attitudes. By the end of the 1980s the Supreme Court too changed directions, essentially reversing *Griggs v. Duke Power Co.*[110] in *Wards Cove Packing Co. v. Atonio*.[111] Congressional passage of the Civil Rights Act of 1991[112] appeared to entail an indirect endorsement of affirmative action, but the Act's purposeful vagueness hamstrung its influence.[113]

Far more important, especially for the long-term future of affirmative action, was Ward Connerly's 1995 embrace of the California Civil Rights Initiative,[114] an anti-affirmative action measure proposed by two conservative white state academics. A Black member of the University of California Board of Regents, Connerly proved influential in leading the Regents to end admissions preferences

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103. Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. (forthcoming 2007) (manuscript at 32).

104. *Id.* at 30. "Net operative results" was a phrase Mishkin himself had employed in *The Uses of Ambivalence*, *supra* note 85, at 928.

105. ANDERSON, *supra* note 2, at 157.

106. 448 U.S. 448 (1980).

107. Pub. L. No. 95-28, 91 Stat. 116 (1977) (codified as amended at 42 U.S.C. § 6701 (2000)).

108. ANDERSON, *supra* note 2, at 147.

109. *Id.* at 160.

110. 401 U.S. 424 (1971).

111. 490 U.S. 642 (1989). *See* ANDERSON, *supra* note 2, at 203–04.

112. Pub. L. No. 102-166, Title I, 105 Stat. 1074, 1077 (1991) (codified as amended at 42 U.S.C. § 2000e, et seq. (2000)).

113. *See* ANDERSON, *supra* note 2, at 213; SKRENTNY, THE IRONIES, *supra* note 30, at 227; Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896 (1993).

114. 1996 Cal. Legis. Serv. Prop. 209 (West) (codified at CAL. CONST. art. 1, § 31 (West 2002)) [hereinafter Prop. 209].

even before the statewide popular vote on what came to be called Proposition 209 went on the ballot in November 1996.[115]

Connerly believed that a serious misreading of what Lewis Powell had said in *Bakke* was a key problem. "We are relying on race and ethnicity not as one of many factors but as a dominant factor to the exclusion of all others," he complained.[116] Proposition 209 would amend the California Constitution to prohibit public institutions from giving preferential treatment on the basis of race, sex, or ethnicity.[117] On November 5, 1996, California voters approved it by a margin of better than fifty-four to forty-six percent,[118] and looking back at that vote almost a decade later, historian Terry Anderson termed the outcome "the demise of affirmative action."[119]

The impact of the measure's disallowance of racially-preferential admissions on the number of Black and Latino students at California's top public universities was immediate and drastic. Within one year the percentage of undergraduates at the University of California at Berkeley who were Black, Latino, or Native American dropped from twenty-three percent to ten percent.[120] At Berkeley and UCLA law schools, Black admissions declined by more than 80 percent, and Latino admissions declined by half.[121]

But California's revolutionary change would spread further. Just two years later, in November 1998, voters in Washington, another generally liberal, West Coast state, approved Initiative 200, a statutory ban on affirmative action modeled on Proposition 209, by a margin of more than fifty-eight percent of the vote.[122] In late 1999, Florida governor Jeb Bush announced his intent to eliminate race-based admissions at all state public universities, and his "One Florida Initiative" was

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115. *See* B. Drummond Ayres Jr., *Conservatives Forge New Strategy to Challenge Affirmative Action*, N.Y. TIMES, Feb. 16, 1995, at A1 [hereinafter Ayres, Jr., *Conservatives Forge New Strategy*]; B. Drummond Ayres Jr., *California Board Ends Preferences in College System*, N.Y. TIMES, July 21, 1995, at A1; Richard Bernstein, *Moves Under Way in California to Overturn High Education's Affirmative Action Policy*, N.Y. TIMES, Jan. 25, 1995, at B7. *See also* John Aubrey Douglass, *Anatomy of Conflict: The Making and Unmaking of Affirmative Action at the University of California*, 41 AM. BEHAV. SCIENTIST 938, 947–52 (1998).

116. Ayres, Jr., *Conservatives Forge New Strategy*, *supra* note 115, at 22.

117. *See* Prop. 209, *supra* note 114.

118. Robert Pear, *In California, Foes of Affirmative Action See a New Day*, N.Y. TIMES, Nov. 7, 1996, at B7.

119. ANDERSON, *supra* note 2, at 256. *See also* B. Drummond Ayres Jr., *Fighting Affirmative Action, He Finds His Race an Issue*, N.Y. TIMES, Apr. 18, 1996, at A1; Barry Bearak, *Questions of Race Run Deep for Foe of Preferences*, N.Y. TIMES, July 27, 1997, at A1; Pear, *supra* note 118.

120. ANDERSON, *supra* note 2, at 258. *See also* David Leonhardt, *The New Affirmative Action*, N.Y. TIMES, Sept. 30, 2007, § 6 (Magazine), at 76 (reporting on the University of California's new admissions practices).

121. *Id.* Anderson adds that "the real winners of the affirmative action battles at select public universities were Asian Americans." *Id.* at 260. *See also* Timothy Egan, *Little Asia on the Hill*, N.Y. TIMES, Jan. 7, 2007, § 4A, at 24 (reporting that thirty-seven percent of undergraduates at California's nine top university campuses are now Asian).

122. Steven A. Holmes, *Victorious Preference Foes Look for New Battlefields*, N.Y. TIMES, Nov. 10, 1998, at A25. *See* ANDERSON, *supra* note 2, at 261.

approved and implemented early in 2000.[123]

The California, Washington, and Florida prohibitions, however, served only as scene-setters for the Supreme Court's landmark reconsideration of Justice Powell's *Bakke* opinion when two challenges to undergraduate and law school admissions programs at the University of Michigan reached the Supreme Court in 2003.[124] Notwithstanding all of the derisory attacks on Powell's analysis, twenty-five years after he articulated the fundamental distinction between race-determinative and race-conscious admissions practices, the Supreme Court unanimously embraced his standard while nonetheless disagreeing about particular applications of it.[125]

In a decision that did not surprise most careful observers,[126] the Court struck down Michigan's undergraduate admissions policy because of the twenty-point bonus that the program automatically awarded to every Black, Hispanic, or Native American applicant.[127] But in the second, more closely-contested case, challenging admissions practices at Michigan's law school, Justice Sandra Day O'Connor led a five-Justice majority in upholding the program pursuant to Powell's 1978 standard.[128]

"[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions," O'Connor wrote.[129] "[O]utright racial balancing," she emphasized, "is patently unconstitutional."[130] Instead, "truly individualized consideration demands that race be used in a flexible, nonmechanical way."[131] O'Connor explained,

> When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.[132]

O'Connor's standard was as strong and stark a vindication of the clear meaning of Powell's opinion as could be imagined. In the case at hand, she said, Michigan Law School's admissions program

> seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this flexible approach, the Law School sufficiently takes into

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123. *Florida Ends Use of Race in College Admissions*, N.Y. TIMES, Feb. 23, 2000, at A14; Sue Anne Pressley, *Florida Plan Aims to End Race-Based Preferences*, WASH. POST, Nov. 11, 1999, at A15. *See* FLA. ADMIN. CODE ANN. r. 6C-6.002(7) (2004).

124. Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

125. *See Gratz*, 539 U.S. at 270–72; *Grutter*, 539 U.S. at 325.

126. *See, e.g.*, Jeffries, Bakke *Revisited*, *supra* note 100, at 14 n.55 (terming the outcome "clearly foreseeable"). *See also* David J. Garrow, *The Path to Diversity? Different Differences*, N.Y. TIMES, Sept. 2, 2001, § 4, at 4.

127. *Gratz*, 539 U.S. at 275–76.

128. *Grutter*, 539 U.S. at 343–44.

129. *Id.* at 325.

130. *Id.* at 330.

131. *Id.* at 334.

132. *Id.* at 336–37.

> account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.[133]

Michigan Law School, O'Connor said, "considers race as one factor among many,"[134] echoing how Powell had identified the crucial distinction a quarter-century earlier. But the O'Connor majority went on to emphasize another point, one reminiscent of Harry Blackmun's anguished comments back in *Bakke*. O'Connor declared,

> [R]ace-conscious policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits."[135]

The majority opinion closed by making that "sunset" point most explicit. "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity,"[136] O'Connor observed. "Since that time, the number of minority applicants with high grades and test scores has indeed increased. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[137]

The pair of majority opinions in *Gratz* and *Grutter* may have utterly vindicated Justice Powell's clear yet nuanced opinion in *Bakke*, but affirmative action opponents like Ward Connerly were far from satisfied with Sandra Day O'Connor's signal that the clock inexorably was ticking down. Connerly promised to mount a Michigan campaign for a statewide popular vote just like those he previously had won in California and Washington.[138] When that measure, Proposition 2, came before voters in November 2006, it won approval by a margin of more than fifty-eight percent of the vote.[139]

University of Michigan authorities unwisely responded to the popular vote outcome by declaring they would examine every possible legal avenue for avoiding implementation of the measure, but were met with a storm of editorial censure and soon changed their tune.[140] Yet the next challenge is whether

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133. *Id.* at 338–39.

134. *Id.* at 340.

135. *Id.* (quoting Brief of Respondent Bollinger at 32).

136. *Id.* at 343.

137. *Id.*

138. Karen W. Arenson, *Ballot Measure Seen in Wake of Court Ruling*, N.Y. TIMES, July 10, 2003, at A17.

139. Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16.

140. *See id.*; Steve Chapman, *University of Michigan vs. The People*, CHI. TRIB., Nov. 23, 2006, § 1, at 19; Editorial, *A New Diversity at Michigan*, CHI. TRIB., Jan. 14, 2007, § 1, at 4; Tamar Lewin, *University to Comply With Ruling*, N.Y. TIMES, Jan. 11, 2007, at A27; *U-M Files for Delay on Prop 2: MSU, Wayne State Also Seek to Retain Policies for 2007 Admissions*, ANN

Michigan's public universities respond honestly and forthrightly to Proposition 2, or, like the evasive, Mishkin-style response to Powell in *Bakke*, choose evasion, dissembling, and deceit instead.

Dissenting in *Gratz v. Bollinger*,[141] Justice Ruth Bader Ginsburg stated that "fully disclosed" racially decisive admissions policies were certainly "preferable to achieving similar numbers through winks, nods, and disguises."[142] Cynical readers of Ginsburg's dissent, or perhaps readers with long experience in U.S. academia, might think that Ginsburg's comment was based upon a belief that college and university leaders will indeed choose artifice and mendacity over good-faith implementation of legal standards with which they personally disagree. This is not a new issue to students of the Black freedom struggle, but most prior iterations of the question occurred in the segregationist South in the decades after *Brown*, not at top-flight national colleges and universities.

Some news reports, however, suggest that Michigan's public colleges and universities may indeed choose the path of disobedience and dissembling, whether by means of favoring students who attest that they have overcome prejudice and discrimination, or specially advantaging all applicants from the heavily Black city of Detroit.[143] Some students of U.S. constitutional history might think that latter policy option an ironic reversal of sorts of *Milliken v. Bradley*;[144] others might instead ponder its relationship to *Gomillion v. Lightfoot*.[145]

The distinguished liberal constitutional commentator Michael Dorf already has warned that "one could well imagine a court saying that an admissions essay question that asks applicants to identify discrimination or prejudice they have overcome is merely a disguised affirmative action program."[146] Indeed, Dorf says, all evasive policies "may be vulnerable to the charge that they are merely covert forms of race-based affirmative action, and thus invalid on that basis."[147]

In the not-so-long run, such tactics are indeed destined to fail. In addition, Ward Connerly and his allies are moving forward with additional new ballot initiatives in up to five states—Arizona, Colorado, Nebraska, Oklahoma, and probably Missouri—with bright prospects for November 2008 victories in each state.[148] But the writing is on the wall, and some of it has been there a very long

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ARBOR NEWS, Dec. 12, 2006, at A1.

141. 539 U.S. 244 (2003).

142. *Id.* at 305 (Ginsburg, J., dissenting).

143. *See, e.g.*, Tamar Lewin, *Colleges Regroup After Voters Ban Race Preferences*, N.Y. TIMES, Jan. 26, 2007, at A1.

144. 418 U.S. 717 (1974) (holding that a multidistrict remedy cannot be ordered for segregation in a single school district without evidence that the other districts were also intentionally segregated), *aff'd*, 433 U.S. 267 (1977).

145. 364 U.S. 399 (1960) (holding that a complaint properly alleged discrimination in violation of the Due Process and Equal Protection Clauses where a municipality redrew city boundaries and consequently excluded all but a handful of Blacks but no Whites from voting in the district).

146. Michael C. Dorf, *Universities Adjust to State Affirmative Action Bans: Are the New Programs Legal? Are They a Good Idea?*, FINDLAW, Jan. 29, 2007, http://writ.news.findlaw.com/dorf/20070129.html.

147. *Id.*

148. *See* Leslie Fulbright, *Connerly Gearing Up for Wider Crusade: Affirmative Action Foe*

time. From Martin Luther King, Jr. in the 1960s, through William O. Douglas, Lewis Powell and Harry Blackmun in the 1970s, to Sandra Day O'Connor and her more liberal colleagues in *Grutter* in 2003, the call for truly individualized consideration of persons who have suffered social or economic disadvantage has been profoundly consistent. The sad truth may be that large colleges and universities refuse to accept that lesson not out of any reparative principle or belief, but simply because of the administrative costs and inconveniences that such an approach to admissions policies undeniably will entail.

Yet the path forward is clear and well-lit. "[A]ny selection process that does in fact consider the entire individual will be time-consuming, labor-intensive, and expensive," observed an impressive report issued in the wake of *Grutter* and *Gratz* by Educational Testing Service.[149] "Institutions that shy away from an admissions regime whose components reflect the seriousness of the task reveal a very great deal about the true nature of their commitment," the ETS report most tellingly noted.[150] If, instead, "we are honest about our objectives, and those goals involve considered decisions reflecting a desire to assemble a truly diverse student body, we must also be willing to pay the costs associated with them."[151] That conclusion is loyal not only to the rulings of Lewis Powell and Sandra Day O'Connor, but also to the sacrifices and efforts of all the Martin Luther Kings and Ed Sylvesters, both famous and forgotten.

Considers Launching Campaigns in 9 States, S.F. CHRON., Dec. 14, 2006, at A1; Peter Schmidt, *4 States Named as New Targets in Affirmative-Action Fight*, CHRON. PHILANTHROPY (Wash., D.C.), May 4, 2007, at 34; Peter Schmidt, *5 More States May Curtail Affirmative Action*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 19, 2007, at 1; Matthew Hansen, *Vote Sought on Affirmative Action Ban—A UNL Professor, Backed By a California Group, Files a Ballot Petition in Nebraska*, OMAHA WORLD–HERALD, Nov. 14, 2007, at 1A.

149. MARK R. KILLENBECK, EDUCATIONAL TESTING SERVICE, AFFIRMATIVE ACTION AND DIVERSITY: THE BEGINNING OF THE END? OR THE END OF THE BEGINNING? 25–26 (2004).

150. *Id.* at 26.

151. *Id.*