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—
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.” The actual phrase itself first appeared in a nonracial context in the
Wagner National Labor Relations Act of 1935, and was then first used with
regard to race in New York’s 1945 Law Against Discrimination.

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rights struggle.

2000e-4, et seq. (2000)).
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
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. 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” 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.” 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.”

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.’” He chose “‘affirmative’ because it was alliterative,” Taylor explained.

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.” 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.” 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.”

Graham recognized that “from the beginning the concept of affirmative action
was somewhat open-ended," 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.” 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, 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.”

Johnson’s 1965 Order, Anderson explains, “became the standing rule for affirmative action for future decades,” 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. 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. 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.” 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.”

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.

14. GRAHAM, supra note 3, at 34.
15. ANDERSON, supra note 2, at 61.
18. ANDERSON, supra note 2, at 92.
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.”

What had to happen for Black Americans, Johnson continued, was “to move beyond opportunity to achievement.”

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.’”

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.” 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.” 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. 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.”).
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


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.

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


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

36. Id.


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.


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,

44. Anderson, supra note 2, at 124.
46. Id. at 426–27.
47. Id. at 427–28.
48. See id.
49. Id. at 430–31.
50. Id. at 431.
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.”

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.” Terry Anderson asserts that in practice, Griggs “basically made fair employment more a group than an individual right,” 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.

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. Public debate and controversy over the incipient federal expansion burgeoned rapidly in late 1971 and early 1972, 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.”

Richardson told reporters that “the primary responsibility for finding methods to increase the numbers of women and minorities must come from the universities themselves,” 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.
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.
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.
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

71. Id. at 332 (Douglas, J., dissenting).
72. Id. at 337.
73. Id. at 336.
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.”

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.

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” in a multifaceted evaluation of student diversity “without . . . being decisive” 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.” 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,” a “masterful stroke of diplomacy,” but at the same time he asserted that Powell’s position could not be “supported by articulated principle.”

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. In other words, all Powell’s opinion had articulated was “a matter of form over substance,” 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

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.
86. Id. at 929.
87. Id. at 930.
88. Id. at 929.
89. Id. at 929 n.78.
90. Id. at 926.
Mishkin passingly acknowledged that Powell’s opinion “tended to equate race with other variables,”

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.”

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.”

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,”

Jeffries contended that Powell had been guilty of “pure sophistry” in concluding that there was any meaningful difference between the admissions process he condemned and the admissions policies he embraced.

The multifaceted approach Powell described and approved, Jeffries claimed, was “in reality” no different than the program he held void except “without fixed numbers.”

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.’”

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.”

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.”

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.”

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

91. Id.
92. Id. at 924.
93. Id. at 926 n.70 (quoting Bakke, 438 U.S. at 315).
94. Id. at 928.
96. Id. at 484.
97. Id.
98. Id.
99. Id.
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 1991112 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

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).
108. ANDERSON, supra note 2, at 147.
109. Id. at 160.
even before the statewide popular vote on what came to be called Proposition 209 went on the ballot in November 1996.\footnote{115}

Connerly believed that a serious misreading of what Lewis Powell had said in \textit{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.\footnote{116} Proposition 209 would amend the California Constitution to prohibit public institutions from giving preferential treatment on the basis of race, sex, or ethnicity.\footnote{117} On November 5, 1996, California voters approved it by a margin of better than fifty-four to forty-six percent,\footnote{118} and looking back at that vote almost a decade later, historian Terry Anderson termed the outcome “the demise of affirmative action.”\footnote{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.\footnote{120} At Berkeley and UCLA law schools, Black admissions declined by more than 80 percent, and Latino admissions declined by half.\footnote{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.\footnote{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

\footnotesize
\begin{itemize}
\item[117] See \textit{Prop. 209}, supra note 114.
\item[120] \textit{Anderson}, supra note 2, at 258. See also David Leonhardt, \textit{The New Affirmative Action}, \textit{N.Y. Times}, Sept. 30, 2007, § 6 (Magazine), at 76 (reporting on the University of California’s new admissions practices).
\item[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, \textit{Little Asia on the Hill}, \textit{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).
\end{itemize}
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 \textit{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


\(^{125}\) \textit{See Gratz}, 539 U.S. at 270–72; \textit{Grutter}, 539 U.S. at 325.


\(^{127}\) \textit{Gratz}, 539 U.S. at 275–76.

\(^{128}\) \textit{Grutter}, 539 U.S. at 343–44.

\(^{129}\) \textit{Id.} at 325.

\(^{130}\) \textit{Id.} at 330.

\(^{131}\) \textit{Id.} at 334.

\(^{132}\) \textit{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.\textsuperscript{133}

Michigan Law School, O’Connor said, “considers race as one factor among many,”\textsuperscript{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 \textit{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.”\textsuperscript{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,”\textsuperscript{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.”\textsuperscript{137}

The pair of majority opinions in \textit{Gratz} and \textit{Grutter} may have utterly vindicated Justice Powell’s clear yet nuanced opinion in \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{140} Yet the next challenge is whether

\begin{footnotesize}
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\item \textsuperscript{133} \textit{Id.} at 338–39.
\item \textsuperscript{134} \textit{Id.} at 340.
\item \textsuperscript{135} \textit{Id.} (quoting Brief of Respondent Bollinger at 32).
\item \textsuperscript{136} \textit{Id.} at 343.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} Karen W. Arenson, \textit{Ballot Measure Seen in Wake of Court Ruling}, \textit{N.Y. TIMES}, July 10, 2003, at A17.
\item \textsuperscript{139} Tamar Lewin, \textit{Michigan Rejects Affirmative Action, and Backers Sue}, \textit{N.Y. TIMES}, Nov. 9, 2006, at P16.
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, Justice Ruth Bader Ginsburg stated that “fully disclosed” racially decisive admissions policies were certainly “preferable to achieving similar numbers through winks, nods, and disguises.” 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. Some students of U.S. constitutional history might think that latter policy option an ironic reversal of sorts of Milliken v. Bradley; others might instead ponder its relationship to Gomillion v. Lightfoot.

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.” 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.”

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. But the writing is on the wall, and some of it has been there a very long

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141. 539 U.S. 244 (2003).
142. Id. at 305 (Ginsburg, J., dissenting).
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).
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.

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150. Id. at 26.
151. Id.