

Why History Remains a Factor in the Search for Racial Equality

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The conversation began innocently enough. “So how do you think of yourself?” we asked. A light-skinned child of six, the product of an interracial marriage, she without hesitation responded, “I am black, African American.” “Why?” came the question from both parents’ mouths even before we realized the consequences or implications of what we had just asked. With a tone that suggested surprise at our need to ask, she pronounced, “If slavery still existed, I would be a slave.” The young girl whose sense of self could not be erased from the history of race in America was my six-year-old daughter Suzanne. Even at that tender age she knew enough about her country to comprehend that she could not live outside of history and its meanings in everyday interactions. As a nation and society we had created race, and she was a by-product of that history; in and out of school she had been so educated. Unwittingly, she joined a long list of scholars in saying that race was an historically manufactured social construction and had a lingering effect on all. No matter how much she might have desired, she could not escape that history.

This essay does more than retrace that history; it explores the link between past events and contemporary public policy. It begins with a review of the constitutional debates over access to education, especially higher education, culminating in the landmark 1978 *Bakke* decision. It briefly reviews the imperatives for adopting affirmative action policies in the United States during the late 1960s and the early 1970s. It argues that federal officials responded to real disparities in life choices and material conditions and that the policies adopted were rooted in the history of racial discrimination in the United States. To underscore this point, I rely almost exclusively on black-white comparisons, while acknowledging that affirmative action benefited American Indians, Latinos and Latinas, Asian Americans in some instances, and white women. Rather than examine all sectors of society, the second half of the essay looks closely at diversity in higher education. I conclude with two essential points. First, policies designed to insure equitable access to opportunity produce a more civic-minded citizenry, which was a key reason for the introduction of affirmative action. Second, the introduction of affirmative action cannot and should not be divorced from the particulars of a given society. In the American context, this meant that action by public and private institutions intended to both correct past inequities and produce societal gains. With the latter in mind, those same policymakers sought to take advantage of the diverse talents and skills that deserved to be nurtured, assuming that in doing so they served the larger goal of furthering the aims of the democratic society. That the debate over affirmative action roils one nation reflects the United States' continued encounter with its racial dilemma. That ethnic hostilities have surfaced in a number of world settings reminds us of the problem difference plays in all societies. Failure to acknowledge and address the dilemmas of ethnic integration could prove a vexing and enduring problem for the world in the twenty-first century.

*The Continued Encounter with the
American Dilemma*

Nearly six decades ago Gunnar Myrdal, aided by the prodigious research skills of a team of social scientists, forced an intellectual and philosophical confrontation: He and his colleagues exposed the profound differences between the American ideal and the American reality. As a liberal democracy, the United States had long been hailed as a “shining city on a hill,” an example of the best in human potential, where, some claimed, caste, class, religion, gender, and race were social markers but not barriers to success and achievement. From the foothills of Appalachia through the dense thicket of ethnic urban enclaves, across the barren landscapes of the West, another narrative competed. It described an America where social markers limited the height of one’s accomplishments and narrowed the scope of one’s dreams. Myrdal’s effort to understand those two Americas culminated in the publication of *An American Dilemma*, which he subtitled *The Negro Problem and Modern Democracy*.¹

Race, Myrdal concluded after his research, played a significant role in America. That the study commenced during the Great Depression, when black unemployment rose substantially, underscored rather than distorted what minority status meant in a democratic society. From our vantage point of the early twenty-first century rather than the midpoint of the twentieth, one might contest the juxtaposition of *Negro* and *problem*. After all, the special place of African Americans in the country’s life and history had as much to do with others as it did with the descendants of the enslaved Africans who labored so mightily in the fields, farms, and factories before the Civil War. Yet in looking at a modern democracy that denied its full benefits to a subordinated, racialized population, Myrdal identified a disjunction that still vexes the United States and the scholars who study the ways of its citizenry.

The American Negro problem is a problem in the heart of the American. It is there that interracial tension has its focus. It is there that the decisive struggle goes on. The “American Dilemma,” referred to in the title of this book, is the ever-raging conflict between . . . the valuation preserved on the general plane which we shall call the “American Creed,” . . . and . . . the valuations on specific planes of individual and group living.²

Using the vernacular of the last century’s first years, which celebrated a general support for democracy and freedom for all Americans, Myrdal asked how to achieve a just society without violating the perceptions of justice and fairness, especially if laws were introduced to protect or advance the interests of a few. How does one realize equity in a society when the focus is often on equality, especially when equity represents the process of becoming equal?³

In the half century and more since Myrdal compiled his observations, much has changed in America. The most rigid, state-enforced examples of racial discrimination live only in the memories of those old enough to have experienced the bitter sting or sweet benefits of legal segregation. Americans are today free to pursue affairs of the heart across the color line without governmental interference or opposition, free to live where their finances permit, open to attend schools and colleges of their choice and means based on factors other than just the color of their skin. Income disparities have narrowed, educational attainment levels have converged for select portions of the general population, and life expectancy, to name a few examples, no longer diverge as markedly.

Yet the tension Myrdal so brilliantly pinpointed remains a source of civic injury. Racial difference and intolerance can inflame as openly today as in the past. Hardly a day goes by when some example of the capacity to hate, often in a murderous fashion, outshines examples of tolerance. For commentators such as Dinesh D’Souza, who insist that racism is a feature of the past and not the future,⁴ come reminders that it is impossible for most of us to com-

pletely step outside of history. In popular culture, academic treatises, social analyses, advice on marriage mates, and families squabbles about friends, we are reminded that race, and our unavoidably incomplete analysis of it, figures significantly in the state policies adopted.

Deep Roots

America's encounter with the dilemma of race began the day nineteen Africans entered colonial Jamestown and became bonded labor. More than two centuries of slavery, a Civil War, and periods of reconstruction and redemption added new chapters but did not alter the main storyline: race marked blacks as second class in American life. By the end of the nineteenth century the spring of hope that followed the abolition of slavery gave way to the winter of despair, or what historian Rayford Logan called the nadir. Extralegal violence, political disfranchisement, and growing residential segregation increased across the South and much of America.⁵

A way of life evolved for blacks, whites, and others. In the South, racial groups lived in both the bright light and the shadows of one another's existence. On one level work patterns meant that blacks often had intimate knowledge of the folkways, thoughts, and behavior of whites. As in slavery, they saw whites for whom they worked at their best and worst. On another level, perceptions of supremacy meant that few whites saw most blacks as intimate equals, for they were not. Laws and local ordinances appeared that regulated human interaction. The system under which all lived became known as Jim Crow, or segregation. At its most basic level the system separated blacks from whites in things sublimely routine and in matters perversely significant—birth registers, water fountains, cemeteries, and telephone directories, for example.

The period from the 1890s to 1940 was more than a tragic story in American race relations; it was a period characterized by pro-

nounced violence. Lynchings, mass murders, convict labor, debt peonage, abject poverty, and more subtle but nonetheless pernicious forms of racism shaped black and white lives for nearly three generations. In this contrived world the lowliest white assumed domain over the most successful black. Looking back from the twenty-first century, some may find it convenient to dismiss this ugly period in American history or to inflate the power of white authority. Many blacks managed for days and weeks at a time to live beyond the stare of white eyes. That too was a central dimension of Jim Crow life. They saw themselves as more than victims; they were full men, women, and children trying to chart lives in a sometimes inhospitable world. Yet victimization was not a figment but a real possibility, one that all blacks feared and one that elders explained to their charges so they could avoid death.⁶

At the local and national levels blacks organized to thwart the system of segregation. They created national protest organizations, used political contacts and involvement to champion their own interests, and engineered efforts to challenge the legality of Jim Crow legislation.⁷ Throughout the history of struggle against the system, the courts of the land played a profoundly central role, especially the U. S. Supreme Court.

In the 1890s the battle lines of the fight for justice and opportunity centered on the Deep South. New Orleans had been a cultural and racial crossroads; there the different strands of Europe knotted with the ethnic fibers of Africa to produce a creole tapestry seldom found in the continental United States. In a tripartite arrangement, African, Europeans, and their progeny claimed their distinct places on the quilt of social relations that distinguished New Orleans, notwithstanding the existence of slavery, from other southern places.⁸

In New Orleans Homer Adolph Plessy joined a group of others incensed by new limits imposed on them on public conveyances. Many blacks feared, and a number of whites hoped, that a new racial covenant was soon to emerge, one that established the sanc-

tity of segregation. Plessy, seven-eighths white but nonetheless black according to state law, believed that the 1890 Louisiana law, the Act to Promote the Comfort of Passengers, violated his rights. The law specified that “all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.”⁹ Railway executives frowned on the provision as unnecessary and an additional financial burden. For nearly two years train workers all but ignored the prohibitions, allowing blacks to sit according to arrival and class of ticket, although companies did add cars for “coloreds only.” Upset by the law and what it implied, blacks pushed to have the law abolished.

On June 7, 1892, a coordinated challenge took place. That day Plessy claimed his seat on the East Louisiana Railway as the train journeyed thirty miles north of New Orleans, headed to Covington. Through a prearranged signal, Plessy moved to the section reserved for whites, only to immediately be asked to return to his seat. Given Plessy’s appearance, it is highly unlikely that the conductor could discern race from a quick glance. That a detective stood ready to arrest him when he refused to surrender his seat suggests a coordinated action. Soon Plessy found himself before a magistrate in New Orleans, who found that he had knowingly and willfully violated the state ordinance. Plessy appealed the ruling to the Louisiana Supreme Court, which allowed him to take his case directly to the U.S. Supreme Court.

Four years after the initial act of civil disobedience, the Supreme Court issued its decision. Henry Billings Brown wrote the majority opinion, which codified the legal principle of separate but equal. The court’s majority concluded that as long as blacks had nominally equal access to resources, the state could devise strategies to separate them from whites. The constitution, the majority reasoned, could not place blacks and whites on the same social plane.¹⁰

Over the course of the next two generations the critical issue would become what constituted equal opportunity.

Within twelve years of the 1896 *Plessy* decision the Supreme Court ventured into the territory of higher education. Berea College in Kentucky, a private institution, had been tied to an interracialist sentiment since its 1859 founding. School officials believed that the welfare of the nation turned on the ability to educate a leadership, guided by Christian principles, that could work with other groups. The school had been founded as a place where blacks and whites would encounter one another as relative equals (prohibitions against interracial dating notwithstanding). Opposed to the commingling, the state of Kentucky inserted itself. The state introduced legislation that required school officials to teach blacks and whites at separate times in separate locations. This set in motion a legal fight that ultimately landed in Washington, D.C.¹¹

The Supreme Court upheld the legality of the Kentucky legislation, arguing that the state of Kentucky could regulate human interaction at public as well as private institutions because the state had authorized the incorporation of the school. The constitutional prerogative did little to hide the net effect: segregation provisions drew invidious distinctions between whites and blacks. The language was highly visible in the Kentucky statute:

If the progress, advancement and civilization of the twentieth century is to go forward, then it must be left, not only to the unadulterated blood of the Anglo-Saxon-Caucasian race, but to the higher types and geniuses of that race.¹²

In fact, *Berea College v. Kentucky* accented the understood logic: segregation was not devised to benefit blacks but rather to insure that the interests of whites prevailed.

It did not take two generations before African Americans and their friends began to fight back. Even during the formative years of segregation individual blacks managed to attend the most selec-

tive colleges and universities. Private schools such as Amherst, Brown, and Harvard, and public universities such as Minnesota, Michigan, and UCLA counted a black graduate or two among their alums in the 1910s and 1920s. From this small cadre emerged a growing black intelligentsia, which included the legal theorists and strategists William H. Hastie and Charles Howard Houston, and such towering figures as Alain Locke, E. Franklin Frazier, and Ralph Bunche. From their seats at Howard University they came to train among others the future Supreme Court justice Thurgood Marshall.¹³

Marshall had been raised in Baltimore, Maryland, a state on the figurative middle ground between slave and free. After the abolition of slavery and the institutionalization of Jim Crow, the state had begun to behave more southern, providing “separate but equal” educational opportunities and accommodations for blacks and whites. Notably absent in the state during the 1930s was a law school for blacks. Marshall knew this firsthand. He had aspired to attend the University of Maryland Law School after graduating from Lincoln University in Pennsylvania, but it had no place for blacks. This was true when he, Houston, and local NAACP officials agreed to challenge the legality and propriety of segregation.¹⁴

A case that appeared in legal annals as *Murray v. Pearson* but many contemporaries considered *Murray v. Maryland* was the first victory in the fight for equal opportunity in higher education. Donald Murray had applied to attend the law school at the University of Maryland only to be told the school did not admit blacks. University president Raymond Pearson explained in a letter to Murray that the state legislature had earmarked funds for him to attend law school out of state or at Morgan State or Princess Anne Academy. The latter, hardly an institution of higher education, highlighted the artifice of segregation’s claim of separate but equal facilities and institutions. At best a high school, neither it, nor Morgan State, offered law degrees. In a 1935 exchange of letters

with the registrar and the president of the University of Maryland, Murray wrote, “I am a citizen of the State of Maryland and fully qualified to become a student at the University of Maryland Law School. No other State institution affords a legal education.”

Houston’s opening comments to the Baltimore City Court that heard the case were framed by Murray’s aims and assessment of his own skills and desires, and by the university’s actions. State university officials became unwitting assistants for the NAACP lawyers. They willingly offered that there was no law school for blacks in the state; showed little sense that one should exist, even a patently unequal one; admitted that the state had not appropriated funds to send Murray out of state; and evinced little concern for even the crudest elements of the *Plessy* doctrine. At the conclusion of the hearing Judge Eugene O’Dunne ordered the university to admit Murray to the University of Maryland Law School. Appeals followed but to no avail. Murray had made his case and won.¹⁵

What Maryland judges decided had little reach beyond the state’s borders. NAACP lawyers and those they defended understood this. Incremental change brought little relief for the majority of blacks seeking a fair share of resources. Yet the body of law rested on the establishment of precedent. Thus a gradualist approach continued.

Meanwhile, potential plaintiffs and strategists set their sights on another border state, Missouri. There were few black lawyers in the state, even in its largest city, St. Louis. As in Maryland, no law school existed for blacks, and they could not attend the law school at the exclusively white state public university. As in Maryland, blacks had the option of attending one of the state-sanctioned black institutions, where a law program would be created, or of attending a law school out of state. If a black resident of Missouri opted for the latter, the state would pay the difference in tuition between Missouri costs and that school’s costs. The state had no allowances for travel or accommodations, however.

Lloyd Gaines, a graduate of all-black Lincoln University of Mis-

souri, sought admission to the University of Missouri's law school. He rejected the state's legitimate offer to build a law program at Lincoln or to travel out of state, saying that doing so would place an undue burden on him and deny him equal rights just because of his race. Charles Houston argued this point before the Missouri state courts in 1936 in *Missouri ex. rel Gaines v. Canada*. Missouri officials took few risks. They assembled a team of skilled attorneys and provided evidence of a willingness to maintain separate yet quality institutions for blacks. After weighing the arguments, the state court rejected Gaines's complaint.

Within two years the case made its way to the U.S. Supreme Court. Against the backdrop of the depression and agitation for social inclusion and improvement from a broad swath of Americans, the Court's traditional role as a conservative protector of the interests of a few began to change. By the second half of the 1930s the Court questioned the constitutionality of all-white juries, validated the right of workers to engage in collective bargaining, and rethought the state's role in the policing of individual debt, among other things. It was this Court that heard Houston's appeal on behalf of Gaines and agreed with his logic that the remedies suggested by the state of Missouri placed undue burden on Gaines. Houston did not attack the logic of segregation in Gaines; instead, he extended that logic, suggesting that minus the immediate construction of a first-rate law school for blacks, the State of Missouri violated its promise of separate but equal opportunities for all. Rather than a frontal attack on segregation, which had the greatest likelihood of ameliorating persecution, lynching, poverty, and the heavy cross of racism, Houston played another game: if black people must be treated differently and poorly, then do so justly as outlined by the law. The majority accepted this argument, writing,

The basic consideration is not to what sort of opportunities other states provide, or whether they are as good as those of Missouri, but as to what opportunities Missouri itself furnishes to

white students and denies to Negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. . . . By the operation of the laws of Missouri a privilege has been created for the white law students which is denied to Negroes by reason of their race.¹⁶

Thus through the 1930s the logic of segregation went unassailed in the legal arena. Since the 1920s black social scientists had been writing that race was a social construction. African American novelists penned a number of works of fiction throughout the 1920s and 1930s questioning the legitimacy and efficacy of segregation for both blacks and whites. Yet racial difference mattered as much as ever as the nation entered into World War II. Where change had occurred, it entailed accepting European immigrants as other than distinct and separate races. Increasingly over the first four decades of the twentieth century a new understanding took hold. Hostile speculations about the racial pedigree of eastern and southern Europeans slowly evaporated. Without exception, all with European ancestry became white. And where questions remained, they became household questions rather than public policy pronouncements acted on by politicians, newspaper moguls, and other shapers of public opinion and policy. Every significant social relationship, from whom one could marry to where one could live to which colleges one could attend, reflected this change, which World War II hastened.¹⁷

For Japanese Americans the war underscored their difference and the primacy of race. Unlike Italian and German Americans, their ancestry, appearance, and race marked them as dangerous and thus a threat to national security. In response California governor Earl Warren had them detained; their property was confiscated and their lives uprooted. Before the war's end, Japanese Americans, irrespective of place of birth, found themselves relocated to isolated

hamlets across the West. Called internment camps rather than concentration camps, the barbed wire enclosures served some of the same purposes, although they did not lead to the same deadly consequences.¹⁸

The war did not produce a fundamental change in life circumstances for African Americans. Segregation remained a staple of American life. Black G.I.s, often in uniform, endured the biting sting of Jim Crow. Across the South white-owned establishments directed black soldiers to the back for service, even when dressed in the colors of the armed services. They trained and served in segregated units; they were assigned to menial, sometimes extremely hazardous duties, such as loading and unloading armaments. When they challenged the status quo, they ran afoul of military protocol and became subjects of court martial. Nonetheless, at home and abroad African Americans used the war to demonstrate their patriotism and to agitate for change.¹⁹

The war's end brought a new wave of legal challenges from African Americans seeking access to higher education. More than other border states, Oklahoma vigorously worked to separate blacks and whites in educational settings at all levels, going so far as to impose fines on those willing to foster interracial instruction. In 1946 a highly accomplished, spirited, though shy graduate of Langston College for Negroes, Ada Sipuel, applied for admission to the University of Oklahoma Law School, which denied her application. Thurgood Marshall, who by now had taken over as general legal counsel for the NAACP, thought Sipuel's situation bore a striking similarity to the *Murray* and *Gaines* cases. In the intervening years, however, Marshall's view on segregation had evolved. For the first time, Marshall expressed doubt that a society committed to equality could effect that equality through segregation. Cautiously, he was prepared to expose "separate but equal" as a social and constitutional fraud.

The Regents of the University of Oklahoma would have nothing to do with such an argument. Heading to trial, they pro-

nounced that they were prepared to build a separate law school for blacks. The full logic of this position only became clear in court when lawyers for the state realized that building separate facilities for blacks in all areas would amount to a staggering expense. The economics of segregation notwithstanding, the lower court upheld the position of the state. On appeal the state again prevailed.

In 1948 the U.S. Supreme Court heard *Sipuel*. With quick dispatch the Court ruled that Oklahoma had to build an equal law school for blacks, admit Sipuel to the present law school, or close it altogether until blacks could be accommodated. Once the case was remanded to the state courts for enforcement, the board of regents reacted with open disdain. They brazenly roped off a section of the state capital for the special instruction of Ada Sipuel. Marshall found this a wanton act of discrimination and again appealed to the Supreme Court. This time he inched closer to assaulting the whole edifice of segregation, suggesting that equality hinged on free exchange of ideas and interactions, which segregation could never produce. In this appeal Marshall distanced himself from the logic of separate but equal. He, unfortunately, was ahead of the Court, which sanctioned Oklahoma's actions as long as equal facilities were offered. This was a setback for equality.²⁰ But in challenging the University of Oklahoma, Marshall not only questioned the efficacy of separate but equal facilities, he also hinted at the value of intellectual exchange across racial lines. A generation and a half later this would become the cornerstone of the diversity argument, calling for the limited use of race in admissions decisions.

During the 1940s, however, the challenge remained: breaking through the walls of segregation that fortified Jim Crow's fortress. No southern state allowed blacks to attend schools with whites, even after black and white soldiers returned home in triumph, having vanquished Nazi and Fascist armies in Europe and Asia. Most African Americans hoped for a double victory, one abroad and one at home. They found instead that change came only after a demand.²¹

Heman Sweatt, a postal worker in Texas, aspired to attend law school. Only twenty-three blacks had licenses to practice law in the state, as compared to 7,701 whites. He wouldn't settle for just any law school; he wanted to attend the state's most prestigious school, the University of Texas at Austin. It, however, barred blacks. Like other southern states, it offered to establish a black school at one of the existing colleges for Negroes. In fact, the state legislature pledged \$3 million for a brand-new university for blacks, beginning with funds for a law school.

From the moment he applied for admission in 1946 until the Supreme Court heard his case on appeal in 1950, Sweatt insisted that he wanted to attend the University of Texas and no other school. The state mounted a vigorous defense of separate-but-equal policies. Marshall and his associates charted a legal defense that put the value of segregated education on trial. Drawing on legal and social science scholars, the NAACP asked what constituted a vital learning environment. NAACP experts openly rejected the social myth of blacks' inherent intellectual inferiority and the societal benefits of segregation. Anticipating questions that would become of supreme importance two generations later, University of Pennsylvania Law School dean Earl Harrison, in response to cross-examination by state attorneys, remarked that "a very important facility of a modern law school consists of one's classmates. In other words, it isn't enough to have a good professor. It is equally essential that there be a well-rounded, representative group of students in the classroom." A classroom of the making proposed by the state lacked this critical diversity, Harrison asserted. Nonetheless, the state court upheld the separate-but-equal approach. The postal worker continued his duties while his case snaked through the court system.

In nearby Oklahoma, meanwhile, the scene switched from the professional school to graduate school. Looking for an unassailable target, the NAACP agreed to represent sixty-eight-year-old George McLaurin. McLaurin, who held a master's degree, wanted a doc-

torate in education and applied to the University of Oklahoma, which rejected his application. McLaurin was an ideal candidate for Marshall and the NAACP because his age deflected the bugaboo of interracial marriage and dating. And given his seniority, delay, such as would be required to construct a separate facility for him, could forever cancel McLaurin's dream of a doctorate.

The NAACP skipped the state court system and appealed directly to a three-judge tribunal of the district court. In August 1948 the district court ordered the university and the state of Oklahoma to admit McLaurin, which it did. He received, thereafter, the worst kind of special treatment. Under the revised state law McLaurin could attend graduate school at the university but on a segregated basis. He would sit in a specially roped off section of class, the library, and the dining hall. If McLaurin was to learn, he would do so without benefit of free and full access to all of the university's resources, especially other students. He alone had the additional task of bearing the heavy cross of race.

The Supreme Court announced its position in both the *Sweatt* and *McLaurin* cases in the summer of 1950. Carefully dodging the matter of *Plessy*, the Vinson Court decided in favor of both men, while upholding segregation. In *Sweatt* the Court ruled that only by attending the University of Texas could he achieve the benefit of an equal education. And, contrary to the outcome in *Sipuel*, it ruled a state could not fulfill its constitutional responsibility through the maintenance of segregated law schools. *McLaurin*, the Court said, raised another constitutional matter. Individuals retained the right to associate with whomever they chose, but the state could not introduce measures that barred such interaction.²² Thus, it outlawed roped classrooms, separate tables, and other state-mandated acts of segregation in university settings. For those hoping for a sweeping reversal of *Plessy* this was not the day. It would come four years later in the *Brown* decision. On this day the Court tracked closely to precedent, extending additional rights to blacks as citizens without overturning half a century of practice.

The *Brown v. Board of Education of Topeka* decision in 1954 did mark a fundamental break. What the Vinson Court found difficult to say, the Warren Court unanimously said: separate but equal was unconstitutional. While *Brown* addressed elementary and secondary schools most explicitly, its implications reached beyond to the collegiate and postbaccalaureate years. More than twenty years of higher education litigation played a pivotal role in shaping the *Brown* opinion. Those earlier cases established the idiocy of segregation, the role of social science in the battle to understand the consequences of racism, and the unflinching truth that all students benefited from a truly integrated learning environment.

On the Road to Bakke

Opposition to *Brown* was swift and venomous. Southern newspapers predicted the fall of the Union, an upsurge in interracial marriage, and a pronounced fraying of the social fabric. Schools across Virginia closed for a year or two in most vicinities and as long as seven years in Prince Edwards County. Arkansas Governor Orval Faubus's decision to oppose desegregation in Little Rock led to a classic confrontation between the governor and President Dwight Eisenhower. In the end the president was forced to send troops under federal command to protect nine young African Americans whose commitment to change brought them into ugly confrontation with hate-spewing mobs of white parents who violently rejected the idea of desegregated schools.

The story of the 1950s and 1960s civil rights movement is all too often remembered as the story of the heroic actions of men and women such as Rosa Parks, Martin Luther King, JoAnn Robinson, and John Lewis. Less attention focuses on the schoolchildren across the nation who found themselves on the battle lines. From 1954, when the Supreme Court declared *Plessy* null and void, through 1955, when the courts directed the South to desegregate with all

deliberate speed, until 1969–71, when most southern states finally desegregated, massive resistance, interposition, and other measures of evasion dominated. Across the South lawyers visited federal courthouses to complain that “all deliberate speed” seemed on a slow train to nowhere. From Virginia to Mississippi many schools were not effectively desegregated until 1970. Moreover, that first generation, those born just as the Court rendered its *Brown* decision, had the unique experience of being the first and in some places the only to experience truly desegregated, if not integrated, classrooms. By the 1980s white flight coupled with the rise of Christian academies to resegregate classrooms north and south.²³

Some will argue somewhat extravagantly that the nation has spent too many resources for too long a time on desegregation. A few openly daydream about the good old days when all was simple and everyone knew his or her place. Yet few readily acknowledge how recently change in American educational opportunities has come. As late as the early 1960s the University of Michigan used photos to pair freshmen roommates by race and gender. Only six or seven years before the *Bakke* decision did elementary and secondary schools across the South desegregate. Black students at historically white colleges, especially in the South, could be counted on two hands rather than by the hundreds. The average black and white American born in 1955 who lived in the South would have spent the majority of their schooling in segregated schools (typically nine years in segregated schools and at most three in desegregated environments).

A literate group of conservatives, backed by a sizable hidden army, opposed the change in their midst. Editorials decried the federal government’s attack on a way of life, exposing once again the rift between those who favored states’ rights and local sovereignty over national protections backed by the U.S. Constitution. Entire school systems, in fact, shut down to forestall the order to desegregate classrooms. Most important, a number of conservative activists channeled their efforts, aided by a few foundations, in the

creation of a select number of focused think tanks and academy-liberated public intellectuals. The American Enterprise Institute, for example, was founded in 1943, “dedicated to preserving and strengthening the foundations of freedom—limited government, private enterprise, vital cultural and political institutions, and a strong foreign policy and national defense—through scholarly research, open debate, and publications.” Three decades later financial support from beer magnate Joseph Coors gave rise to the Heritage Foundation, which says its mission is “to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, a strong defense.” Over the course of the next half century this emerging group became known as the New Right. They would become formidable foes of those who had pushed for equality and civil rights in the period after World War II. More than anything, they came to oppose the creation, implementation, and extension of a public policy called affirmative action.²⁴

During and after World War II the federal government, often pressured by blacks, introduced federal regulations or policies to police job discrimination. The pattern began with Roosevelt’s creation of the Committee on Fair Employment Practices in 1941. Known as the FEPC, this body investigated charges of racial, gender, and religious discrimination in employment during the war. Many states followed with their own committees on fair employment, which in turn benefited many of the migrants who flocked into the nation’s cities after 1945.

Governmental monitoring of hiring discrimination did not end with the conclusion of the war. As table 1 outlines, Democratic and Republican presidents alike issued executive orders from 1941 to 1961 to demonstrate their concerns for racial discrimination, especially by members of federal agencies. Few of these agencies had enforcement units, but their existence did allow for governmental monitoring of federal agencies and contractors.

The very first mention of affirmative action as a possible public

policy program came in 1961 (although the phrase originated in 1935). On March 6 of that year President John F. Kennedy signed Executive Order 10925, which created the Committee on Equal Employment Opportunity. In that executive order he mandated that projects with federal funds “take affirmative action” to ensure hiring and promotion practices free of discrimination. Three years later the U.S. Congress signed into law the Civil Rights Act of 1964. This legislation prohibited all forms of discrimination based on race, color, religion, and national origins. The order and the act were in direct response to the objective finding that race did matter in American life and opportunity, and that some were indeed victimized by racism.²⁵

This understanding gained more traction the next year, when President Lyndon Johnson, in the graduation speech at Howard University, made clear that passage of the Civil Rights Act alone would not ameliorate the lingering effects of discrimination and prejudice. Johnson told those gathered on that June day,

TABLE 1. Executive Orders on Affirmative Action, 1941–61

<i>Executive Order</i>	<i>Effect</i>	<i>President (Party)</i>	<i>Year</i>
8802	Established Fair Employment Practices Commission	Roosevelt (Democrat)	1941
9346	Recreated Fair Employment Practices Commission	Roosevelt (Democrat)	1943
9980	Created Fair Employment Board within Civil Service Commission	Truman (Democrat)	1948
10308	Created 11-person Committee on Government Compliance	Truman (Democrat)	1951
10479	Created 15-person President’s Committee on Government Contracts	Eisenhower (Republican)	1953
10925	Created President’s Committee on Equal Employment Opportunity	Kennedy (Democrat)	1961

Source: Adapted from John David Skrenty, *The Ironies of Affirmative Action* (Chicago: University of Chicago Press, 1996), 113–14.

You do not wipe away the scars of centuries by saying: “now, you are free to go where you want. Do as you desire, and choose the leaders you please.” You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, “you are free to compete with all the others,” and still justly believe you have been completely fair. . . . This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory, but equality as a fact and a result.

Three months later Johnson put his pen behind his words and on September 24, 1965, signed Executive Order 11246. That order went further than any effort to date in establishing the federal government commitment to the general notion of “affirmative action.” Johnson, without absolute clarification, instructed contractors to take affirmative action in the employment and hiring of minorities. Although he did not spell out in precise terms what affirmative action meant, he did send a clear signal that traditional avenues of hiring and employment were to come under greater scrutiny, with different results expected. This pen stroke catalyzed the debate that continues to this day about how to insure opportunity for all in such a way that race is not an invidious distinction.²⁶

It was Executive Order 11246, issued by President Lyndon Johnson in 1965, which firmly established the federal government as a guiding hand in the debate about opportunity and equity. The year before Congress had passed the Civil Rights Act; that legislation forbade employment discrimination. To enforce the policy, Title VII of the Civil Rights Act created the Equal Employment Opportunity Commission (EEOC), as a five-member, bipartisan body with the power to investigate, conciliate, and resolve questions of employment discrimination. Executive Order 11246, however, established employment guidelines for federal contractors. Companies with more than fifty employees and contracts worth more than fifty thousand dollars had to develop affirmative action plans and

timetables for hiring racial minorities. Some scholars attribute the growth in black economic advancement to this executive order and its multiplier effect throughout the public and private sectors.

As numerous commentators have noted over the years, ironically perhaps, it was the Republican Richard Nixon rather than the Democrat Lyndon Johnson who produced the most forceful plan for addressing workplace opportunity in American life. The American craft unions as well as the construction trades had a history of discriminatory hiring practices that was nearly one hundred years old. Brothers tended to hire brothers; fathers hired sons. Few minorities could break in, and fewer women. In Philadelphia, Pittsburgh, and other cities hostility to opening up jobs provoked explosive outbursts. Nixon, to break this juggernaut and curry political favor, instructed his labor department to seek breakthroughs in Philadelphia, with goals and timetables for improvement. President Nixon summarized the prevailing view: “We would not impose quotas, but would require federal contractors to show ‘affirmative action’ to meet the goals of increasing minority employment.”²⁷

Even before Nixon made this decision, conservatives wondered out loud if policies to improve the life chances of minorities threatened to discriminate against whites. Senator James Eastland, a very conservative Democrat from Mississippi, voiced this view during the debate over passage of the Civil Rights Act of 1964. He would say, “I know what will happen if there is a choice between hiring a White man or hiring a Negro, both having equal qualifications. I know who will get the job. It will not be the White man.” Already, five years before Nixon’s Philadelphia plan, whites’ fear of being supplanted by blacks had entered public policy debates. Thus at the very moment federal officials strove to define affirmative action, a countereffort to temper its reach was born. The dual efforts amounted to what conservative economist Thomas Sowell labeled a conflict of visions.²⁸

The public debate over education and opportunity would tra-

verse two paths. One centered on the desegregation of public schools in the North and South. A number of new measures found a public airing in the late 1960s and early 1974. Third-party candidate George Wallace, fiery governor of Alabama, commanded considerable attention as a voice for the little man. He helped the Republican Party unlock the South from the Democratic Party's grip by appealing to white voters' base concerns on matters of race, economic security, crime, and religion. Across the South in 1968 he outpolled Democratic nominee Hubert Humphrey, who came in third to Wallace and Nixon in a three-way race, and fed the belief that a new conservative core could be formed. This possibility was not lost on Republican strategist Kevin Phillips, who helped draft what became known as the Republican Party's southern strategy, an approach predicated on wresting conservative Democrats from the Democratic to the Republican Party.²⁹

The red button issue of busing to achieve racial balance and diversity in public schools proved the critical wedge issue across the land. No proposal struck such a dissonant note with the white electorate as did busing. In Boston, Charlotte, Detroit, and elsewhere busing gained favor with judges seeking a solution to the lingering effects of residential segregation.³⁰ With few exceptions, Americans, through the 1980s—and in many areas today—lived in racially exclusive communities. The only way to correct this imbalance and eliminate school segregation was through active means such as busing. Busing, after all, had been used across the South to maintain segregation; this time it had the potential of removing it.

More than the initial debate about affirmative action, the prospects of busing white kids to previously all-black schools and blacks to previously all-white schools enraged parents, especially white parents. Yet without tackling the problem at the primary and secondary levels, advocates of equality saw little hope that postsecondary schools would ever manage to create an integrated environment.

Beyond the glare of the media's focus on busing, which was no

longer just a southern issue, a new challenge to higher education emerged. By 1974, whites had begun to question any use of racial preferences in the admission process at selective universities in the United States. It did not matter that as late as the 1960s southern states such as Mississippi, Georgia, and Alabama excluded black citizens from attending public universities, or that private schools such as Rice, Duke, Vanderbilt, and Tulane had similar prohibitions. Almost forgotten, it seems, is the brutal toll efforts to desegregate southern institutions took on the minds and psyches of those pioneering few who put themselves on the line at Ole Miss, the University of Alabama, and the University of Georgia. But as journalist and desegregation pioneer Charlayne Hunter-Gault recalled, the events of the 1960s live on for those who led the fight and for the institutions they sought to change. Hunter-Gault and classmate and friend Hamilton Holmes became the first blacks to join the undergraduate class at the University of Georgia, but only after a fierce fight. A quarter of a century after her graduation, a time that allowed for some modicum of healing and distancing, she returned to campus. It was 1988, but the events of the 1960s still shaped her person, and she would tell those gathered:

For centuries, we shared a world of courtesy and difference established on utter tragedy. As Blacks, we gave to the white world, and that world gave to us. But the gifts were ambiguous, weighted as they were with the force of unequal tradition. You were not ours, but we were yours. Then, slowly, painfully, came the furious dawn of recognition. We saw, half hidden in the blazing noonday sun, the true outline of our burden. . . . No one here today would pretend that the Old South is dead and buried, that the events of the past twenty-five years, even my presence here today, have transformed our peculiar world into one that is beyond recognition. The Confederate flag still flies in places on this campus . . . and it would still be unwise for me to spend too much time in certain municipalities a few hours' drive from here.

In confronting her own ghosts, Hunter-Gault acknowledged something else that day: everyone was history's warden; our mutual freedom and peace as a nation came only by acknowledging the connection between the past and the future.³¹ After all, she had not endured taunts, threats, and recrimination to advance her life or that of friend Hamp Holmes alone. They were part of a social movement to improve the lives of many more—bright youngsters of all backgrounds who had the gifts to succeed in college.

Fifteen years after Hunter-Gault's graduation and ten years before she addressed the University of Georgia community, the question of race in college admission took another track. Minnesota native Allan Bakke, an engineer, aspired to attend medical school. He applied to a number of institutions, among them the University of California at Davis. Davis at the time had a policy of reserving sixteen slots in its entering class for racial minorities, arguing that diversifying the medical profession was essential to its mission. Bakke in turn argued that such racial preferences amounted to reverse discrimination and violated his constitutional rights.

For the first time in more than three decades the courts had to wrestle with the thorny issue of the permissible use of race in admission to graduate or professional school. Moreover, unlike plaintiffs in suits brought by the NAACP in the 1930s and 1940s, Bakke could not demonstrate a history of institutional discrimination against whites. The University of California at Davis had no history of systematically denying access to whites or of saddling whites with resource-impooverished education at segregated schools. For the first time the courts had to address the Eastland concern: could advantages for blacks and Latinos be viewed as disadvantages for some whites and thus a violation of the Constitution.

A splintered Supreme Court addressed the matter in 1978. Justice Lewis Powell wrote the prevailing opinion. Other justices concurred with or dissented from parts or all of Powell's conclusion. Powell's *Bakke* opinion guided institutions for another twenty-five years. He established that race could be a factor among others in

the admission process, that each individual applicant had to be reviewed separately, that quotas were prohibited, and that diversity was a compelling state interest. The Court's majority rejected the notion that race preference could be considered to remedy past discrimination. Much had ostensibly changed in America in the years between the 1963 March on Washington and the 1978 *Bakke* decision. Thurgood Marshall, who by the latter date had joined the high court, failed in fact to convince a majority of the Court that history and race mattered and that fifteen years was too short to have corrected all the ills of centuries of slavery, racial violence, and discrimination.³² Yet on the streets of America the debate raged as ever before as individuals assessed opportunity in their spheres of existence.

Opportunity in Postwar America

On February 25, 1967, James Farmer, former head of the Congress for Racial Equality (CORE), addressed conferees at an American Studies Conference at Lincoln University, a historically black college in Pennsylvania. Farmer came to recall his role in the civil rights struggles in the South and CORE's place in that history. He began his delivery with a brief recount of his travels and the demands of leading a major social-movement organization. He then settled into the main text of his delivery. He had just returned from Little Rock, Arkansas, the site of one of the epic showdowns in the long lists of confrontations between blacks determined to unsettle the status quo and whites who sought and fought to preserve the privileges of their whiteness. Few had forgotten the fierce determination of the young African American students who dared to integrate Central High School, or Governor Faubus's role in preserving segregation, or President Eisenhower's resort to federal intervention. This time, however, Farmer set out on a mission more humble than toasting the young. He simply wanted to know

how things had changed in Little Rock, ten years later. He happened upon an old acquaintance, the kind of everyday person whose life amounts to little more than a footnote in history, if that. Farmer's informant looked at him with real sincerity and said, "Brother Farmer, everything has changed, but everything remains the same. Yes, I can now buy a hot dog at that lunch counter. Big deal." Farmer's friend didn't end his critique there, however. He added, "Yes, I can go downtown and check into a hotel, if I had the money, which I don't. I have been out of work for six months. And furthermore, if I go three miles outside the city, I won't know that there ever was a Civil Rights Act of 1964. And yes, we can sit on the front seat of the bus. We can go to the theater and sit in the audience; we can buy a hot dog and a hamburger. Everything has changed but everything remains the same."³³

James Farmer's friend captured the pessimism and optimism in a long moment in American history. Affirmative action policies grew out of that moment. They sought to extend a helping hand to some and an avenue to mobility to many. Even by 1967, notwithstanding the personal distress of the Little Rock resident, progress had been made. In 1939, 42.5 percent of all employed black males worked in agriculture, overwhelmingly in the South; by 1969 that percentage had shrunk to 5.3 percent. Conversely, the proportion in service, including finance, insurance, and real estate, grew from 15.8 to 21.1 percent during the same period. At the same time, the percent finding jobs in public administration jumped from 1.6 to 7.3 percent. While a full 60 percent of all employed black women labored as domestic servants in 1939, just 17.5 percent did in 1969. During the same period black women saw sizable increases in clerical and sales positions, as operatives, and in other service (meaning nondomestic) jobs.³⁴

No doubt the shift from the rural South to the urban South and North, which began in the first decades of the twentieth century and accelerated after World War II, contributed to the patterns described above. In addition, migration in the second half of the

twentieth century corresponded with other important structural changes that had profound effects on the opportunity structures for many. First, significant numbers of blacks entered industrial sector jobs. Second, the mechanization of cotton production rendered the sharecropping system obsolete in many ways; fewer planters needed surplus labor to harvest crops cheaply when a one-time investment in a mechanical cotton picker could do the work of several men, women, and children. Third, movement into new employment sectors, no matter how temporary, fueled a closing of the income gap between blacks and whites. In 1939, the average black male earned 41 cents for every dollar earned by his white male counterpart. That figure inched to 48 cents in 1949 and 58 cents by 1969. For black women the climb was more dramatic. In 1939 black women earned 36 cents on the dollar, when compared to white women. By 1969 the figure was 84 cents on the dollar. While racial disparities persisted, measurable progress occurred.³⁵

Nonetheless, huge pockets of racialized poverty persisted in America as of 1968–69. Too often prosperity in black households depended on one or two paychecks, with the loss of a steady job proving determinative. On the whole, black households earned considerably less than whites. More blacks lived on the fragile line between solvency and insolvency, comfort and poverty. As a result, poverty or potential poverty characterized life for many. This assessment validated the claims of the Little Rock resident who bleakly noted he could now buy food at any lunch counter in the city, only he lacked the financial means—not the spirit or desire. Armed with nothing more than personal experience, his assessment explained a great deal by the end of the 1960s.

Of course neither social critique nor social policy ended in 1969. Progress continued to be made. According to a recent assessment, 93 percent of blacks and 65 percent of whites lived in poverty in 1939—that is, during the final years of the depression. Wages increased, benefits (health insurance, etc.) expanded, and poverty rates dipped significantly over the next three and a half decades.

Figures for 1974 show that 30 percent of blacks and just 9 percent of whites lived below the poverty line. As the nation struggled through a recession in the 1980s, the poverty rate increased, but the differential remained pretty much at 1974 levels. Thus while opportunities for blacks grew between the depression and the Great Society, race continued to make a difference. And a narrowing of the income gap did little to diminish the gap in wealth.³⁶

Racial differences had a disproportionate effect on children. As late as 1985 nearly half (44 percent) of black children lived in poverty, compared to 16 percent of whites. If one removes governmental assistance and other transfer payments from the calculations, nearly two-thirds of all black children spent some portion of the first ten years of their lives in poor households. Of course there is a direct correlation between the increase in female-headed households and poverty. While we can debate whether a female-headed household is a priori dysfunctional, there is little doubt that such households are the sites of large pockets of poverty in the United States (by 1985, 75 percent of black children and 42 percent of white children lived in female-headed households). Some economists have warned, however, that the real increase in poverty for all racial groups stemmed from a real decline in earnings between the 1970s and 1980s, with low-wage workers hurt the most. Nor was poverty evenly distributed. Among whites the poor were spread from non-metropolitan areas to suburbs to the inner city. With the mass movement of blacks to cities and the corresponding demographic shift, the bulk of black poverty was housed in the central city.³⁷

Access to the full benefits of American life seemed tantalizingly closer for the post-1960s generation than any cohort since Emancipation. But what much of the scholarship and commentary on the struggle for civil rights often ignores is the most essential: blacks sought more than just equality, they sought equity. The pursuit of equity, many understood, meant state action to level the playing field, when and where needed. The appearance of inequality could lead to the achievement of equality. Equity meant becoming equal.

In everyday language, NAACP President Ben Hooks often referenced the staggering of the starting blocks in a 400-meter race. Each racer had an assigned starting place. Although from the casual glance, it appeared that the outside runner had an advantage over the runner in lane one, such was not the case. That is certainly the subtext of James Farmer's friend's comment. He understood that the removal of segregation signs was an important but incomplete achievement. He wasn't alone. Martin Luther King reached a similar conclusion in his last years, as he doggedly pushed for a poor people's campaign. This sentiment crisscrossed the words and deeds of those who crafted the Black Manifesto and a number of other utterances from the 1960s and 1970s. If one looks closely, the cry for equity even existed in the songs of the civil rights struggle. Freedom to live where they chose, eat where they liked, earn what their education and skills would produce, and to do so unshackled by the heavy cross of racism animated the songs. Oftentimes meaning was shrouded in the language of misdirection, but when reanalyzed the songs revealed a collection of individuals for whom democracy hinged on equitable and not just equal access to the nation's bounty. Was this true for all that participated? Undoubtedly not. Was this a part of the lexicon of social relations that shaped public policy then and now? The answer is unquestionably, yes.³⁸

Debate over Affirmative Action

The debate about affirmative action in the United States is fundamentally about how to reconcile the tension between the need to include and the desire to limit that inclusion. In fact, it can be argued that affirmative action represented a fairly conservative state innovation. Critics, of course, emphasized the excesses: poorly qualified job seekers securing hiring preferences because of their race or gender; selective colleges and universities admitting woefully underprepared students because they were racial minorities;

objectively weaker firms winning bids to fulfill a tacit quota. While some advocated the abolition of standards and hired folks of questionable qualifications, by all accounts the exaggerated anecdotes captured the broadest headlines. In the 1960s Republicans and Democrats alike feared the America they saw on the television screens each night—riots, racial confrontations, an open questioning of authority, and bleak, unvarnished portraits of despair and hopelessness in large pockets of urban and rural America. Thus it was not a calculated overthrow of the established order that led President Lyndon Johnson to call for federally supported state access to opportunity. Johnson understood that individuals with a stake in society made better—and perhaps quieter—citizens. Nor was this perspective lost on the Republican president Richard Nixon, who embraced and expanded affirmative action policies, especially in the employment sectors. For a moment, in fact, it appeared that an agreement had emerged to ameliorate past injustices by consciously considering race, among other attributes, as a positive for blacks as it had served for whites.

During the period between 1968 and 1978 affirmative action policy began to take shape in several specific areas—in education, employment, and promotions. Although some objected to what unfolded, the United States had previously preserved certain benefits for discrete groups. The most heralded example came after World War II. This time members of Congress preserved special status for the millions of returning soldiers. They received extra points on civil service exams, attractive grants for attending colleges, assistance in purchasing homes, and other advantages denied to civilians, and even previous veterans. This G.I. Bill of Rights became known as “veterans’ preferences,” writes John David Skrentny, “rather than hidden with an ambiguous term like *affirmative action*.”³⁹

While it may be argued that the phrase itself was ambiguous, the intent was crystal clear to most Americans. Certainly by the mid-1970s most knew that affirmative action policies were adopted to

address past and current inequities in education, employment, and promotions. Had a consensus emerged about the efficacy of this policy? Certainly not. As a bevy of social scientists noted by the mid-1980s, many whites harbored great ambivalence, if not outrage, at the idea of blacks getting more than they supposedly deserved. Scholars complained of reverse discrimination, blacks of tokenism, and conservatives of all races of the bastardization of standards. The journalist Nicholas Lemann recently suggested that the outcry over the last fifteen years is not surprising given the quick endorsement of affirmative action by policymakers and politicians of both parties by the mid-1970s. He contends that it was the *Bakke* case, which centered on Allan Bakke's claim that the University of California at Davis Medical School had set aside sixteen slots for racial minorities with lower test scores and grade point averages, that initiated the current period of public debate.⁴⁰

Lemann may be only partially correct. For more than two decades Americans have discussed the value of set-aside programs, preferences in hiring, promotions, and the awarding of contracts. Case law in the United States is replete with examples of jurists, opposing lawyers, and clients debating the importance of continuing or eliminating programs that came under the umbrella of affirmative action. Since the 1970s a few social scientists have gained prominence by asserting with renewed vigor that no matter what social policies are adopted black Americans lack the intellectual acumen to compete successfully with whites and Asians. From William Shockley and Richard Jensen to Richard Herrnstein and Charles Murray, a kind of biological determinism was mobilized to undermine a range of social policies, including affirmative action.⁴¹

In the second half of the 1990s poll data reflect a great degree of public ambivalence about the efficacy of race-based preferences, with responses turning as much on phrasing and word choice as in a full rejection of policies and practices that allow race or gender to be among a number of factors taken into consideration for admis-

sion to colleges or in job selection. However, Myrdal's earlier conclusion that race and place in a democratic society amounted to a national dilemma pulses with as much currency as it did five decades ago. An implicit assumption in the earlier study warrants closer analysis. The difficulty with affirmative action is not that critics and proponents cannot cite examples of successes and excesses. With such policies, with as many variations as have occurred over the last three decades, there are bound to be examples of both. Nor should policymakers lose sight of questions of morality, fairness, and justice. A profound commitment to fairness has been a stated objective of liberal democracies for some time. Still, those same policymakers should seek to balance overall social benefit against individual complaints of injury. In the United States this balancing act is further complicated by the nation's very diversity. For example, there has always been one black America and many African American communities. Similarly, all white Americans do not possess the same social, political, or economic privileges. If anything a fuller consideration of diversity may aid the debate that Lemann thinks Americans must have; it will certainly show that no society can escape its history, although its members can design their future.

Implications from the Michigan Example

In 1997 the conservative legal advocacy group Center for Individual Rights (CIR), backed by a few Michigan state legislators, and financed by what appears to be an interlocking group of foundations opposed to affirmative action, launched a campaign directed at the University of Michigan. A handful of Republicans in the state had attempted to get the legislature to pass provisions abolishing affirmative action in admission to the state's leading institutions, most notably the University of Michigan, Ann Arbor. Seiz-

ing the language of individual rights, the attack on the university came from some at least who believed that race should be an inconsequential factor.

Following a spate of racist and racially insensitive incidents in the late 1980s, university officials, especially newly named president James Duderstadt, championed a greater effort to increase the numbers of racial minorities and women in faculty and staff positions and students enrolled in the institution's undergraduate programs. Duderstadt labeled his effort the Michigan Mandate, and from 1988 through his resignation as president in 1995 he insisted that all units report their successes and failures in diversifying the campus. This approach became a lightning rod for those opposed to and supportive of the university's objective.

Soon after Lee Bollinger was named president of Michigan in 1997 three Republican legislators placed ads in newspapers statewide inviting white students who believed that race played a factor in their failure to gain admission to the university to contact them. According to published reports more than five hundred replied. The three legislators took this route after failing to garner support for legislative injunctions on either side of the political aisle. Neither Republicans nor Democrats had an interest in attacking this socially explosive issue.⁴²

To a certain degree conservative activists had claimed the language and style of the old civil rights activists as their own. They were now out to eliminate the use of race in critical areas of American life. They were out to protect individual rights over group preferences. They were willing to mobilize a population through direct appeals to potential plaintiffs. When the NAACP used such tactics in the 1930s, 1940s, and 1950s, whites, especially in the South, branded them outside agitators. Such charges failed to materialize this time around. Echoes of Senator Eastland still reverberated across the social landscape of America more than three decades later: black gain would amount to white loss. Scores of whites earnestly believed that racial preferences must have

accounted for the rejection or deferral letters they received; otherwise, how do you explain that a black or Latino had gotten into Michigan and they had not. Nor would sophisticated statistical explanations mollify them. It didn't matter that the elimination of all underrepresented minorities from the pool of applicants would have only marginally increased their likelihood of admission. The reaction was visceral and individual. They were out and someone else was in. They had come to believe that color-blind and race-neutral meant the same thing.

CIR settled on three individuals in two separate cases. Jennifer Gratz and Patrick Hamacher complained that the undergraduate admission process at the university unfairly discriminated against them. Meanwhile, Barbara Grutter brought suit against the university's law school, which had an entirely different admission process, requirements, and pool of applicants. She too alleged that the use of race in the admission process discriminated against her and favored blacks, American Indians, and Latinos.

My colleagues Patricia Gurin and Jeffrey Lehman will detail the educational benefits of diversity and the legal rationale adopted by the University of Michigan in the challenge brought forth by Grutter, Gratz, and Hamacher. It is important to remember, however, a commitment to diversity originated with the institution's founding and changed in scope and breadth as the society grew and developed. As early as 1887 a *Harper's Weekly* article observed,

The most striking feature of the University [of Michigan] is the broad and liberal spirit in which it does its work. Women are admitted to all departments on equal terms with men; the doors of the University are open to all applicants who are properly qualified, from whatever part of the world they may come.⁴³

"Inclusiveness" has been part of the university's modus operandi, at least tacitly, almost from the beginning.

The university's first international student (a Canadian) was

admitted in 1843; the first black males (both from Detroit), in 1868, with absolutely no fuss or fanfare. On the other hand, there was considerable controversy over the admission of the first women in 1870, but, under interim president Henry Simmons Frieze, a resolution by the board of regents that the university was open to any person who “possesses the requisite literary and moral qualifications” settled the matter. Michigan, however, was by no means the first institution of higher learning in the Midwest to admit women: as early as 1834, Oberlin College was enrolling both women and black students. The first black woman enrolled in 1878, and by the late 1800s, Michigan was a place where at least some qualified black students could earn an education.⁴⁴

The University of Michigan was never a utopia, however. For most years the numbers of students of color could be counted on both hands. So despite a long tradition of accepting students of color, that tradition reflected a passive approach rather than an active effort to attract women and students of color; hence, the numbers of those students remained relatively small in comparison to total enrollment. Predictably, such small representation brought concomitant difficulties. In 1940, for example, when black students represented only 1 percent of the total student enrollment, they reported financial problems because of a lack of financial resources and because most available jobs went to white students. Perceptions accounted for much. Black students in particular complained of being treated differently and of an inadequate social life.

During much of the twentieth century, women and members of racial and ethnic groups were faced with various kinds of legal and social exclusion, not least of all in the realm of education. Because education, in a very real sense, is what opens the door to opportunity, it was not really surprising that education should be at the forefront of the most important civil rights decision of the twentieth century, *Brown v. Board of Education*. Nevertheless, for nearly two decades following the *Brown* decision, educational institutions—especially colleges and graduate schools—remained pre-

dominantly white and male. Only after enactment of affirmative action measures in the late 1960s and early 1970s did the enrollment percentages for students of color, especially black students, begin to show significant improvement.⁴⁵

I have already mentioned Johnson's Executive Order 11246, which is generally credited with launching what we have come to call the affirmative action movement. The order required federal contractors to take "affirmative action" to ensure equality of employment opportunity without regard to race, religion and national origin, and was expanded in 1968 to include gender. What made the order different from its predecessors, however, was that it was turned over to the Labor Department for administration. This meant, in turn, that the provisions of the order could now be enforced. It also meant that colleges and universities receiving funding from the federal government were subject to the affirmative action provisions.

With the implementation of President Johnson's executive order came the first real pressure for colleges and universities throughout the country to increase not only their enrollment of underrepresented students, but also their hiring of faculty and staff. The effect was certainly felt at the University of Michigan, which began to take an increasingly proactive stance in making the university more inclusive.

The 1960s and 1970s were eras of increasing student activism and unrest, fueled not only by major civil rights actions (the march on Selma, for example), but by increasing U.S. military involvement in Vietnam. Between February and April 1970 the University of Michigan campus was torn by a series of university-wide confrontations. The list included a strike against classes, with considerable pressure put on faculty and students to participate, and by the Black Action Movement (BAM), which had a stated goal of increasing black enrollment to 10 percent of total enrollment by 1973.

By 1975, the goal of 10 percent black enrollment still had not

been reached, and students protested once again (BAM II). The goal of 10 percent was not actually reached until 1976, and even then continued to grow slowly (by 1984, minority students represented only 11 percent of total enrollment). In 1987, at a time when campus feelings against apartheid in South Africa animated significant numbers of students, the issue of minority enrollment resurfaced, sparking what some called the BAM III movement. Most notably, continued failure by the university to fulfill its commitment to increase black enrollment led to a blockade of the Michigan Student Union and to sit-ins in the Fleming Administration Building.

Since the last BAM strike in 1987, the University of Michigan has vigorously pursued a policy of ensuring that more members of underrepresented groups are admitted to the university and that they have the opportunity to participate fully in the life of the institution. Steps taken include providing substantial financial support to these students at all degree levels, developing the necessary administrative infrastructures to support affirmative action and equal opportunity, and designing an extensive array of recruiting and retention programs.⁴⁶

In 1988, the university announced its strategic plan, President Duderstadt's Michigan Mandate, which was designed to ensure that all racial and ethnic groups would be full participants in the life of the university. The fundamental principle of the mandate was that the university should become a leader in creating a multicultural community that could serve as a model for society as well as for higher education. An integral part of the mandate was the Michigan Agenda, which outlined a similar series of strategic actions designed to produce gender equity and a university environment that would foster the success of women, be they students, faculty, or staff.

By the time Grutter, Gratz, and Hamacher brought suit in 1997, "minority" enrollment was 25 percent, including Asian Americans,

and females totaled 47 percent of all students. The numbers fail to address the true benefits of diversity for majority and minority student alike. The lawsuits, ironically, did force the university to clarify what it had been doing and why, and to articulate a rationale for the educational benefits of diversity. This close examination is good for all sectors of society and may prove the most enduring legacy of CIR's challenges. Fundamentally, improving access is a part of the process of enabling interaction. After all how do you achieve sufficient numbers of students from various backgrounds if you are asked to ignore the entire person? The courts answered that you could do so as long as a mechanistic approach is not taken. That the undergraduate admissions staff had looked and reviewed each of the more than fourteen thousand applications each year was lost on all but two members of the Supreme Court. The majority interpreted evidence in a manner that suggested the university's practices at the undergraduate level were too formulaic. The Court upheld that while affirmative action is the policy, diversity is the goal. And building an inclusive diverse society is as paramount today as it was a generation ago. As one national commission noted, "The current scope of affirmative action programs is best understood as an outgrowth and continuation of our national effort to remedy subjugation of racial and ethnic minorities and of women—subjugation in place at our nation's founding and still the law of the land within the lifetime of 'baby-boomers.'"⁴⁷

Conclusion

More than a decade since she defined herself as black, my daughter's thoughts on race in America have evolved. She is now poised to compete for a seat in the 2004 freshman class at some of the nation's most selective institutions. She has amassed a cumulative GPA of about 3.8 at a leading area prep school, competitive test

scores, significant work experience, and a varsity letter. She has also experienced the divorce of parents, bouts of depression, and general adolescent angst.

Nonetheless, she frequently complains that we spend too much time talking about race. She chafes when her younger brother reads a social situation through the color-tinted lenses of race and history. She begs him to stop. She's equally critical of white friends, especially males, who believe race is an artifice that could never have had a bearing on her life and her experiences. Their inability to see race is as palpable for her as her brother's quick resort to racial explanation.

For my daughter, race matters more than she would like at times, and that's the conundrum she and we face. Some could rightly ask why an admissions counselor would pay any attention to my daughter's racial and ethnic background. She grew up in upper-middle-class circumstances with a father who is a faculty member and administrator. She has certainly had advantages; some would even cry privileges. Why should she get any boosts?

Yet she has never had the privilege of living in a race-neutral or color-blind world. Dates, friendships, expectations, and obligations have been shaped by her place on America's racial pentagram. Some of these encounters have been painfully hurtful; others enriching and they have afforded an opportunity to grow. Still Ann Arbor is by no means the rest of the country. The cocoon-like environment of a college town can afford an unrealistic portrait of what's ahead and how race may or may not figure in the equation.

If diversity is the key, ignoring race would amount to the greatest contrivance, even for my somewhat privileged daughter. Universities and colleges have asked, and received, the right to review the entire applicant. In that way we operate like other sectors of society. At the scene of a crime the officer asks the witness for all bits of information, no matter how trivial. One cannot imagine a witness failing to note the race, gender, height, age, or weight of a would-be suspect if they had that information and were free to give

it. It is the officer's job to sort between the important and the insignificant. For decades now universities have so functioned. They receive mounds of information on each applicant, and from there they go through an exhaustive review of the characteristics that make one individual more compelling for inclusion in the freshman class over another. It has never been just about grade point averages or test scores, nor should it ever. What a young person scores on one day's test or how much they achieved in high school is at best a loose proxy for future achievement. Noncognitive factors such as creativity, perseverance, resilience, cooperation, and curiosity are equally important; as too are family background, resourcefulness, drive, and dedication.

Truth be told, selective universities and colleges take few risks on truly marginal students. If they do, typically they are star athletes or musicians or politically connected. Moreover, the University of Michigan and others like it have long tried to have race count as but one of many factors in the admission process. The university knows the folly of admitting a kid just because he or she is black, brown, or red. And even attorneys for the Center for Individual Rights admitted that *all* students admitted to the university are qualified. So the red herring of admitting an unqualified black or Latino student over a qualified white applicant is a shibboleth designed to inflame more than inform.

It would be foolish to believe legal challenge or threat will not produce a change in behavior. Without stretching credulity, one can imagine this as a desired outcome. Threatening letters from the Center for Equal Opportunity, for example, led Princeton and MIT to open summer research opportunity programs to all students, irrespective of race, and produced consternation across other campuses. Perhaps we have reached a stage when such programs should have a broader constituency. Still the imperative that gave rise to them has not disappeared. The country desperately needs the intellectual capital found within all segments of the population. Demographic shifts in the composition of America's school-age

population increase the power of the realization. Failure to identify and nurture such talent has profound implications. Sweeping change or incremental recision seems the strategy of affirmative action opponents. And conceivably race and class will be indexed on a kind of sliding scale, with race functioning as a plus factor for first-generation college students more than others.⁴⁸

Whether that takes twenty-five years, as Justice Sandra Day O'Connor hopes, or much longer, as Justices Ruth Bader Ginsburg and Stephen Breyer fear, there is no way of eluding the conclusion that history matters in the contemporary debate about race, social policy, and higher education. When the NAACP began its assault on segregation in the 1930s, it fought for all black Americans deprived access to various social institutions. NAACP lawyers leaned on the Fourteenth Amendment's guarantee of equal protection under the law, which had been crafted to check the excesses of the majority. The cases in the law books bear the names of Sweatt, McLaurin, Sipuel, Gaines, and Murray, but behind them stood others systematically denied pathways to opportunity because of their race. In telling contrast neither Grutter, Gratz, nor Hamacher represented such a class. The majority of admittees, students, and alumni of the University of Michigan remain, as they have been for decades, overwhelmingly white. Thus the Court, the university, and society have to balance race as a positive and a negative force in everyday life.

The University of Michigan in these legal cases understood and appreciated its place in the nation's history. It mounted a successful defense of affirmative action before the Supreme Court because colleges and universities have a vaunted role in building a diverse democracy. For a few choice years they welcome the world's brightest and invite them to learn in close proximity. Many have assumptions questioned, viewpoints challenged, and long-held beliefs tested. They learn and make the most of the environment. Others hunker down and find that school narrows rather than expands their outlook on the world. Whatever the outcome, nothing can

substitute for the grand experiment that is college education. The production of a talented and informed citizenry is as critical to the nation's future as ever before, and including a broad cross-section of Americans in those conversations is critical. That is why affirmative action, as one public policy option, commands a longer life than opponents dare claim. Its maintenance is not about the weakening of standards or the fraying of interracial relations. No matter how many times we click our heels and wish it were not so, race and history matter in the lives of all Americans. Maybe one day that will be less so. But at no time should we trade an honest exploration of our past for a Disney-like substitute. Tackling the history of race is the only way to build a diverse, plural democracy. And collectively that remains our shared responsibility.