Ohio Northern University Law Review

Volume 48 | Issue 1 Article 4

Beyond the Law: A Four-Step Explanation of Why AffirmativeAction Is Here to Stay

Jesse Merriam

Ohio Northern University
Law Review

Dean's Lecture Series

Beyond the Law: A Four-Step Explanation of Why Affirmative Action Is Here to Stay

JESSE MERRIAM*

TABLE OF CONTENTS

INTRODUCTION

More than 40 years ago, Ronald Dworkin made the following observation about *Regents of the University of California v. Bakke*,[1] the Supreme Court's first major affirmative action case: "No lawsuit has ever been more widely watched or more thoroughly debated in the national and international press."[2] Indeed, according to Howard Ball, "[a] record fifty-eight amicus briefs were filed after the Court granted certiorari in *Bakke*."[3] Signaling what would become a trademark of affirmative action litigation, the *Bakke* amicus briefs weighed heavily in the state's favor,[4] and featured influential professional and academic institutions.[5] The Ivy League schools filed their own amicus brief, defending their use of affirmative action as essential to their academic goals.[6] McGeorge Bundy (the Harvard dean and Ford Foundation president) wrote a lengthy cover story in the *Atlantic Monthly* passionately arguing in favor of affirmative action.[7] Before announcing the Court's judgment in that case, Justice Lewis F. Powell Jr. echoed Dworkin's assessment: "Perhaps no case in modern memory has received so much media coverage and scholarly commentary."[8]

Now the Harvard affirmative action case,[9] as it advances through the federal courts more than 40 years later, might surpass the *Bakke* case in terms of media coverage.[10] Before the district court even made its decision to

---

* This Article was presented as part of the Ohio Northern University Pettit College of Law Dean's Lecture Series. I would like to thank all of those involved, particularly Dean Rose and Professor Gerber, for the opportunity to present my research on affirmative action and judicial politics. Associate Professor of Government, Patrick Henry College; Washington Fellow, The Claremont Institute Center for the American Way of Life. Ph.D. (Political Science, Johns Hopkins University); M.A. (Philosophy, Johns Hopkins University); J.D. (The George Washington University Law School); B.A. (Government, Wesleyan University).

1. 438 U.S. 265 (1978).

2. Ronald Dworkin, *Why Bakke Has No Case*, THE N.Y. REV. (Nov. 10, 1977), https://www.nybooks.com/articles/1977/11/10/why-bakke-has-no-case/?lp_txn_id=1246446.

3. HOWARD BALL, THE BAKKE CASE: RACE, EDUCATION, & AFFIRMATIVE ACTION 77 (2000).

4. According to Ball, 42 of these 58 amicus briefs "supported the petitioner" (i.e., in favor of affirmative action) while only "sixteen sided with the respondent" (i.e., in opposition to affirmative action). Id.

5. *Id.* at 82.

6. *See also* Anne E. Bartlett, *Justice Department Files* Bakke *Brief*, THE HARV. CRIMSON (Sept. 21, 1977), https://www.thecrimson.com/article/1977/9/21/justice-department-files-bakke-brief-pan/.

7. McGeorge Bundy, *The Issue Before the Court: Who Gets Ahead in America?*, THE ATL., (Nov. 1977), https://web.archive.org/web/20070217075143/http://www.etsu.edu/cas/history/docs/bundy.htm.

8. Anthony Lewis, *'Bakke' May Change a Lot While Changing No Law*, N.Y. TIMES (July 2, 1978), https://timesmachine.nytimes.com/timesmachine/1978/07/02/issue.html.

9. On February 25, 2021, a petition for writ of certiorari was filed in *Students for Fair Admissions v. Harvard*. At the time of my writing, the case is currently pending the Supreme Court's certiorari decision.

10. *See* Vivi E. Lu, *Students for Fair Admissions Petitions SCOTUS to Take Up Suit Against Harvard's Race-Conscious Admissions*, THE HARV. CRIMSON (Feb. 25, 2021), https://www.thecrimson.com/article/2021/2/25/sffa-scotus-petition/.

uphold the program, Natasha Kumar Warikoo, a sociologist at Tufts and a visiting professor at Harvard, predicted that the Harvard case "could be the beginning of the end of affirmative action."[11] *Washington Post's* Paul Waldman likewise predicted that the Harvard case will destroy affirmative action: "it'll be all over."[12] Even after the district court applied Supreme Court precedent to rule in favor of Harvard, pundits still predicted that the case might "end affirmative action."[13] On the American Constitution Society blog, Vinay Harpalani, a legal scholar specializing in affirmative action law, predicted that the First Circuit would affirm the District Court decision (which turned out to be correct),[14] but that "a cert grant will likely mean the end of affirmative action in university admissions."[15]

Professor Harpalani's prediction is almost certainly wrong; even if the Supreme Court grants certiorari, there is almost no chance that the Harvard case, regardless of how it is decided by the Supreme Court, will mean the end of affirmative action in university admissions or in any other area of American life. The point of this Article is to explain why this is so.

Before we get into the substance of the argument, however, it is important to appreciate the extent to which this Article goes against the grain of expert opinion on the future of affirmative action. Indeed, it is not just Professor Harpalani who has predicted the demise of affirmative action. For over 30 years, leading scholars and pundits, on both the left and right alike, have been predicting the demise of affirmative action. These predictions have consistently been wrong.

Consider how, after *City of Richmond v. J.A. Croson Co.*,[16] conservative columnist Charles Krauthammer issued the following prediction about the decision: "*Croson* marks the beginning of the end of affirmative action."[17] An article in the peer-reviewed National Black Law

11. Natasha K. Warikoo, *Opinion: The False Narrative Driving the Harvard Affirmative Action Case*, PBS (Nov. 2, 2018, 2:17 PM), https://www.pbs.org/newshour/education/opinion-the-false-narrative-driving-the-harvard-affirmative-action-case.

12. Paul Waldman, *Opinion: The Case That Will Destroy Affirmative Action in Higher Education*, THE WASH. POST (Oct. 18, 2018, 3:08 PM), https://www.washingtonpost.com/blogs/plum-line/wp/2018/10/18/the-case-that-will-destroy-affirmative-action-in-higher-education/.

13. Alexia Fernández Campbell & P.R. Lockhart, *The Harvard Admissions Case That Could End Affirmative Action, Explained*, VOX (Oct. 2, 2019, 2:50 PM), https://www.vox.com/identities/2019/10/2/20894934/harvard-admissions-case-affirmative-action.

14. Vinay Harpalani, *The Supreme Court and the Future of Affirmative Action*, AM. CONST. SOC'Y (Oct. 28, 2019), https://www.acslaw.org/expertforum/the-supreme-court-and-the-future-of-affirmative-action/; Harvard, 980 F.3d at 203-04.

15. *Id*.

16. 488 U.S. 469, 511 (1989) (holding that a government contract set-aside plan violated the Equal Protection Clause).

17. Charles Krauthammer, *Exit Affirmative Action*, WASH. POST (Feb. 3, 1989), https://www.washingtonpost.com/archive/opinions/1989/02/03/exit-affirmative-action/86cbc246-f37b-4c50-b09f-b0a764e593c0/.

Journal likewise declared that *Croson* represented the "sunset of affirmative action."[18] After the appointment of Justice Clarence Thomas in 1991, these predictions became even bolder.[19] For example, in 1992, George A. Rutherglen, writing in the Illinois Law Review, predicted that "[a]n increasingly conservative Court is likely to limit affirmative action to progressively narrower circumstances, and perhaps, to prohibit it entirely."[20] Professor Carl Livingston likewise argued that "[t]he Court's affirmative action jurisprudence has shifted dramatically to the conservative right since 1978 . . . towards the dismantling of affirmative action."[21]

After the *Croson* decision failed to put an end to affirmative action, pundits and scholars simply shifted their predictions to *Adarand Constructors, Inc. v. Peña*.[22] Shortly after the *Adarand* oral argument, *Newsweek* featured a staff article entitled "the end of affirmative action."[23] After the Supreme Court held in *Adarand* that affirmative action programs must be subject to strict scrutiny, many scholars assumed affirmative action had effectively been forbidden, to the point that Darien McWhirter wrote an entire book on the premise that *Adarand* had killed affirmative action for good; the only question for McWhirter was what kind of civil rights policies should be adopted in its place.[24]

Scholars made similar predictions about the Fifth Circuit's decision in *Hopwood v. Texas*.[25] After the lawsuit was filed, and before the Fifth Circuit's decision was issued, Jeffrey Rosen claimed in a *New Republic* article that affirmative action "law was unraveling" and that affirmative action may be "doomed" by the stark racial preferences revealed in the *Hopwood* litigation.[26] Rosen was right that the Fifth Circuit would invalidate the program, but he was wrong to infer "doom" from the case; the decision ended up having limited impact, partly because the Supreme Court refused to hear the case.[27] Nevertheless, even after the Supreme Court denied *certiorari* in *Hopwood*, scholars continued to

18. Cristopher H. Davis & Darrell D. Jackson, *The Sunset of Affirmative Action:* City of Richmond v. J.A. Croson Co., 12 NAT'L BLACK L. J. 73 (1990).

19. George A. Rutherglen, *After Affirmative Action: Conditions and Consequences of Ending Preferences in Employment*, 1992 U. ILL. L. REV. 339, 340 (1992).

20. *Id.*

21. Carl L. Livingston, *Affirmative Action on Trial: The Retraction of Affirmative Action and the Case for its Retention*, 40 HOW. L.J. 145, 162 (1996).

22. 515 U.S. 200 (1995).

23. *The End of Affirmative Action*, NEWSWEEK, 12 Feb. 1995.

24. DARIEN MCWHIRTER, THE END OF AFFIRMATIVE ACTION: WHERE DO WE GO FROM HERE? (1996).

25. 78 F.3d 932 (5th Cir. 1996).

26. Jeffrey Rosen, *Is Affirmative Action Doomed?*, THE NEW REPUBLIC (Oct. 17, 1994), https://newrepublic.com/article/73772/affirmative-action-doomed

27. Texas v. Hopwood, 518 U.S. 1033 (1996) (cert. denied).

see the case as spelling "the end of affirmative action in higher education."[28] Michelle Adams wrote in 1998 that *Croson* and *Adarand* had already "dismantled preferential forms of affirmative action,"[29] and *Hopwood* was simply the nail in the coffin, signaling "the last wave of affirmative action."[30] This was the general sentiment among scholars at the conclusion of the 20th century—for example, Michael Selmi lamented in a 1999 law review article that "we find ourselves in the midst of an extensive dismantling of the affirmative action infrastructure, one that may foreshadow the end of affirmative action."[31]

A few years later, the Michigan cases—*Gratz v. Bollinger*[32] and *Grutter v. Bollinger*[33] —incited a new flurry of autopsies. *This* time, the scholars and pundits assured, affirmative action was going to die.[34] Indeed, Ronald Dworkin predicted that the Michigan cases "might well mean the end of effective affirmative action programs in American colleges and universities."[35] The conservative writer Charles Krauthammer likewise predicted, just as he had 14 years earlier, that "the day now seems at hand . . . for the abolition of affirmative action."[36] But yet again, that is not what happened.[37] The Supreme Court invalidated the University of Michigan undergraduate policy,[38] but upheld the law school program, albeit with Justice O'Connor's own prediction that affirmative action would die within the next 25 years.[39]

The *Grutter* decision, however, did not deter scholars and pundits from continuing to offer dire diagnoses on the state of affirmative action.[40] Six years later, in *Ricci v. DeStefano*,[41] the Supreme Court invalidated New Haven's application of Title VII's "disparate impact" analysis in its fire department promotions, and this prompted pundits to say that the Supreme Court had killed affirmative action.[42] Juan Williams, writing for the

28. Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 763 (1997).

29. Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1397 (1998).

30. *Id.*

31. Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 698 (1999).

32. 539 U.S. 244 (2003).

33. 539 U.S. 306 (2003).

34. Ronald Dworkin, *The Court and the University*, THE N.Y. REV. (May 15, 2003), https://www.nybooks.com/articles/2003/05/15/the-court-and-the-university/.

35. *Id*.

36. Charles Krauthammer, *How* Not *to Abolish Affirmative Action*, WASH. EXAM'R (Feb. 10, 2003), https://www.washingtonexaminer.com/weekly-standard/how-not-to-abolish-affirmative-action.

37. *Grutter*, 539 U.S. at 343.

38. *Gratz*, 539 U.S. at 275-76.

39. *Grutter*, 539 U.S. at 343.

40. Juan Williams, *Affirmative Action Died Too Soon*, WASH. POST (July 26, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072402101.html.

41. 557 U.S. 557, 593 (2009).

42. *Id.* at 592.

Washington Post, declared that "[a]ffirmative action, age 45, is dead."[43] Ward Connerly, a conservative activist and ardent affirmative action critic, issued a similarly dire diagnosis: "the *Ricci* decision suggests that we are witnessing the beginning of the end of affirmative action preferences."[44]

In 2013, a few years after *Ricci*, the Court decided to hear yet another case out of the University of Texas system, *Fisher v. University of Texas*,[45] and as expected, more predictions of death followed. When the Supreme Court decided to hear the case, Sam Fulwood of the Center for American Progress proclaimed that "[f]or all intents and purposes, affirmative action is dead."[46] Likewise, after the Court decided to *rehear* the case after sending it back to the Fifth Circuit, "legal experts thought that the decision [to rehear the case] signaled the end of affirmative action."[47] Indeed, Professor Herbert C. Brown Jr. observed that experts widely believed that *Fisher II* would bring "the dreaded end of affirmative action."[48] Similarly, Eric Levitz wrote the following about *Fisher II*: "The Supreme Court will very likely end affirmative action at UT Austin, and may even end affirmative action at all public universities."[49] Dan Solomon at Texas Monthly wrote that *Fisher II* "is a major case that could mean the end of affirmative action across the country."[50] But that, yet again, is not what happened. The *Fisher II* decision, while reciting the Court's previous condemnations of affirmative action, upheld the University of Texas program by creating a new approach to strict scrutiny, one significantly more deferential to government discretion and applicable only to affirmative action law.[51]

In 2014, in between *Fisher I* and *Fisher II*, the Supreme Court decided another affirmative action case, *Schuette v. Coalition to Defend Affirmative*

---

43. Williams, *supra* note 40.

44. Ward Connerly, *Ricci and the Future of Race in America*, THE CHRISTIAN SCI. MONITOR (July 14, 2009), https://www.csmonitor.com/Commentary/Opinion/2009/0714/p09s01-coop.html

45. 570 U.S. 297, 303 (2013).

46. Sam Fulwood III, *The Death of Affirmative Action*, CTR. FOR AM. PROGRESS (Apr. 3, 2012, 9:00 AM), https://www.americanprogress.org/issues/race/news/2012/04/03/11368/race-and-beyond-the-death-of-affirmative-action/.

47. Hugh Barrett McClean, *The Diversity Rationale for Affirmative Action In Military Contracting*, 66 CATHOLIC UNIV. L. REV. 745, 771 (2017), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2066&context=all_fac.

48. Herbert C. Brown, Jr., *A Crowded Room or the Perfect Fit? Exploring Affirmative Action Treatment in College and University Admissions for Self-Identified LGBT Individuals*, 3 WM. & MARY J. OF WOMEN AND THE L. 603, 630 (2015), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1409&context=wmjowl.

49. Eric Levitz, *The Supreme Court May Be on the Verge of Ending Affirmative Action*, MSNBC (June 29, 2015, 6:50 PM), https://www.msnbc.com/msnbc/the-supreme-court-may-be-the-verge-ending-affirmative-action-msna628811.

50. Dan Solomon, *What Antonin Scalia's Empty Spot Means for Texas-Based Supreme Court Cases*, TEX. MONTHLY (Feb. 16, 2016), https://www.texasmonthly.com/the-daily-post/what-antonin-scalia-retirement-means-for-hb2-and-abigail-fisher-vs-ut/.

51. Fisher v. University of Texas, 136 S.Ct. 2198, 2214 (2016).

Action,[52] involving a constitutional challenge to Michigan's state ban on affirmative action. This case brought the same predictions. When the *Schuette* case was in the lower court, the right-leaning *Weekly Standard* celebrated "the end of affirmative action."[53] After the Supreme Court upheld the Michigan ban, Victor Davis Hanson, in the *National Review*, wrote a nearly identical article, with the same title, "The End of Affirmative Action."[54] And yet affirmative action has continued not only to exist but to thrive.

That hasn't stopped scholars from predicting the demise of affirmative action. In a 2018 UC Davis Law symposium on the 40-year legacy of the *Bakke* decision,[55] Yuvraj Joshi wrote that "Justice Kennedy's retirement spells the end of affirmative action as we know it."[56] Professor Kermit Roosevelt of Penn Law similarly predicted "that affirmative action's fate was sealed with Judge Brett Kavanaugh's nomination."[57] A prominent education publication summarized the expert opinion on the subject as follows: "Scholars believe Supreme Court likely to end affirmative action with Kavanaugh."[58] The same predictions followed Justice Ginsburg's death. David S. Cohen claimed that if former President Trump nominated Justice Ginsburg's successor, "[t]here would be a sixth vote against affirmative action."[59] And when former President Trump did just that by nominating Amy Coney Barrett, experts predicted that she would vote against Harvard if the case got to the Supreme Court.[60] Conservatives, meanwhile, rejoiced that Justice Barrett's confirmation represents the end of affirmative action.[61]

---

52. 572 U.S. 291 (2014).

53. Kevin Mooney, *The End of Affirmative Action*, WASH. EXAM'R (Oct. 10, 2011, 1:00 PM), https://www.washingtonexaminer.com/weekly-standard/the-end-of-affirmative-action.

54. Victor Davis Hanson, *The End of Affirmative Action*, NAT'L REV. (May 1, 2014, 4:00 AM), https://www.nationalreview.com/2014/05/end-affirmative-action-victor-davis-hanson/.

55. Bakke *at 40: Diversity, Difference, and Doctrine*, 52 UC DAVIS L. REV. (Oct. 26, 2018), https://lawreview.law.ucdavis.edu/symposia/2018-fall/.

56. Yuvraj Joshi, *Racial Indirection*, 52 UC DAVIS L. REV. 2495, 2497 (2019), https://lawreview.law.ucdavis.edu/issues/52/5/Symposium/52-5_Joshi.pdf.

57. Seth Schuster, *Kavanaugh's Confirmation May Spell the End of Affirmative Action at Penn and Elsewhere*, THE DAILY PENNSYLVANIAN (Oct. 7, 2018, 11:57 PM), https://www.thedp.com/article/2018/10/brett-kavanaugh-upenn-asian-admissions-policies-eric-furda-philadelphia.

58. Monica Levitan & LaMont Jones, *Scholars Believe Supreme Court Likely to End Affirmative Action with Kavanaugh*, DIVERSE EDUC. (Sept. 13, 2018), https://diverseeducation.com/article/126121/.

59. David S. Cohen, *What the Loss of Ruth Bader Ginsburg Means for the Supreme Court*, ROLLING STONE (Sept. 18, 2020, 10:03 PM), https://www.rollingstone.com/politics/political-commentary/ruth-bader-ginsburg-scotus-trump-justice-appointment-1063402/.

60. Benjamin L. Fu & Dohyun Kim, *Experts Say SCOTUS Nomination Threatens Harvard Admissions Lawsuit Ruling*, THE HARV. CRIMSON (Sept. 29, 2020), https://www.thecrimson.com/article/2020/9/29/barrett-nomination-admissions-lawsuit/.

61. Jason L. Riley, *With Justice Barrett, Is the End Near for Racial Preferences?*, WSJ (Oct. 27, 2020, 7:05 PM), https://www.wsj.com/articles/with-justice-barrett-is-the-end-near-for-racial-preferences-11603839923.

Just as none of the Supreme Court's decisions have had the effect of eliminating or even limiting affirmative action, the same will likely be the case with President Trump's recent Supreme Court appointments. They will almost certainly have little if any effect on the future of affirmative action. The point of this Article is to explain why.

More particularly, this Article will seek to explain why, despite the fact that the Supreme Court has invalidated the vast majority of the affirmative action programs it has adjudicated,[62] despite the fact that 9 states have banned affirmative action altogether,[63] and despite the fact that the Republican Party has controlled the Supreme Court for more than 50 years due to Republican Presidents nominating 16 of the last 20 Justices,[64] affirmative action has not only survived over the last two generations but it has broadened and strengthened in the face of this judicial, legislative, and popular resistance.

There is no other program in the country's history that has these characteristics. To appreciate its uniqueness, we must first appreciate that affirmative action is not a static program; rather it has changed significantly over time.[65] Indeed, affirmative action has existed in American law for over 75 years, but the programs have changed substantially over this period. This Article will highlight these changes by tracing the development of affirmative action, separating the program into four discrete phases.[66] This analysis will illustrate how each phase served a critical role in sustaining affirmative action by facilitating its adaptation to the time period's political and legal pressures.[67]

The Article will break down according to these four phases. Part I will explore what affirmative action looked like in the generation before the civil rights movement.[68] Part II will cover affirmative action's second phase,

62. Margaret Kramer, *A Timeline of Key Supreme Court Cases on Affirmative Action*, The N.Y. Times (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/affirmative-action-supreme-court.html.

63. "Since 1996, nine states have voted to ban the use of affirmative action in college admission: California (1996), Texas (1996), Washington (1998), Florida (1999), Michigan (2006), Nebraska (2008), Arizona (2010), New Hampshire (2012), and Oklahoma (2012)." Jenna A. Robinston, Did You Know? Eight States Ban Affirmative Action in College Admissions (Oct. 24, 2019), https://www.jamesgmartin.center/2019/10/did-you-know-eight-states-ban-affirmative-action-in-college-admissions/.

64. Supreme Court Nominations (1789-Present), U.S. S., https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm.

65. For purposes of this Article, affirmative action refers to any program that (1) prefers historically disadvantaged groups in the provision of employment, educational, or related professional benefits, and (2) provides this preference for the purpose of either redressing past discrimination or creating future economic or social equality. Accordingly, the preference of white gentiles over Jewish applicants, a preference practiced by many elite colleges and universities in the early 20th century, will not be treated as affirmative action, because this preference favored a majority group that was not in any sense historically disadvantaged, and moreoever, the preference was not designed to redress past discrimination or to create future economic equality.

66. *See infra* Parts I-IV.

67. *Id.*

68. *See infra* Part I.

which arose in the 1960s, in concert with the rise of the civil rights movement.[69] Part III will discuss how a third phase began when Richard Nixon enacted the Philadelphia Plan, thus extending affirmative action beyond the Kennedy and Johnson administrations and signaling that affirmative action had transitioned into a long-term policy associated with both parties.[70] The Supreme Court affirmed this transition shortly after, in *Griggs v. Duke Power*,[71] when the Supreme Court interpreted "disparate impact" analysis (a tool for affirmative action) as being part and parcel of Title VII of the Civil Rights Act.[72] Part IV will explain how the Court's decision in *Bakke v. UC Davis*[73] marked the beginning of a fourth period, what I have characterized as the diversity phase.[74]

The Article Conclusion will begin by considering whether we are in the process of shifting toward a fifth phase, one in which affirmative action is now beyond the law because the government's interest in ideational diversity for its epistemological value has transitioned into a governmental command to pursue racial diversity for its categorical moral value. After considering the possibility that American law is entering a fifth affirmative action phase, the Article will consider the descriptive and normative implications arising from this development—namely what it teaches us about American law and politics that, over a roughly 75-year period, affirmative action has managed to strengthen and broaden outside the sanction of public opinion, the federal judiciary, and state law.[75] The upshot of this analysis is that, whatever happens in the Harvard case, affirmative action is here to stay.

I. PHASE ONE: AFFIRMATIVE ACTION AS AN ANTI-DISCRIMINATION ENFORCEMENT TOOL

During the 1940s and 1950s, the federal and state governments began adopting anti-discrimination requirements in various areas of government employment. Although Presidents Franklin D. Roosevelt, Harry S. Truman, and Dwight D. Eisenhower did not explicitly adopt affirmative action programs, they informally employed affirmative action by using statistical underrepresentation of blacks in various areas of employment as evidence of discrimination against blacks, thereby providing the basis for governmental intervention even when there was no actual evidence of discrimination.[76]

69. *See infra* Part II.
70. *See infra* Part III.
71. 401 U.S. 424 (1971).
72. *Id.* at 432-33.
73. 438 U.S. at 265.
74. *See infra* Part IV.
75. *See infra* Conclusion.
76. JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA 113-15 (1996).

These were, as John Skrentny writes, color-blind or classically liberal programs administered with affirmative action measures.[77] That is, during this period, there were no formal pronouncements concerning preferences for certain racial groups over others.[78] But with the rise of the first round of non-discrimination measures came enforcement mechanisms that looked a lot like formal affirmative action.[79] In Skrentny's words, "agencies in search of a useful tool for fighting discrimination were continually led to the affirmative action approach"—i.e., they were led to "monitoring numbers and percentages of African-Americans hired as a measure of discrimination."[80] Skrentny thus argues that affirmative action in America developed gradually, across administrations and party lines, and long "*before* the development of the civil rights movement, *before* the racial crisis in the cities, *before* the rise of militant black groups and theories of compensatory preferences."[81] Below, I will draw from different sections of Skrentny's analysis and other scholarly works in providing a brief overview of how Phase 1 affirmative action operated. This section will focus on how Phase 1 affirmative action was characterized by affirmative action solutions to anti-discrimination norms, thereby laying the foundation for Phase 2 affirmative action, the formal programs adopted during the civil rights movement.

The term "affirmative action" first appeared in federal law as part of the National Labor Relations Act of 1935 ("the Wagner Act"),[82] which required employers engaging in unfair labor practices to take "affirmative action" in correcting such practices.[83] The Wagner Act was only a labor law, not a "civil rights" or "affirmative action" law the way that we currently use those terms.[84] But the Wagner Act inspired New York State to pass the Fair Employment Practices Act ("Ives-Quinn Act"),[85] which used nearly identical language as the Wagner Act but also included language on racial discrimination.[86] This was the first state ban on racial discrimination in employment.[87]

There was significant opposition to the Ives-Quinn Act on the ground that it would lead to affirmative action, what was described by one of the

77. *Id.*
78. *Id*. at 113.
79. *Id*. at 115.
80. *Id*.
81. SKRENTNY, *supra* note 76, at 117.
82. 29 U.S.C.A. § 160(c) (1935).
83. *Id*.
84. *Id.*
85. N.Y. Exec. Law § 296.
86. *Id.*
87. *New York Leads the Way*, N.Y. STATE, https://empirestateplaza.ny.gov/people-new-york/new-york-leads-way.

opponents of the legislation as "the Hitlerian rule of [racial] quotas."[88] This concern was dismissed on the ground that the Act would "not compel an employer to employ quotas or to employ less efficient persons because of race, creed, color, or religion, but it specifically prohibits discrimination solely on these grounds."[89] The critics turned out to be right.[90] Within a few years of the law's enactment, the New York Commission Against Discrimination, the agency charged with enforcing the Act, interpreted the law as requiring what we would describe as affirmative action – i.e., race-based preferences in the hiring process.[91] The New York law prompted other states to adopt similar enactments, creating affirmative action schemes across the nation.[92]

The first such federal measure was President Roosevelt's Executive Order 8802, which prohibited racial discrimination in the defense industry.[93] As Skrentny recounts, the Fair Employment Practice Committee ("FEPC"), the six-person committee charged with enforcing the order, was "most concerned not necessarily with stopping discriminatory intent, but with getting 'results.'"[94] In fact, David Sarnoff, a member of the FEPC committee, even suggested that government, management, and labor should not feel obligated to comply with the anti-discrimination *text* of Executive Order 8802.[95] Instead, Sarnoff claimed, those subject to the executive order should be more inspired by *its goal* to achieve greater racial proportionality.[96] And Sarnoff urged the use of "ingenuity" in seeking to satisfy this goal.[97] This idea of using ingenuity to achieve a vague goal of proportionate representation would become, Skrentny writes, "a familiar pattern" throughout the 1940s and 1950s—i.e., the pattern of "[a] civil rights administrator demanding a demonstrable, result-oriented implementation,

88. Anthony S. Chen, *"The Hitlerian Rule of Quotas": Racial Conservatism and the Politics of Fair Employment Legislation in New York State, 1941-1945*, 92 J. OF AM. HIST. 1238 (2006).

89. *Id.* at 1258.

90. Morroe Berger, *New York State Law Against Discrimination Operation and Administration*, 35 CORNELL L. REV. 747, 769 (1950).

91. *See id.* (documenting how the newly created New York Commission Against Discrimination enforced the Act to increase the hiring of African Americans even when there was no actual evidence of discrimination).

92. For information on how the New York law influenced other states, see Anthony S. Chen, *The Passage of Fair State Employment Legislation, 1945-1964: An Event-History Analysis with Time-Varying and Time-Constant Covariates*, 79 INST. FOR RES. ON LAB. AND EMP. 1, 6-7 (2001), https://www.irle.berkeley.edu/files/2001/The-Passage-of-State-Fair-Employment-Legislation-1945-1964.pdf.

93. Exec. Order No. 8802, 6 Fed. Reg. 3,109 (June 25, 1941).

94. SKRENTNY, supra note 76, at 115.

95. *Id.*; Exec. Order No. 8802.

96. SKRENTNY, *supra* note 76, at 115.

97. *Id.* (1996) (quoting LOUIS RUCHAMES, RACE, JOBS, & POLITICS: THE STORY OF FEPC 39-40 (1953)).

though hedging the issue of how this could be legally be done" under the governing anti-discrimination law.[98]

Indeed, we see this pattern appear again in the enforcement of President Truman's Executive Order 9980, which ordered the "desegregation of the federal workforce."[99] Similar to FDR's Executive Order 8802, Truman's Executive Order 9980 created an agency, the Fair Employment Board ("FEB"), to enforce it.[100] And like FDR's FEPC, the Truman's FEB quickly turned into an affirmative action program.

From the start, the FEB Chairman, James L. Houghteling, pushed for the executive order to serve as a remedy for black underrepresentation, not simply as a remedy for racial discrimination.[101] For example, in a report on the FEB's first year (covering from October 1, 1950 to September 30, 1951), Houghteling explained that the Board should focus on the "persistent assembly and analysis of the facts, statistical and other, which will determine with some exactness whether, where, and to what extent discrimination is practiced, and how, and by whom."[102] This proactive approach, Houghteling argued, was preferable to the passive approach of simply responding to complaints of discrimination, for such a passive *post hoc* approach would, in Houghteling's words, "be tantamount to nullification of the most important and progressive steps contemplated by the Executive Order."[103] In Houghteling's view, treating the Executive Order as being limited to its text (as a mere ban on racial discrimination in federal employment) would nullify the underlying purpose of the order (which he interpreted as having the goal of increasing black representation in the federal workforce).[104] This approach was again on display in Houghteling's letter "to President Truman's administrative assistant Donald S. Dawson," explaining how the Board, to enforce Executive Order 9980, would have to collect data concerning the ratios of black employment in various areas of the federal government.[105]

In 1951, President Truman issued Executive Order 10308, creating the eleven-person Committee on Government Contract Compliance, charged with investigating discrimination by government contractors.[106] Two years later, President Eisenhower issued Executive Order 10749, which created the

98. *Id.*

99. Exec. Order No. 9980, 13 Fed. Reg. 4,311 (July 26, 1948).

100. *Id.*

101. SKRENTNY, *supra* note 76, at 115.

102. *Id.* at 116 (1996) (quoting Report from the Fair Employment Board to the Civil Service Commission, *in Employment of Blacks by the Federal Government*, *in* 4 CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT: 1945-1968 88 (Michal R. Belknap ed., 1991) (1996)).

103. *Id.* at 117 (quoting Report from the Fair Employment Board to the Civil Service Commission, *in Employment of Blacks by the Federal Government*, *in* Belknap, *supra* note 102, at 90).

104. *Id.* at 115-16.

105. SKRENTNY, *supra* note 76, at 115-16.

106. Exec. Order No. 10308, 16 Fed. Reg. 12,303 (Dec. 3, 1951).

fifteen-person President's Committee on Government Contracts, headed by Vice President Richard M. Nixon.[107] Although this committee had limited authority, Nixon's role in the Committee may have had a significant impact on the trajectory of affirmative action, as nearly 20 years later, Nixon would become a critical figure in creating Phase 3, a period that entrenched affirmative action in American law and politics.[108] But before Nixon entrenched affirmative action, it would expand significantly with the rise of the civil rights movement, beginning with the Supreme Court's decision in *Brown v. Board of Education*.[109]

II. PHASE TWO: AFFIRMATIVE ACTION AS A CIVIL RIGHT

During the civil rights movement, a period covering from 1954 to 1968,[110] affirmative action changed in three important ways. One, affirmative action transitioned from providing racial preferences only as a means of enforcing non-discrimination requirements, to providing racial preferences in form, as part of the non-discrimination requirements themselves. Two, affirmative action broadened to apply beyond public employment, as private companies and universities began to engage in large-scale affirmative action experiments. Finally, affirmative action began to take on a more transformative function. Whereas Phase 1 affirmative action was characterized by governmental administrators using race-conscious tools (such as the collection of employment data) for the specific and targeted purpose of *redressing* the problem of underrepresentation among African Americans in particular industries, Phase 2 affirmative action was characterized by the government's use of racial preferences as a *prospective* tool for reforming society on a larger scale. This suggested that affirmative action requirements might not be satisfied by a one-time preference in employment hiring or university admissions decisions; rather, affirmative action might require a wholesale reformation of how businesses and universities operated. As a result, any test or practice that obstructed the path to proportionate equality would become subject to closer scrutiny.

A. Affirmative Action Under the Kennedy and Johnson Administrations

President Kennedy's Executive Order 10925, issued shortly after assuming office, represented the first federal reference to "affirmative action"

107. Exec. Order No. 10749, 23 Fed. Reg. 427 (Jan. 21, 1958).

108. Dean J. Kotlowski, *Nixon and the Origins of Affirmative Action*, 60 THE HISTORIAN 523 (1998).

109. 347 U.S. 483 (1954).

110. Historians generally chronicle the movement as beginning with the 1954 *Brown* decision and ending in 1968 with the passage of the Fair Housing Act, the last piece of significant civil rights legislation passed under President Johnson.

in a racial context.[111] On its face, the order was much like previous non-discrimination orders in that it simply required government contractors to "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."[112] But whereas the earlier non-discrimination orders took on an affirmative action application through the agencies responsible for enforcing them, President Kennedy made clear from the start that his order would require more aggressive actions.[113] For example, in a July 1961 press release, a few months after issuing Executive Order 10925, President Kennedy claimed that the Committee on Equal Employment Opportunity, the agency charged with enforcing the order, had conducted a survey of black employment, and this survey pointed to "where work is particularly needed to assure equal employment opportunity."[114] In that press release, Kennedy predicted that increased black employment would be reflected in the subsequent year's survey, suggesting that some sort of quota would be in place.[115] Further evidence of Kennedy's tacit approval of quotas has been noted by Kennedy's personal adviser, Arthur Schlesinger Jr., who, in his biography of Kennedy, observed that Kennedy explicitly sought for every government department to make "a special effort to seek Negroes for high federal jobs" and "to recruit Negroes."[116]

Just as Kennedy was strengthening affirmative action in federal employment, he was expanding it into the private sector.[117] In July 1961, Kennedy created the Plans for Progress Program, a voluntary association of large companies that received exemptions from the Committee on Equal Employment Opportunity for complying with the Program's race-based goals.[118] Kennedy made his friend, Robert Troutman, Jr., the director of the program, and Troutman's 1962 resignation letter suggests that the Program operated through quotas.[119] As Troutman explained, his job as director had

111. Exec. Order No. 10925, 26 Fed. Reg. 1,977 (Mar. 6, 1961).

112. *Id.*

113. SKRENTNY, *supra* note 76 at 117; ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 931-32 (2002).

114. SKRENTNY, *supra* note 76, at 117 (quoting Report from the Fair Employment Board to the Civil Service Commission, *in Employment of Blacks by the Federal Government*, *in* Belknap, *supra* note 102, at 90).

115. *Id.*

116. SCHLESINGER, JR., *supra* note 113, at 932-33.

117. SKRENTNY, *supra* note 76, at 118.

118. *Id.*

119. *Id.*

been to create "a series of one-year goals"[120] so that blacks could "enjoy a respectable portion of the nation's better jobs."[121]

While scholars have used this evidence to argue that Kennedy implicitly supported the use of racial quotas, it is important to note that he never explicitly approved of them.[122] But whatever Kennedy's particular intentions, it was unmistakable that affirmative action—i.e., some sort of preference in employment on the basis of race—was starting to become part of what non-discrimination law meant. It was no longer simply a tool that an agency might use to enforce a non-discrimination requirement.

Just as President Kennedy was far from clear on what kind of racial preferences would be required by these programs, so was the Civil Rights Act of 1964, the landmark civil rights legislation banning racial discrimination in many areas of public and private life.[123] It is true that opponents of the legislation expressed concern that Title VII of the Act (banning various forms of discrimination in private employment) would give the federal government the authority to mandate race-based hiring whenever it found a "lack of racial balance."[124] But it was far from clear at the time that Title VII would be interpreted to require this, and in fact, there were assurances in the floor debate that this is not what the legislation would require.[125] Nevertheless, the legislation certainly anticipated that the threat of lawsuits would have the effect of inducing voluntarily initiated affirmative action programs. As Christopher Caldwell writes, "[o]ne way to shelter one's business from the government's investigative zeal was to act in the spirit of voluntarism—to establish pre-emptively a government-approved affirmative action program, along lines laid out in Section 718 of the act."[126]

This "voluntarism" came to look more like governmental regulation just one year after the Civil Rights Act was passed, when President Johnson issued Executive Order 11246, requiring government contractors to adopt affirmative action programs.[127] Johnson's order was similar to the Roosevelt,

120. *Id.*

121. *Id.* at 118 (quoting Press Release on Resignation of Robert Troutman and His Attached Final Report on Plans for Progress (Aug. 20, 1962) *in Equal Employment Opportunity*, *in* 5 CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT: 1945-1968 119 (Michal Belknap ed., 1991)).

122. SKRENTNY, *supra* note 76, AT 118.

123. *See generally* Civil Rights Act of 1964 §706(g), 88 Pub. L. 352, 78 Stat. 241.

124. H.R. Rep. No. 914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2436.

125. *See, e.g.*, 110 Cong. Rec. 1518 (Jan. 31, 1964) (statement of Rep. Willis).

126. CHRISTOPHER CALDWELL, AGE OF ENTITLEMENT: AMERICA SINCE THE SIXTIES 32 (2020); §706(g), 78 Stat. at 241.

127. *See* Exec. Order 11246 §202(1), 30 Fed. Reg. 12923 (Sept. 24, 1965) (The relevant language is as follows: "The 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. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.").

Truman, Eisenhower, and Kennedy orders, but, as Skrentny observes, it was different in one important respect: Johnson's order created a power specifically located in "the OFCC, in the Department of Labor, rather than in some in some free-floating presidential committee, like the earlier PCEEO."[128] This shift held the potential for the federal government playing a more transformative role in regulating race and employment.

Johnson's mandate, however, hinged on a rather uncertain term: What would it mean for the OFCC to enforce "affirmative action" compliance?[129] In January 1967, Edward Sylvester, Director of OFCC, issued a statement acknowledging that he did not have a clear understanding of what "affirmative action" entailed.[130] According to Director Sylvester, the term was sufficiently capacious to have different meanings in different contexts.[131] The bottom-line for Director Sylvester was, whatever the actual meaning of the term, the program had to produce results.[132] While "this does not necessarily include preferential treatment" on the basis of race, Sylvester strongly suggested that racial preferences would be warranted if that is what was required to increase black employment.[133] In Sylvester's words, "affirmative action is anything that you have to do to get results."[134]

The OFCC's first major affirmative action program reflected Sylvester's openness toward racial quotas.[135] This program involved "special area plans" for construction contracts in four cities: St. Louis (January 1966), San Francisco (December 1966), Cleveland (February 1967), and Philadelphia (November 1967).[136] The final contract, what came to be known as the Philadelphia Plan, proved the most controversial.[137] OFCC, working with the Federal Executive Board,[138] created a numbers-based model for hiring minority workers on the basis of "the construction workforce, sources of minority recruitment, and racial population ratios."[139] These were not racial quotas but rather "suggested ranges."[140] Using ranges, as opposed to rigid quotas, was viewed by the Federal Executive Board as a strength of the

128. SKRENTNY, *supra* note 76, at 134.
129. *Id.*
130. *Id.* at 135.
131. *Id.*
132. *Id.*
133. SKRENTNY, *supra* note 76, at 135 (referencing Richard P. Nathan, *Jobs and Civil Rights 93*, U.S. GOV'T PRINTING OFF. (1969)).
134. *Id.*
135. *Id.* at 136.
136. *Id.*
137. *Id.* at 138.
138. SKRENTNY, *supra* note 76, at 137 (writing that the Federal Executive Board consisted of "regional federal officials of each contracting agenda in the area.").
139. *Id.* at 137.
140. *Id.* at 138.

Philadelphia Program, in that ranges would permit administrative flexibility.[141] The General Accounting Office, however, found the plan too vague and therefore inconsistent with the Johnson Executive Order.[142] According to the General Accounting Office, the Plan's use of suggested ranges "was defective because it did not contain definite minimum standards on which approval or disapproval of an affirmative action program would be based."[143] The implication was that a rigid racial quota rested on more solid legal footing than a flexible goal.[144] A Senate report on the Federal Highway Act of 1968 reflected this emerging consensus that quotas are preferable.[145] Indeed, the Senate report quoted the General Accounting Office for the proposition that government contracts for the highway program "should include a statement of definite minimum requirements to be met by the bidder's program, and any other standards or criteria by which the acceptability of such program would be judged."[146]

This shift toward explicit quotas in the late 1960s coincided with shifts within the civil rights movement, which was quickly moving from peaceful protesting to violent rioting.[147] In accord with this shift, affirmative action became decreasingly defended as an administrative tool for enforcing non-discrimination. It became more about creating equality of results. This equality rhetoric had an increasingly urgent nature to it, as race riots erupted throughout the country. This rhetoric marked a transition, in John Skrentny's view, toward defending affirmative action as a tool "for elites to maintain control, to manage a crisis."[148]

As evidence of this shift, Skrentny points out how, in July 1967, in response to the Newark riots, Attorney General Ramsey Clark wrote a letter to President Johnson explaining how it would have been easier to control the rioting had the National Guard had a more "visible Negro presence."[149] The Attorney General's letter cited the Army as advising that "steps should be taken immediately to correct the racial imbalance."[150] That August, the National Advisory Commission on Civil Disorders recommended to President Johnson that the Administration should "increase substantially the recruitment of Negroes in the Army National Guard and Air National

141. *Id.*
142. *Id.*
143. SKRENTNY, *supra* note 76, at 138 (quoting James E. Jones, *"The Bugaboo of Employment Quotas"*, 34 WISC. L. REV. 341, 360 (1970)).
144. *Id.*
145. *Id.*
146. *Id.* (quoting S. Rep. No. 90-1340, at 3497 (1968); Jones, *supra* note 167, at 361-64).
147. SKRENTNY, *supra* note 76, at 72.
148. *Id.* at 103.
149. *Id.* at 88 (quoting Memorandum from Attorney General Ramsey Clark to the President (Jul. 21, 1967)).
150. *Id.*

Guard."[151] President Johnson passed the letter on to Defense Secretary Robert S. McNamara, calling the hiring of blacks "a matter of highest urgency."[152]

As a direct response to the riots, the Johnson Administration administered the Economic Opportunity Act in a race-based way, so that "[a] disproportionate amount of funding for community action programs began to go to urban areas with large black populations."[153] As Margaret Weird and James Button have documented, the "black riots had a greater direct, positive impact than any other independent variable upon total OEO [Office of Economic Opportunity] expenditure increases in the latter 1960s."[154] This commingling between civil rights and affirmative action became apparent also in Martin Luther King's activism, a significant shift given that, throughout his career, King had been careful to avoid topics that would alienate white liberals from his civil rights agenda.[155] In King's 1967 congressional testimony, on the significance of the race riots, King "came about as close as possible," in Skrentny's opinion, "to advocating affirmative action without actually doing so."[156] In one instance, King suggested the possibility of "compensatory or preferential treatment"[157] for blacks, comparable to how India sought to deal with its caste system, and in that testimony King defended something like a veterans' Bill of Rights for "the disadvantaged"—i.e., "a broad based and gigantic bill of rights for the disadvantaged, our veterans of the long siege of denial."[158]

The riots also had the effect of fusing public and private energies behind affirmative action.[159] In early 1968, the Johnson Administration devised a new program, Job Opportunities in the Business Sector, providing government subsidized job training in the private sector.[160] The Job Opportunities in the Business Sector program worked with the National Alliance of Business, which Johnson personally oversaw, to secure jobs for the program's beneficiaries.[161] After a year and a half, 150,000 persons had been given jobs under the program, and 75 percent of the program's

151. *Id.* (quoting Letter to President Johnson from Kerner Commission (Aug. 10, 1967)).
152. SKRENTNY, *supra* note 76, at 88 (quoting Memorandum for Honorable Robert S. McNamara (Aug. 10, 1967)).
153. *Id.* at 89.
154. *Id.* (quoting James W. button, Black Violence 37 (1978)).
155. *Id.* at 96.
156. *Id.*
157. SKRENTNY, *supra* note 76, at 96 (quoting Civil Rights During the Johnson Administration, at frame 0955 (Steven F. Lawson ed. 1984)).
158. *Id.*
159. *Id.* at 89-91.
160. *Id.* at 91.
161. *Id.*

beneficiaries were black.[162] Johnson was explicit in calling for black employment as a way for government and business to manage the rioting, stating: "You can put these people to work and you won't have a revolution . . . . Keep them busy and they won't have time to burn your cars."[163]

This willingness to depart from race-neutral hiring criteria was also coming from the business community itself.[164] In Skrentny's words, "business elites were increasingly advocating racial hiring" as a way to manage the urban race crisis.[165] A Harvard Business Review article, for example, warned that, without affirmative action, American cities would be overrun "with riots and arson and spreading slums."[166] The National Alliance of Businessmen urged businesses "to give jobs to ghetto blacks before their businesses burned down."[167] A U.S. New & World Report article observed that a deviation from ordinary employment criteria, such as application tests and criminal background checks, would be necessary "to ease discontentment that has brought violence and destruction to many of America's big cities in recent summers."[168]

The 1968 Kerner Report (on race relations and the riots) avoided taking an explicit stance on affirmative action, but at many points it strongly hinted at race-based hiring as a remedy for the crisis.[169] For example, the Report "strongly recommend[ed] that local government undertake a concerted effort to provide substantial employment opportunities for ghetto residents."[170] Given that the term "ghetto" was almost exclusively used at the time to refer to black neighborhoods, this was an unmistakable reference to affirmative action. Likewise, the Report observed that "[r]acial discrimination and unrealistic and unnecessarily high minimum qualifications for employment or promotion often have the same prejudicial effect."[171] This was a sign that race-neutral criteria should be scrutinized closely, and perhaps even forbidden, if they had a disparate impact on the basis of race. In accord with this close scrutiny, the Report "recommend[ed] that municipal authorities

---

162. SKRENTNY, *supra* note 76, at 91.

163. *Id.* at 91 (quoting Joseph A. Califano, The Triumph and Tragedy of Lyndon Johnson 225-26 (1991)).

164. *Id.* at 89-91.

165. *Id.* at 89.

166. *Id.* at 89 (quoting Alfonso J. Cervantes, *To Prevent a Chain of Super-Watts*, 45 Harv. Bus. Rev. 53, 56 (1967)).

167. SKRENTNY, *supra* note 76, at 90 (quoting Glenn K. Hirsch, *Only You Can Prevent Ideological Hegemony: The Advertising Council and Its Place in the American Power Structure*, 5 THE INSURGENT SOCIOLOGIST 64, 76 (1975)).

168. *Id.* (quoting U.S. News & World Report, Mar. 18, 1968, at 61).

169. *Id.* at 97.

170. *Id.* (quoting National Advisory Commission on Civil Disorders, Report 294 (1968) [hereinafter NACCD]).

171. *Id.* (quoting NACCD, *supra* note 170, at 416).

review applicable civil service policies and job standards and take prompt action to remove arbitrary barriers to employment of ghetto residents."[172] In particular, the Report urged municipal authorities to question job "requirements relating to employment qualification tests and police records."[173]

In line with the Kerner Report, the concept of "'merit' began to change shape and meaning."[174] As one utility company acknowledged, applying different hiring criteria for blacks was indeed "discrimination in reverse," but it was justified discrimination to achieve the promise of civil rights, because "such steps are required to convince the Negroes that we are serious and want them to apply for work with us."[175]

It was quickly becoming clear that the civil rights movement would not simply be about banning racial discrimination as such; it was, more fundamentally, about managing America's race problem. And this would mean more than simply applying hiring criteria in a race-conscious way; it would also require distributing jobs on a racial basis so as to guarantee equality in results. Indeed, as President Johnson explained in a famous commencement address at Howard University, his administration sought "not just equality as a right and a theory but equality as a fact and equality as a result."[176] The language of civil rights and affirmative action had become so intermingled under the Johnson Administration that, as Christopher Caldwell describes it, "[c]ivil rights meant affirmative action."[177]

This same transition in rhetoric and operations was occurring within university admissions. Indeed, Jerome Karabel's *The Chosen*—an excellent book on the Harvard, Yale, and Princeton admissions practices—

172. SKRENTNY, *supra* note 76, at 97 (quoting NACCD, *supra* note 170, at 294).

173. *Id.* at 97 (quoting NACCD, *supra* note 170, at 294).

174. *Id.*

175. *Id.* at 91 (quoting U.S. News & World Report, Sept. 13, 1968, at 61-62).

176. *Id.* at 153 (quoting *EEOC Administrative History*, *in* CIVIL RIGHTS DURING THE JOHNSON ADMINISTRATION, 1963-1969, at frame 0003 (Steven F. Lawson ed. 1984)). For the full speech, see Lyndon B. Johnson, Commencement Address at Howard University: "To Fulfill These Rights.", THE AMERICAN PRESIDENCY PROJECT (June 4, 1965), https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights. Johnson's address is famous for announcing the administration's focus on equality of results rather than equality of form, despite the fact that the address did not mention a single policy idea. This was, apparently, by design. The author of the speech explained that Johnson sought to be vague in policy prescriptions, while seeking to make whites feel "a little guilty" about the status of blacks. The advantage of this approach was that "the strong language and vagueness of the Howard speech operated as carte blanche to any egalitarian initiative" and it could "therefore be used as a precedent or a tradition to justify the affirmative action model pragmatically developing in the EEOC." This worked exactly as planned. Indeed, the EEOC, under Chairman Clifford Alexander, began citing the speech as the basis for "asking business to focus on the racial makeup of the workforce." In explaining why this was not "reverse discrimination," and therefore in violation of the Civil Rights Act, Chairman Alexander would cite President Johnson's Howard commencement address as evidence of why it was permissible. *See id.* at 152-53.

177. CALDWELL, *supra* note 126, at 231.

demonstrates how, coinciding with the rise of the civil rights movement in the 1950s and 60s, the Big Three made substantial changes in their admissions standards to increase black enrollment.[178] More specifically, Karabel points out how Harvard, Yale, and Princeton shifted their affirmative action policies in the 1950s and 60s in accord with three distinct events: the Supreme Court's decision in *Brown v. Board*,[179] the increased momentum of the civil rights movement in the early 1960s, and the urban race riots in the late 1960s. Below, I will draw from Karabel's research to highlight how the progression of affirmative action at various elite colleges and universities in the 1960s operated in concert with the federal government's expanding affirmative action programs.[180]

B. Affirmative Action Comes to the Ivy League

The single most important institution to the migration of affirmative action into higher education was Harvard University, and the single most important figure in Harvard's creation of affirmative action was John U. Monro. In 1948, Monro, at the time working in Harvard's Office Veterans Affairs, "began organizing summer recruiting trips, first to Chicago and then to the South, to recruit Black students to Harvard."[181] In 1950, Monro became Harvard's Director of Financial Aid and in this capacity Monro persuaded Harvard to develop its recruitment of black students by working with the National Scholarship Service and Fund for Negro Students, an organization for which Monro served on the board of directors.[182] In 1958, Monro became Dean of the College, a position he held for ten years, until he left Harvard for Miles College, a black college that at the time was still not accredited.[183] These ten years under Monro's leadership were critical to Harvard's role as the nation's affirmative action leader. In 1959, Harvard created the so-called "Gamble Fund," funded by the Taconic Foundation.[184] Although the Gamble Fund was crafted in race-neutral terms (the program was designed to recruit "economic and culturally impoverished" students in the South), black students were the program's "major beneficiaries," with 18 black students in

178. JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 8-9 (2005).

179. 347 U.S. at 495 (striking down the doctrine of "separate but equal" in public education).

180. *See infra* Part II.B.

181. David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative* Action, 25 VA. J. SOC. POL'Y & L. 158, 177 (2018); *see also* TONI-LEE CAPOSSELA, JOHN U. MONRO: UNCOMMON EDUCATOR 1, 3 (2012).

182. *Id.* at 56, 83.

183. This decision was so shocking that it garnered national headline media attention See, e.g., Fred M. Hechinger, *Dean Quits Harvard to Aid Negro College*, NY Times 1 (March 10, 1967).

184. *Id.*

the program's first three years.[185] The Gamble Fund sought to help students prepare for Harvard by sending them to Andover the summer before their freshmen year.[186] In some cases, students were sent to Andover for an entire year of preparation before enrolling in Harvard.[187]

It is important to note that at this point Harvard's affirmative action program was limited, at least as a matter of formal policy, to special recruitment efforts. Although Karabel quotes one "well-informed observer"[188] for the proposition that by the late 1950s "affirmative action was already institutional policy" in Harvard admissions, [189] in that Harvard had a practice of "go[ing] out of its way [to admit black students]" and would "take a boy with inadequate test scores if there are indicators he will develop,"[190] this racial preference had not yet been expressed as a formal policy at Harvard.[191]

It is also noteworthy that, as late as the early 1960s, Yale was explicitly against race-based treatment of the SAT.[192] In 1960, for example, after Yale's special recruitment efforts managed to yield only five black students out of a class of 1,000,[193] Yale explicitly addressed whether it should apply different admissions standards on the basis of race.[194] Dean of Admission Arthur Howe Jr. rejected this proposal on the ground that black applicants should be expected to "meet the same standards required of other applicants."[195] This "same standard" principle was on display in how Yale's special recruitment program had found a top black student, a student with great leadership skills who had been number one in his high school class of 500, but even though Yale had recruited him, Yale still ended up rejecting him, due to his "averaging only 488 on the SAT," well below the school's bottom tenth percentile.[196] This rejection was, in the admission's officer's words, "the price we pay for our academic standards."[197] Within just a few years, this rejection based on the student's SAT score would become doubtful, perhaps even unthinkable.

---

185. *Id.*
186. KARABEL, *supra* note 178, at 400.
187. *Id.*
188. *Id.* at 400.
189. *Id.* at 401 (quoting Charles Puttkammer, Negroes in the Ivy League 19 (1962)).
190. *Id.* at 401 (quoting Puttkammer, *supra* note 189, at 19).
191. KARABEL, *supra* note 178, at 402.
192. *Id.* at 379.
193. *Id.*
194. *Id.* at 380.
195. KARABEL, *supra* note 178, at 380 (quoting Letter from Arthur Howe Jr. to Connelly Edwards (Mar. 30, 1960)).
196. *Id.*
197. *Id.* (quoting Katherine T. Kinkead, *The Brightest Ever*, NEW YORKER, Sept. 10, 1960).

Indeed, as the civil rights movement picked up pace and demands for more black students heightened, the demands for race-based treatment of academic credentials intensified.[198] In the fall of 1962, President Kennedy organized a meeting consisting of the leaders of five major universities, including Harvard and Yale.[199] In that meeting, President Kennedy implored these major universities to take a more aggressive position on racial equality and justice.[200] Kingman Brewster Jr., who was Yale's representative at that meeting, became Yale's acting president the following year.[201] In 1964, the year after Brewster became Yale's president, Brewster awarded Martin Luther King Jr. an honorary doctorate, an unmistakable sign that Yale was beginning to place race relations at the forefront of its mission.[202] Nevertheless, "despite vigorous efforts to identify qualified black candidates and to help them meet Yale's standards,"[203] Yale still managed to enroll only 14 African-Americans that year, fewer than 2 percent of the incoming freshman class.[204]

Once again, Yale considered formally adopting different admissions standards on the basis of race.[205] But this was met, yet again, by resistance, as the Governing Board of the Committee on Admissions expressed "no interest in suddenly opening the gates solely to increase the number of Negro and foreign students, unless they were qualified according to the same criteria used to judge all other candidates."[206] George May, Dean of Yale College, similarly expressed "strong opposition" against race-based admissions standards.[207]

That year, an Ivy League school outside of the Big Three, Dartmouth College, became the first school after Harvard to go on the record in formally recognizing its affirmative action program.[208] In a March 1962 letter, the Dartmouth director of admissions wrote that it was common practice for Dartmouth to "take into account the background from which a boy comes."[209] It was clear from the context that, by "background," the admissions director

198. *See id.* at 380-85.
199. *Id.* at 381.
200. KARABEL, *supra* note 178, at 381.
201. *Id.*
202. *Id.*
203. *Id.* at 383.
204. *Id.*
205. KARABEL, *supra* note 178, at 383.
206. *Id.* (quoting Minutes of the Committee on Admissions and Freshmen Scholarships, Yale U. (Oct. 26, 1964)).
207. *Id.*
208. Lisa M. Stulberg & Anthony S. Chen, *The Origins of Race-Conscious Affirmative Action in Undergraduate Admissions: A Comparative Analysis of Institutional Change in Higher Education*, 87 SOC. EDUC. 36, 42 (2013).
209. *Id.* (quoting Letter to George Kalbeleish from Leeman D. Thompson (Nov. 6, 1963)).

was referring to racial background, as the letter continued by explaining that "we bend over backward to help Negroes if they can show any capacity at all for handling the work at a place like Dartmouth College."[210] As an observer later wrote about the 1960s Dartmouth affirmative action policy, "most of the selection criteria used for [white] applicants are not applicable [for black applicants]."[211]

In 1963, the following year, two more Ivies, the University of Pennsylvania and Columbia, went on the record in formally recognizing their own affirmative action policies.[212] In February of 1963, *The Daily Pennsylvanian*, the University of Pennsylvania's student newspaper, ran a story on the University's affirmative action program; in that story, the Dean of Admissions, William G. Owen, acknowledged that the University applied different admissions standards to students on the basis of race.[213] A similar article ran in the *Columbia Spectator* in October of that year. In that article, entitled ''Colleges Seek Negro Applicants," Columbia's Dean Henry S. Coleman acknowledged that Columbia applied different SAT standards to different racial groups.[214]

As other Ivy League schools followed Harvard's lead, the pressure built for Princeton, traditionally the most conservative of the Big Three, to get on board.[215] In 1964, Princeton became the first Ivy League institution to hire a black administrator, a clear sign that Princeton was seeking to compete in terms of its racial liberalism.[216] The following year, Alden Dunham, the Princeton director of admissions, wrote an article in the alumni magazine on Princeton's policy of seeking out "qualified Negroes" as part of Princeton's role in fulfilling "a responsibility to be responsive to the nation's need for men who can fulfill important leadership roles."[217]

That year, 1964, two more Ivies, Brown and Cornell, also adopted formal affirmative action programs.[218] Cornell created the Cornell Opportunities Program, which, according to an article in the *Cornell Daily Sun*, admitted black students "without reference to any specific requirements for

---

210. *Id.* at 42-43.

211. *Id.* at 43 (quoting REPORT OF TRUSTEES' COMMITTEE ON EQUAL OPPORTUNITY, DARTMOUTH COLLEGE (Dec. 1968)).

212. *Id.*

213. James J. Lack, *Admission Head Seeks Top Negro Applicants*, DAILY PENNSYLVANIAN, Feb. 26, 1963, at 1.

214. Edward J. Rubenstein, *Colleges Seek Negro Applicants*, COLUMBIA SPECTATOR, Oct. 15, 1963, at 1.

215. KARABEL, *supra* note 178, at 392.

216. *Id.* at 394.

217. *Id.* (quoting E. Alden Dunham, *A Look at Princeton Admissions*, PRINCETON ALUMNI WEEKLY, Jan. 19, 1965).

218. Stulberg & Chen, *supra* note 208, at 41.

admission."[219] Cornell President James Perkins explicitly linked Cornell's affirmative action program to the civil rights movement, particularly the Supreme Court's *Brown* decision.[220]

That was a critical year, as two elite liberal arts colleges, Swarthmore and Wesleyan, and two elite state universities, UCLA and Michigan, became the first non-Ivies to adopt affirmative action programs.[221] As early as 1960, Swarthmore's president admitted privately that the college had a practice of "leaning over backwards" for black applicants and "mak[ing]concessions in matters such as Board score performance."[222] But Swarthmore did not launch a formal affirmative action program until 1964, when it received a $275,000 grant from the Rockefeller Foundation for the purposes of recruiting and funding black student enrollment.[223] In 1964, Wesleyan University hired the Swarthmore Dean of Admissions for the purpose of creating a similar affirmative action program.[224] The new Dean of Admissions helped Wesleyan to receive the same Rockefeller affirmative action grant.[225] That year, Wesleyan, under the leadership of the new Dean of Admissions, adopted "different criteria for admission" so that "test scores were not to be used in the same way" for black applicants.[226] This produced an immediate boost in black enrollment at Wesleyan, increasing 1,457 percent over just three years (from .7 percent of the 1964 freshman class to 10.9 percent of the 1967 freshman class).[227]

Not to be outdone, Harvard and Yale began shifting beyond their recruitment measures.[228] In 1965, Yale's President Brewster appointed Inky Clark as Yale's Dean of Admissions, a man who "realized that a change in the definition of merit was required if black enrollment was to increase substantially."[229] That very year, Yale "moved rapidly to make their promise of a more racially diverse Yale a reality,"[230] and the Admissions Policy Advisory Board explicitly acknowledged that admissions officers "must be prepared to take more risks"[231] on black applicants. As one faculty member

219. Betty Mills, *Home Economics Admissions to Employ COSEP Program*, CORNELL DAILY SUN, Dec. 15, 1967, at 1, 14.
220. Stulberg & Chen, *supra* note 208, at 41.
221. *Id.* at 41-42.
222. *Id.* at 42 (quoting Letter from Courtney Smith to Mrs. Lawrence B. Arguimbau (Dec. 19, 1960).
223. *Id.*
224. Stulberg & Chen, *supra* note 208, at 42.
225. *Id.*
226. *Id.*
227. *Id.*
228. *See* KARABEL, *supra* note 178, at 380-92, 400-05.
229. *Id.* at 384.
230. *Id.*
231. *Id.* (quoting Admissions Policy Advisory Board, Second Report 12-13, Yale U. (OCT. 31, 1966)).

put it, Yale had to fulfill its "national obligation to participate actively in the education of Negroes."[232] To fulfill this obligation, Yale concluded, "it is necessary . . . to look behind the usual quantitative measures of academic achievement."[233]

This push to look beyond the usual quantitative measures became even more urgent after a 1967 Harvard study on race and SAT performance concluded that "only 1.2 percent of the nation's male black high school graduates could be expected to score as high as 500 on the verbal section of the SAT and a mere three-tenths of one percent as high as 550."[234] To put that in perspective, that same year, 1967, the median SAT scores for Harvard admitted students were 697 verbal and 708 math.[235] The implication of the study was clear: Elite universities would need to apply radically different admissions standards on the basis of race.

Ironically, Princeton, which had been the slowest to adopt a special recruitment program, was the quickest of the Big Three to modify its admissions criteria.[236] For the years between 1963 and 1966, Princeton had over a 200-point SAT difference for black students and the overall student population (for this period, Princeton's black students averaged 550 verbal and 590 math on the SATs, whereas the class overall averaged 650 verbal and 695 math).[237] Harvard and Yale would soon follow in explicitly modifying their admissions standards.[238]

According to Karabel, the biggest factor prompting Harvard and Yale's shifts was the racial rioting of the late 1960s, both on and off campus.[239] In 1968, the recently organized Black Student Alliance of Yale (BSAY) met with the Yale administration and demanded more black students.[240] Over the next few months, the racial politics on college campuses became more militant, and in January 1969, the BSAY "demand[ed] that 12 percent of the incoming class be blacks."[241] President Clark agreed to the goal while hedging that "we cannot hold out the promise of achieving any target if it

232. *Id.*

233. KARABEL, *supra* note 178, at 384 (quoting Admissions Policy Advisory Board, *supra* note 231, at 12-13).

234. *Id.* at 382-83.

235. Report of the President of Harvard College and Reports of Departments, p. 103, available at https://iiif.lib.harvard.edu/manifests/view/drs:427268818$105i.

236. *See* KARABEL, *supra* note 178, at 392-400.

237. *Id.* at 395.

238. *See id.* at 380-92, 400-05.

239. *Id.* at 390.

240. *Id.* at 390.

241. KARABEL, *supra* note 178, at 390.

would mean admitting students who . . . would not be likely to meet Yale's requirements."[242]

Similar events were occurring at Harvard.[243] In 1968, the Harvard black student organization demanded that Harvard "admit a number of Black students proportionate to our percentage of the population as a whole."[244] Chase Peterson, the new Dean of Admissions, did not quite agree to the quota, but in April 1968, Peterson, in a joint statement with the Ad Hoc Committee of Black Students, agreed that in the coming year Harvard would enroll "a substantially higher number of black students."[245]

Campus racial violence escalated in the coming year.[246] On April 9, 1969, there was a campus conflict in which 48 people needed medical care and 145 Harvard and Radcliffe students were arrested for their involvement in the violence.[247] This was less than a week before admissions decisions were to be made under the agreement; according to Admissions Dean Peterson, "there was a serious question as to whether the admissions office itself would be attacked and whether we would be able to complete our procedures and mail our letters by April fifteenth."[248] Two weeks later, another campus conflict occurred over the newly created Department of Afro-American Studies.[249] This conflict led Harvard to hire its first black admissions officer, and to alter its admissions criteria "to take still greater account of the limitation of background schooling that shaped the qualifications of many black candidates."[250]

The number of black students at Harvard increased dramatically: "The first class admitted after the agreement, selected in 1969, had far more black students than any previous class."[251] The post-riot affirmative action program produced 90 black students in a class of 1202, almost 8 percent of the student body, "a 76 percent increase over the 51 black freshmen in 1968."[252] To get such a large increase, Harvard had to modify its admissions criteria further, so that there was a nearly 200-point SAT gap between black freshmen and the freshmen class as a whole (black freshmen had a 1202 median SAT score,

---

242. *Id.* at 390-391 (quoting Jeffrey Gordon, *Inky's Era*, YALE ALUMNI MAGAZINE, March 1970, at 35).

243. *Id.* at 402.

244. *Id.* (quoting Joel R. Kramer, *University Will Not Move on Afro's Focus Requests*, HARVARD CRIMSON, Apr. 11, 1968).

245. *Id.*

246. KARABEL, *supra* note 178, at 402.

247. *Id.* at 402-03.

248. *Id.* at 402 (quoting Charles J. Hamilton, *Peterson Pledges Search for More Black Students*, HARVARD CRIMSON, Apr. 30, 1968).

249. *Id.* at 403.

250. *Id.* at 403.

251. KARABEL, *supra* note 178, at 403.

252. *Id.*

whereas the freshmen class as a whole had a 1385 median).[253] By 1971, Harvard's legacy preferences (i.e., preferences for the children of alumni), which had long been a critical part of Harvard's operations, were outmatched by Harvard's racial preferences (i.e., preferences for black applicants).[254]

Princeton underwent similar changes in the late 1960s. In the fall of 1967, Princeton, in its annual "Report to Schools," issued a call for more black applicants, the University's "first such appeal since 1963."[255] Princeton made it clear that it would be applying different admissions standards, a particularly startling transition given that Princeton already had a 200-point SAT difference between white and black admissions in the preceding few years.[256] The Report explained how, because "the need for Negro leadership is particularly urgent at the present time," the Princeton Admissions Office would "interpret fairly credentials of students from non-traditional backgrounds, realizing that their test scores, academic records, and leisure time activities are often different."[257] Princeton explicitly explained that "the increasingly violent racial disturbances that shook the nation's cities in the summer of 1967 were the main cause of the change in its admissions policy."[258] That admissions year, "Princeton not only accepted late applications from black candidates but actively encouraged them."[259] The following year, 1968, saw more racial unrest on Princeton's campus, as black students engaged in several campus occupations in response to college policies, prompting Princeton to "alter[] its admissions policies yet again."[260] By 1970, Princeton had a vast affirmative action program, consisting of three principal components: (1) an extensive special recruitment program, (2) a newly constructed admissions committee, along with a "single member of the staff writing assessments of all candidates deemed 'disadvantaged,'"[261] and (3) a modified way of looking at merit for black applicants so as to look beyond "the kind of academic record that would lead to admission under ostensibly color-blind criteria."[262] In 1970, Princeton's affirmative action program yielded the most significant black ratio of any of the Big Three, an astonishing 10.4 percent of the student body.[263] As a testament to the revolutionary time period, and the ways in which affirmative action changed

253. *Id.* at 404.
254. *Id.*
255. *Id.* at 396.
256. KARABEL, *supra* note 178, at 395.
257. *Id.* at 396 (quoting Office of Admission, "Report to Schools," 1967, 4).
258. *Id.* at *397.*
259. *Id*.
260. *Id.* at 398.
261. KARABEL, *supra* note 178, at 398.
262. *Id*.
263. *Id.*

during the civil rights movement, Princeton went from being a school that did not admit a single black student for three consecutive years in the 1950s to being more than ten percent black in 1970.[264]

By the end of the civil rights era, affirmative action had become a formal national program, extending to various areas of public, private, and academic life. But it was still circumscribed in three ways. One, it was generally justified as a short-term remedy to address the grievances of the civil rights era, not as a long-term policy tool that would survive generations after the civil rights movement had ended. Two, it was not only tethered to the civil rights era, but it was still at this point affiliated with a liberal or leftist political perspective, without the legitimacy of bipartisanship and legal authorization. Three, it was limited to elite institutions. Although affirmative action had spread in the 1960s from Harvard to the rest of the Ivies, several elite liberal arts colleges, and a few elite public universities, it still was not seen as integrally part of the educational enterprise altogether. All of this would change in Phase 3, when affirmative action became entrenched in American politics, law, and education.

III. PHASE THREE: THE ENTRENCHMENT PERIOD

At the close of the 1960s, it would have been reasonable to think of affirmative action in the public employment context in quite narrow terms, as something that only the Democratic Party pushed—and perhaps, even more narrowly, as only a short-term measure in response to the exigencies wrought by the civil rights era. Affirmative action in higher education would have appeared similarly narrow, as a program that only the Ivy League schools pushed—and perhaps, even more narrowly, only as part of a short-term measure to train black leaders who would operate, in Karabel's words, as "bridges between the white establishment and the increasingly disaffected black population of the nation's ghettos."[265] Although affirmative action had existed in a limited form before the civil rights movement, as discussed in Part I, it did not take shape until the civil rights movement. So when Richard Nixon was elected in 1968, on a campaign that emphasized law and order and the need to push back against civil rights, it seemed that the civil rights era was done, and so were the affirmative action initiatives that had accompanied it.[266] But that is exactly the opposite of what happened. Instead of eliminating affirmative action, the Nixon election began the process of entrenching affirmative action as an enduring part of American law and politics.[267] More

264. *Id.*

265. KARABEL, *supra* note 178, at 398.

266. HERMAN BELZ, EQUALITY TRANSFORMED: A QUARTER CENTURY OF AFFIRMATIVE ACTION 34 (1990).

267. *Id.* at 51.

specifically, between the election of Richard Nixon in 1968 and the Supreme Court's decision in *Bakke* ten years later, three events helped transform affirmative action into a fundamental part of American politics, law, and education.[268] These three events constitute what I have dubbed the third phase – or the entrenchment phase – of affirmative action.

A. President Nixon and the Philadelphia Plan

The first event occurred shortly after Richard Nixon became president. In 1969, President Nixon resuscitated the Johnson Administration's Philadelphia Plan, which, as discussed in Part II.A, had been rejected by the Comptroller General in 1968 for being too vague.[269] Nixon sought to redress this defect by requiring bidders for federal construction contracts in the Philadelphia area to submit "acceptable affirmative action"[270] programs that would "include specific goals of minority manpower utilization."[271] Unlike the Johnson Administration's program, the Nixon Administration defined the permissible ranges for these specific goals, with the range increasing by 5 percentage points in minority representation until hitting roughly 25 percent minority (depending on the industry) in 1973.[272]

Why did Nixon, who had just been elected for his opposition to the perceived excesses of the civil rights movement under the Johnson Administration, take the striking position of not only adopting Johnson's most aggressive affirmative action policy but also making it even more ambitious in terms of providing for explicit quotas?[273] While Nixon was certainly not a foe of civil rights—indeed, as discussed in Part I, Nixon had been the chairman of the Government Contracts Committee in the Eisenhower Administration[274]—three strategic factors seemed to be driving his creation of the modified Philadelphia Plan.[275]

One, Nixon had won the 1968 election by walking the middle line between the pro-civil rights position of Democrat Hubert Humphrey (leading architect of the 1964 Civil Rights Act) and the reactionary views of third-party candidate George Wallace (governor of Alabama and outspoken critic of integration).[276] Nixon's 1968 campaign strategy was to campaign against the excesses of the civil rights movement (in particular, forced busing) so as

268. *See infra* Part III.A.-C.
269. *See supra* Part II.A.; SKRENTNY, *supra* note 76, at 138.
270. Order from Arthur A. Fletcher § 3, June 27, 1969, United States Dep't of Labor, 115 CONG. REC. 17,133 (daily ed. Dec. 18, 1969) [hereinafter cited as June 27 order].
271. *Id.*
272. BELZ, *supra* note 266, at 36.
273. *Id.* at 34-35.
274. *See supra* Part I.
275. SKRENTNY, *supra* note 76, at 184.
276. *Id.*

to attract the Southern white vote without alienating more moderate Republican voters in the North.[277] Nixon's so-called "Southern strategy" was quite controversial, especially among blacks and white liberals, so that when he came into office, Nixon needed to build some political capital if he wanted to take action against forced busing.[278] Affirmative action was the easiest way for Nixon to assuage concerns that he was more like the reactionary Wallace than like the liberal Humphrey.[279] As Herman Belz observed, "These conflicting pressures led the Nixon Administration to take a more conservative position on race-conscious remedies in school desegregation and a more liberal one on preferential treatment in employment discrimination policy."[280] A second factor driving Nixon's support of the Philadelphia Plan was his black outreach strategy.[281] Some of his leading strategists believed that middle-class blacks were becoming disenchanted with the Democratic Party.[282] Supporting the Philadelphia Plan, they predicted, promised greater Republican support among middle-class blacks, in part because they would see themselves as potential beneficiaries of Nixon's affirmative action efforts.[283] Finally, not only would the Philadelphia Plan curry favor with black voters, but it would also weaken Nixon's greatest political opponent, the labor unions.[284] As discussed in Part II.A, by the end of the 1960s, business elites had become some of the leading voices in support of affirmation action.[285] But labor unions were still some of the leading critics. Belz writes that this was a weakness for the Democratic Party: "Democratic unity on civil rights was fragile, especially with respect to employment discrimination—where the black lobby and organized labor were potential enemies."[286] By pushing the Philadelphia Plan, Nixon hoped to drive a wedge in the Democratic Party coalition between black voters and labor unions.[287]

While it may have seemed at the time as a devious way for President Nixon to weaken affirmative action, split the Democratic Party coalition, and thereby stultify the civil rights momentum, the Philadelphia Plan had the opposite effect. That is, it functioned to strengthen affirmative action, to weaken the conservative backlash, and to create a permanent civil rights

277. *Id.* at 184-85, 187.
278. *Id.* at 181, 187.
279. *Id.* at 184.
280. BELZ, *supra* note 266, at 35.
281. SKRENTNY, *supra* note 76, at 186-87.
282. *Id.* at 187.
283. *Id.*
284. BELZ, *supra* note 266, at 35.
285. *See supra* Part II.A.
286. BELZ, *supra* note 266, at 35.
287. *Id.*

regime.[288] Indeed, the Democratic Party at the time was uneasy with quotas, as this would require it to alienate what was left of its white working-class constituency.[289] What the Democratic Party needed was for a Republican to do it.[290] As John Skrentny writes, "[a]ll that remained to legitimate a new civil rights policy for the Left was for a right-leaning president to enter the scene" and adopt affirmative action for a conservative cause.[291] Bruce Ackerman therefore views President Nixon as the final element in enshrining the civil rights movement as a "constitutional movement," that is, as creating a transformation of our constitutional order outside of the rigid procedures of Article V.[292] Rogers Smith likewise sees in Nixon a critical force in making the civil rights revolution, and therefore affirmative action, a center-piece of American politics.[293] Shelby Steele, an African-American conservative critic of affirmative action, also locates Nixon at the center of this revolution: "Racial quotas came in during the Nixon administration, not because Republicans believed in them, but because they lacked the moral authority to resist them."[294]

Whether Nixon was acting strategically, as Skrentny believes, or in a more principled way, as Ackerman suggests, or more submissively, as Steele alleges, the outcome of Nixon's Philadelphia Plan was clear: Affirmative action was no longer just about the civil rights era or a particular political party.[295] It was now firmly grounded in American politics. The next significant event in Phase 3 would be to root the practice in American law.

B. Judicial Authorization

The first major federal lawsuit over affirmative action was *Porcelli v. Titus*,[296] which arose from the Newark School Board's 1968 effort to promote black teachers to be vice-principals and principals, a decision that was made in response to the 1967 Newark riots.[297] Ten white teachers sued the City for

---

288. *Id.* at 37.

289. *Id.* at 34-35; SKRENTNY, *supra* note 76, at 186.

290. *Id.* at 224.

291. *Id.*

292. See, e.g., 3 BRUCE A. ACKERMAN, *The Civil Rights Revolution*, *in* 3 WE THE PEOPLE 77-78, 182-83 (2014).

293. Rogers M. Smith, *Ackerman's Civil Rights Revolution* and *Modern American Racial Politics*, 123 YALE L.J. 2906, 2911 (2014).

294. CLINT BOLICK, THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION? 115 (1996) (quoting Shelby Steele, *How Liberals Lost Their Virtue Over Race*, Newsweek (Jan. 8, 1995, 7:00 PM), https://www.newsweek.com/how-liberals-lost-their-virtue-over-race-182026)).

295. *See* SKRENTNY, *supra* note 76, at 224; ACKERMAN, *supra* note 292, at 77-78; BOLICK, *supra* note 294, at 115 (quoting Steele, *supra* note 294).

296. 302 F.Supp. 726 (1969).

297. *See id.* at 729; SKRENTNY, *supra* note 76, at 102.

violating the Fourteenth Amendment and Title VII by suspending the "promotion lists" and "abolish[ing] the examination procedure for the purpose of appointing Negroes to positions for which they would not otherwise be eligible."[298] The district court conceded that race "played a part in the Board's decision to suspend the promotion lists and abandon the examination system,"[299] but the district court found that this was not in violation of the Fourteenth Amendment and Title VII because "the Board had the authority to take such steps as it deemed necessary and proper to promote the educational welfare of the Newark school community."[300] The Third Circuit affirmed the decision and even went so far as to suggest that the action taken by Newark may be necessary under the Fourteenth Amendment, because strict color-blindness "would be in negation of the Fourteenth Amendment to the Constitution and the line of cases which have followed *Brown v. Board of Education*."[301]

The following year, the Third Circuit heard another affirmative action case, this one arising over President Nixon's Philadelphia Plan.[302] As discussed in Part II.A, the Comptroller General had invalidated Johnson's Philadelphia Plan for being too vague. To address this problem, the Nixon plan consisted of precise numeric timetables.[303] Immediately after Nixon's plan was put into place, the Contractors Association of Eastern Pennsylvania challenged Nixon's numeric timetables as operating as a racial hiring quota, in violation of, among other things, the Civil Rights Act of 1964 and the Fifth Amendment's Due Process Clause.[304] The district court dismissed the lawsuit for lack of standing.[305] On appeal, the Third Circuit held that the Contractors Association had standing but rejected the challenge on its merits.[306] The thrust of the court's reasoning was that the Department of Labor had broad discretion to enforce affirmative action, including the implementation of quotas.[307] This was because the Civil Rights Act's "general prohibition against discrimination cannot be construed as limiting Executive authority in defining appropriate affirmative action on the part of a contractor."[308] And President Johnson's Executive Order 11246 (the basis for the Philadelphia Plan) gave the Department of Labor a "broad delegation of authority" that

298. *Porcelli*, 302 F.Supp. at 729, 732.
299. *Id.* at 732.
300. *Id.* at 736.
301. Porcelli v. Titus, 431 F.2d 1254, 1257-58 (3d Cir. 1970).
302. Contractors Ass'n of Eastern Pennsylvania v. Sec'y of Labor, 311 F.Supp. 1002, 1004 (1970).
303. SKRENTNY, *supra* note 76, at 138; BELZ, *supra* note 266, at 36.
304. *Contractors Ass'n of Eastern Pennsylvania*, 311 F.Supp. at 1008.
305. *Id.* at 1007.
306. Contractors Ass'n of Eastern Pennsylvania v. Sec'y of Labor, 442 F.2d 159, 166 (3d Cir. 1971).
307. *Id.* at 174-75.
308. *Id.* at 173.

permitted the Department to "interpret[] 'affirmative action' to require more than mere policing against actual present discrimination."[309] While conceding that "the Philadelphia Plan is color conscious," the court maintained that this "color consciousness" is precisely what Title VII permits as a remedy, and precisely what the Kennedy and Johnson executive orders required.[310]

That year, in *Griggs v. Duke Power Co.*,[311] the Supreme Court heard its first affirmative action case, a case that secured the status of affirmative action under the Civil Rights Act.[312] The *Griggs* case arose after Duke Power, a power generating facility, adopted two possible methods for promotions—having a high school diploma or passing an intelligence test.[313] Because black workers disproportionately failed to satisfy these conditions, they sued on the ground that Duke Power had violated the Civil Rights Act of 1964 by using a means of promotion that disproportionately denied promotions to black employees.[314] The NAACP brought the case to the Supreme Court, and in its brief, the NAACP argued that the Civil Rights Act does not merely ban outright discrimination; rather, the NAACP argued, the lower courts had correctly interpreted the Act '"to give it a broad and flexible'" application, so that it would prohibit even race-neutral employment decisions that have the effect of treating racial groups differently.[315] This "broad and flexible" approach would give "Title VII the potential for becoming an effective force for fair employment in contrast to the many state fair employment laws which languished under restrictive applications."[316] The NAACP argued that now that "outright and open exclusion of Negroes is passe," the next line of legal attack under Title VII must be against '"the use of neutral, objective criteria which systematically reduce Negro job opportunity.'"[317] The NAACP brief even cited the Kerner Report for the proposition that "racial discrimination and unrealistic and unnecessarily high minimum qualifications for employment or promotion have the same prejudicial effect."[318] As explained by Skrentny, the NAACP's strategy was to use the federal government's Kerner Report, and its linkage between black employment and the

309. *Id.* at 175; Exec. Order No. 11246, 30 Fed. Reg. at 12,319.
310. *Contractors Ass'n of Eastern Pennsylvania*, 442 F.2d at 173.
311. 401 U.S. at 424.
312. SKRENTNY, *supra* note 76, at 166.
313. *Griggs*, 401 U.S. at 425-26.
314. *Id.* at 426.
315. SKRENTNY, *supra* note 76, at 186 (quoting Brief for Petitioner at 9, Griggs v. Duke Power Company, 420 F.2d 1225 (4th Cir. 1970)).
316. *Id.* (quoting Brief for Petitioner, at 16, *Griggs*, 420 F.2d at 1225).
317. *Id.* (quoting Brief for Petitioner, at 25, *Griggs*, 420 F.2d at 1225).
318. Brief for Petitioner, at 19, *Griggs*, 420 F.2d at 1225 (quoting NACCD, *supra* note 194, at 416).

government's management of the race riots, to nudge the Court to take on its role in managing American race relations.[319]

In a unanimous opinion written by Chief Justice Burger, the Supreme Court agreed with the black workers, holding that employment tests are presumptively invalid if they have a disparate impact on the basis of race.[320] The Court interpreted Title VII as being about more than racial discrimination as such: "The objective of Congress in the enactment of Title VII is plain from the language of the status. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[321] This means that, "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operated to 'freeze' the status of quo of prior discriminatory employment practices."[322] In other words, not only did Title VII not ban affirmative action, as the Third Circuit had held, but it also required it.[323] While the *Griggs* decision did not explicitly mandate quotas, this was the obvious implication of the decision,[324] because if an employer wanted to avoid Title VII litigation, the easiest way to do so was to ensure a racial balance of its employees.[325] In the words of Herman Belz, "*Griggs* shifted civil rights policy to a group-rights, equality-of-result rationale that made the social consequences of employment practices, rather than their purposes, intent, or motivation, the decisive consideration in determining their lawfulness."[326] By creating a threat of Title VII liability for any business practice that had a disparate impact on the basis of race, the *Griggs* decision supplied both a "theoretical basis"[327] as well as a very real "practical incentive" for employers to adopt racial preferences.[328]

This was a critical step toward entrenching affirmative action. As Skrentny writes, "*Griggs* legitimated, by the highest authority in the land, the idea that race was a reality in American life that must be recognized in everyday practice."[329] *Griggs*, in other words, established new "boundaries of legitimate actions," so that after *Griggs*, "for a judge to challenge [affirmative action] would mean risking legitimacy as a judge."[330] The result

319. SKRENTNY, *supra* note 76, at 168.
320. *Griggs*, 401 U.S. at 429.
321. *Id.* at 429-30.
322. *Id.* at 430.
323. BELZ, *supra* note 266, at 51.
324. *See id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. BELZ, *supra* note 266, at 51.
329. SKRENTNY, *supra* note 76, at 170.
330. *Id.* at 174.

of this legitimation was that affirmative action was now unmoored from the contingencies of a particular political party, social movement, or historic cause.[331] Indeed, by the early 1970s, affirmative action had become another tool in American public policy, at the disposal of both political parties. The parties would end up dividing on many issues. But they had coalesced around affirmative action. The next step to entrench this practice was for it to spread throughout higher education.

C. Affirmative Action Permeates Higher Education

Most discussions of the legality of affirmative action in higher education begin with *Bakke*. But before *Bakke*, there had been a similar lawsuit that reached the Supreme Court, *DeFunis v. Odegaard*.[332] This lawsuit highlighted the extent to which affirmative action was spreading throughout higher education in the early 1970s.

The lawsuit arose after Marco DeFunis, a University of Washington graduate of Sephardic Jewish ancestry, was denied admission to the law school.[333] DeFunis had strong academic credentials, but he had lived all his life in Washington State and applied to the less-competitive University of Washington Law School "for personal, financial, and family reasons."[334] He was rejected twice, in 1970 and 1971, and he believed he was rejected because the University of Washington, under the leadership of President Charles Odegaard, had recently promulgated an affirmative action program for the entire university.[335] Because the state trial court had ruled in DeFunis's favor and ordered his immediate admission, the law school admitted DeFunis in 1971.[336] Therefore, by the time the Supreme Court heard the case in fall of 1973, DeFunis was already in his final year of law school.[337] Although his lawsuit certainly seemed like a live controversy, in that he had not yet graduated and the Supreme Court's ruling in Washington's favor would likely permit Washington to deprive DeFunis of his final semester of law school, the Court nevertheless ruled that DeFunis's matriculation rendered the lawsuit moot.[338]

This was a clear sign that the Supreme Court was not ready to adjudicate affirmative action lawsuits.[339] As Justice Douglass's clerk wrote in a

331. *Id.* at 177.
332. 416 U.S. 312 (1974).
333. HOWARD BALL, THE BAKKE CASE: RACE, EDUCATION, & AFFIRMATIVE ACTION 22 (2000).
334. *Id.*
335. *Id.* at 23.
336. *Id.* at 27.
337. *Id.* at 31.
338. BALL, *supra* note 333, at 43-44.
339. *Id.* at 45.

memorandum to his boss, there was a strong legal argument that DeFunis's claim was not moot because the "controversy will continue and is a recurring one."[340] Therefore, the clerk claimed, if the Court dismissed his claim on mootness grounds, "it would be fairly obvious that all the court is doing is ducking the issue."[341] And this would signal to colleges and universities that the Supreme Court tacitly approved of affirmative action.

This signal was especially important because the facts underlying the *DeFunis* case represented an important trend in higher education. As discussed in Part II.B, affirmative action in higher education began at Harvard and then rapidly expanded to other elite institutions, including the rest of the Ivies, several elite liberal arts colleges, and a few elite public universities.[342] The University of Washington adopted its affirmative action program in 1968, following the lead of elite public institutions like Michigan, UCLA, and Berkeley.[343] At the time, Washington was not nearly as competitive or prestigious as these schools.[344] The person who initiated affirmative action at Washington, President Charles Odegaard, seems to have brought affirmative action to the University of Washington not simply as part of an egalitarian commitment to racial equality, but as part of a larger effort to transform the university into a national institution.[345] Indeed, Odegaard is credited for having transformed the University of Washington, upon becoming president of the institution in 1959, by doing four things: increasing student enrollment, adding new university buildings, producing research grants, and introducing affirmative action.[346] This has come to be known as the "golden era in the history of the university,"[347] with the Governor even making the day of his retirement, May 11, 1973, "Charles E. Odegaard Day."[348] The *DeFunis* case not only stands out for the Supreme Court's unwillingness to adjudicate the controversy, but also for what it signaled about what it meant to be a national university after the civil rights movement.[349] Being an elite institution now required, in addition to all the traditional indicia of academic prestige (such as modern facilities and research scholars), an affirmative action program.

---

340. *Id.* at 31.
341. *Id.*
342. *See supra* Part II.B.
343. BALL, *supra* note 333, at 4.
344. *Id.* at 5-6.
345. *Id.*; Tom Griffin, *Charles Odegaard, 1911-1999, was UW's steady hand for 15 remarkable* years, U. OF WASH. MAG. (Mar. 2000), https://magazine.washington.edu/feature/charles-odegaard-1911-1999-was-uws-steady-hand-for-15-remarkable-years/.
346. *Id.*
347. *Id.*
348. *1970-1979*, U. OF WASH., https://www.washington.edu/alumni/columns/june98/1970.html.
349. BALL, *supra* note 333, at 45.

This link between prestige and affirmative action was also expressed in the amicus briefs filed in the *DeFunis* case. Supporting the state's side were 22 amicus briefs, including "120 groups and individuals."[350] This included the U.S. Equal Employment Opportunity Commission, Harvard University, Harvard College, the Massachusetts Institute of Technology, 70 law school deans, the American Bar Association, the American Association of Law Schools, the Law School Admissions Committee, the American Association of Medical Colleges, and the NAACP.[351] On the other side, there were only six groups that filed amicus briefs in support of DeFunis.[352] Three of these groups represented Jewish interests (American Jewish Congress, the Advocate Society, and the Anti-Defamation League), one represented union interests (AFL-CIO), and two represented business interests (the U.S. Chamber of Commerce and the National Association of Manufacturers).[353]

The contrast in the amicus filings could not have been clearer. The national arsenals of powers, including the U.S. government, the most elite academic institutions, and the leading professional associations, were all on the side of affirmative action.[354] *DeFunis* thus represented how much had changed in the nation's power relations as a result of the civil rights movement.[355] Affirmative action now had the sanction of both political parties, the Supreme Court, and the nation's elites.[356] Over the next decade it would spread throughout higher education, paving the way for Phase 4, when affirmative action became reconceptualized as about diversity, a move that has permitted affirmative action to broaden and strengthen despite adverse judicial decisions, state referenda, and public opinion.[357] The Supreme Court's decision in *Bakke* initiated this change.

IV. PHASE FOUR: THE DIVERSITY TURN

The *Bakke* case involved a constitutional and statutory challenge to the legality of the UC Davis Medical School admissions program, which specifically reserved 16 out of 100 spots for "minority group" members, explicitly identified as "blacks, Chicanos, Asians, American Indians."[358] A divided Supreme Court held that this use of a strict numeric set-aside amounted to a racial quota, in violation of the 14th Amendment's Equal

350. *Id.* at 34.
351. *Id.*
352. *Id.* at 35-36.
353. *Id.*
354. BALL, *supra* note 333, at 34.
355. *Id.* at 35.
356. *Id.*
357. *Infra* Part IV.
358. *Bakke*, 438 U.S. at 274.

Protection Clause.[359] In Justice Lewis Powell's plurality opinion, Justice Powell speculated that a more individualized system based on the value of diversity would comply with the 14th Amendment.[360] To illustrate this point, Justice Powell cited Harvard College's admissions program as a model.[361] Justice Powell even included an extensive discussion of the Harvard admissions program in his appendix, entitled the "Harvard College Admissions Program."[362] Before we get to Justice Powell's opinion, there are some notable facts about the underlying lawsuit, relating to some of the trends discussed earlier in the Article.

A. The Bakke Background Facts

One notable background fact about the underlying lawsuit is that UC Davis was not at the time an established or prestigious institution.[363] Allan Bakke filed his lawsuit in 1974, only two years after UC Davis graduated its first class; indeed, the medical school was created in 1966.[364] Nevertheless, one of the first things that this new medical school did was reserve a significant number of spots for non-white medical students.[365] This attests to the point made in Part III.C, how affirmative action had become associated with institutional prestige, thereby facilitating the spread of affirmative action from elite institutions to less-competitive ones in the 1970s.[366]

A related point of interest is that the UC Davis affirmative action program reflected the changing demographics of the country.[367] As discussed in Parts I-III, earlier phases of affirmative action had been structured around increasing black representation in various professions.[368] But as immigration patterns began changing in the 1970s, owing in part to the 1965 Immigration Act, it became increasingly clear that American race relations were not entirely about the traditional black-white paradigm.[369] The UC Davis system—which reserved spots for "blacks, Chicanos, Asians, [and] American Indians"[370]—signaled that, in this new America, affirmative action programs would become more complicated, going beyond the politics of black-white relations.

---

359. *Id.* at 318-20.
360. *Id.* at 318.
361. *Id.* at 316.
362. Appendix to Opinion of Powell, J. at 321, *Bakke*, 438 U.S. at 321.
363. BALL, *supra* note 333, at 49.
364. *Id.*
365. *Id.* at 49-50.
366. *See supra* Part III.C.
367. *See supra* Parts I-III.
368. *Id.*
369. Hist. Ed., *U.S. Immigration Since 1965*, HIST. (Mar. 5, 2010), https://www.history.com/topics/immigration/us-immigration-since-1965.
370. *Bakke*, 438 U.S. at 274.

A third point relates to Allan Bakke's personal story. Allan Bakke applied to medical school in his early 30s, after having served in the Marine Corps and having worked as a NASA engineer.[371] He had a strong GPA and high MCAT scores, but because of his age, he was rejected from every medical school to which he applied.[372] Nevertheless, despite his age, Bakke was a very strong candidate for the recently created UC Davis Medical School, where Bakke's numbers were well above average.[373] Indeed, Bakke's overall MCAT score was 72 and his GPA was 3.44; by contrast, the averages for the regular pool of UC Davis Medical admissions were 69 on the MCAT and a 3.5 GPA, and the averages for the special affirmative action pool were 33 on the MCAT and a 2.6 GPA.[374]

In May of 1973, however, Davis rejected Bakke, and Bakke subsequently wrote a letter to the "Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota."[375] When Bakke applied again in 1974, the associate dean (the person to whom he had sent the letter) was among the six people who interviewed him, and the interview involved "a discussion of the Davis quota system."[376] This discussion in the interview may have been what led to Bakke's lawsuit, as "the dean gave Bakke the lowest score of any of the interviewers and exercised his discretion not to place him on the waiting list," apparently as retribution for Bakke's position on affirmative action.[377]

This is, again, evidence of how affirmative action related to shifting power relations. Just a decade earlier, it would have been unthinkable that a medical school applicant would be penalized by a dean for merely criticizing affirmative action. But by the mid-1970s, affirmative action had become so enmeshed with how academic institutions operated that an applicant's political view on affirmative action may have been the basis for denying admission to a veteran with scores substantially above the school's average.[378]

---

371. BALL, *supra* note 333, at 46-47.

372. *See id.* at 52-54.

373. *Id.* at 46-47, 52.

374. *Id.* at 52.

375. Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 CARDOZO L. REV. 379, 404 n. 86 (1979) (quoting Record at 259, *Bakke*, 438 U.S. at 265).

376. *Id.*

377. *Id.*

378. *See* S. J. Diamond, *Where Are They Now?: A Drifter, A Deadbeat and an Intensely Private Doctor. Hardly Heroes, These Are the Faces Behind Some of the Most Famous Legal Decisions in America*, L.A. TIMES (Aug. 30, 1992, 12:00 AM), https://www.latimes.com/archives/la-xpm-1992-08-30-vw-8207-story.html. After winning his lawsuit in the Supreme Court, Bakke was able to enter medical school, at the age of 38, eventually becoming an anesthesiologist. He is now 80 years old and still refuses to talk publicly about the lawsuit.

When Allan Bakke's case came before the Supreme Court, it was, as mentioned in the Article Introduction, one of the most controversial cases ever to come before the Court.[379] It therefore may not come as a surprise that Justice Powell later proclaimed it to be his most important opinion.[380] What may come as a surprise, however, is that it is also one of his most misunderstood opinions.[381] In particular, three misunderstandings of Justice Powell's opinion have prevented scholars from seeing how *Bakke* did not simply uphold a certain type of affirmative action program.[382] This opinion helped change affirmative action into what it is today.[383]

B. Three Misunderstandings of Justice Powell's Opinion

Scholars misinterpret Justice Powell's opinion in three important ways. Below, I will explain these misinterpretations and discuss how a correct interpretation will help us more clearly understand the trajectory of affirmative action law.

1. The Source of the Appendix

Scholars often treat Justice Powell's Appendix A to the *Bakke* opinion as though this were a formal document from the Harvard Admissions Office. This conventional understanding is certainly understandable. After all, the Appendix had an official-sounding title: "Harvard College Admissions Program." Moreover, Powell's Appendix A read like a formal document, even citing internal university reports and describing in detail how the admissions committee operates.[384] And, if one wanted to locate the source for the Appendix to the *Bakke* opinion, one would find that it matched the language appended to an amicus brief filed in *Bakke* by Harvard College (joined by Columbia, Stanford, and University of Pennsylvania).[385] Given the content of Appendix A and that there was no indication of where the information came from outside of that Harvard amicus brief, a natural reading of the Appendix is that Justice Powell had simply appended a formal university admissions document that Harvard included in its amicus brief.[386]

While this conventional interpretation is reasonable, it is not correct. The Appendix's text originally comes not from an appendage of an amicus brief

379. *See supra* p. 1.

380. Linda Greenhouse, *Powell: Moderation Amid Divisions*, N.Y. TIMES (June 27, 1987), https://www.nytimes.com/1987/06/27/us/powell-moderation-amid-divisions.html.

381. *See infra* Part IV.B.

382. *Id.*

383. *See infra* Part IV.B and Part IV.C.

384. *Bakke*, 438 U.S. at 321-22.

385. Appendix to Brief of Columbia Univ. et al. as Amici Curiae at 1-2, *Bakke*, 438 U.S. at 265 (No. 76-8110).

386. *Id.*

but rather from *the body* of an amicus brief—namely, Archibald Cox's amicus brief for Harvard College in the *DeFunis* case, an amicus brief that is not publicly available.[387] Indeed, in his research on the *Bakke* Appendix, Professor David B. Oppenheimer has found that Justice Powell merely took Cox's argument in *DeFunis* about the normative value of the Harvard College admissions program and entered it as the Appendix to his *Bakke* opinion.[388] The only change in the language was an update to Cox's dating of the Harvard affirmative action program to account for the five years between the *DeFunis* and *Bakke* decisions.[389] Professor Oppenheimer has thus come to the startling conclusion that "the *Bakke*/Harvard appendix, which has become the standard description of the diversity justification for affirmative action, is not an official publication of the Harvard admissions office, but rather an advocate's description in an *amicus curiae* brief of how Harvard operates."[390]

Oppenheimer has also discovered, through research of Justice Powell's notes in the *DeFunis* case, how it came to be that Justice Powell took text from an amicus brief in *DeFunis* and entered it as Appendix A in the *Bakke* case.[391] When *DeFunis* was pending before the Court, Justice Powell's clerk, John C. Jeffries Jr., wrote a memo telling Powell to "pay particular attention to the 'brief by Archibald Cox for Harvard College.'"[392] Justice Powell seems to have followed his clerk's advice, even adding a red check mark over Cox's name.[393] Additionally, Professor Oppenheimer found in Justice Powell's *DeFunis* file two 1974 newspaper articles "describing and promoting the diversity justification, specifically referencing and quoting the Cox/Harvard brief."[394] The first article was a March 3, 1974 New York Times article by Anthony Lewis[395] and the other was a Newsweek article by Jerrold K. Footlick.[396]

According to Oppenheimer, when the *Bakke* case was before the Court, Justice Powell returned to the Cox amicus brief from *DeFunis*.[397] Indeed, in 1977, when the *Bakke* case was before the Court, Justice Powell's clerk, Bob

387. In fact, Professor Oppenheimer was able to make this startling discovery only because his institution, Berkeley Law, had a reprinted version of the case and related briefs in a three-volume set. Oppenheimer, *supra* note 181, at 170.

388. *Id.* at 171.

389. *Compare* Brief of the President and Fellows of Harvard College at 14, *with Bakke*, 438 U.S. at 321.

390. Oppenheimer, *supra* note 181, at 171.

391. *Id.* at 172-73.

392. *Id.* at 172.

393. *Id.*

394. Oppenheimer, *supra* note 181, at 172.

395. Lewis, *supra* note 8, at 5.

396. Jerrold K. Footlick, *Justice: Racism in Reverse*, NEWSWEEK, 1974, *reprinted in* Justice Powell's DeFunis archives at 68.

397. Oppenheimer, *supra* note 181, at 172.

Comfort, wrote a memo on *Bakke* to Justice Powell, and in that letter, Comfort repeatedly cited as authority the "Brief for Harvard College in *DeFunis*."[398] Justice Powell added in the margin of the memorandum, "This is the position that appeals to me. Use *DeFunis*."[399] By deciding to "use *DeFunis*," Justice Powell was clearly referring to the Cox amicus brief in *DeFunis*, and not to the actual *DeFunis* opinion, which of course dismissed the lawsuit on mootness grounds.[400]

Why is it significant that Appendix A was taken from the body of Cox's amicus brief? That relates to how scholars overstate the reliability of the Appendix in describing how Harvard admissions operated at the time.

2. The Reliability of the Appendix

Scholars treat the *Bakke* Appendix as an accurate description of the Harvard program, contra all the evidence provided supra in Part II.B.[401] There are, of course, reasons to be suspicious of any piece of advocacy as providing an objective description of facts.[402] But Cox's description of the Harvard program is particularly unreliable. The Cox brief cited only two authorities for how Harvard admissions operated—reports submitted in 1960 and 1968 by the outgoing admissions deans for the Harvard faculty.[403] Here is the relevant *Bakke* Appendix language:

> For the past 30 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose

398. *Id.* at 173.
399. *Id.*
400. *Id.* at 172.
401. *Compare* Appendix to Opinion at 321-24, *Bakke*, 438 U.S. at 265 *with supra* Part II.B.
402. JEROME FRANK, COURTS ON TRIAL 15-16 (3rd ed. 1973).
403. Appendix to Brief of Columbia Univ. et al. as Amici Curiae, *supra* note 390, at 1-2.

> a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer. Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty —perhaps 150 or so out of an entering class of over 1,100 the Committee seeks variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College] . . . The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a flue faculty and our libraries, laboratories and housing arrangements.[404]

Justice Powell cited two Harvard documents, and these internal reports had absolutely nothing to do with race and its relationship to academic diversity. These reports do, to be clear, discuss the value of academic diversity, but they tell us nothing about how *race* relates to academic diversity.

One of these Harvard documents, a 1960 report by Dean Bender, identifies various types of diversity that Harvard was seeking to create:

> A Harvard College with a certain range and mixture and diversity in its student body – a college with some snobs and some Scandinavian farm boys who skate beautifully and some bright Bronx premeds, with some students who care passionately if unwisely (but who knew about editing the Crimson or beating Yale), or who have ambition to run a business and make a million, or to [be] elected to public office.[405]

The 1960 report certainly suggests Harvard would benefit from a diversity of professional interests, including students interested in medicine, business, and politics, but it says nothing about the benefit of racial diversity.[406] In fact, the only reference to ethnicity is to Scandinavian hockey players.[407] Perhaps the reference to "Bronx premeds" was an indirect

404. *Id.* (quoting Fred L. Glimp, *Final Report to the Faculty of Arts and Sciences*, 65 Official Reg. Harv. U. No. 25, 93, 104-105 (1968)).

405. *Ex-Dean Bender's Valedictory Message*, Harv. Crimson (Oct. 2, 1961), https://www.thecrimson.com/article/1961/10/2/ex-dean-benders-valedictory-message-pexcerpts-from/?page=2.

406. *Id.*

407. *Id.*

reference to Jewish pre-med students.[408] Otherwise, there is nothing about ethnicity or race in that statement.[409]

The second document, a 1968 report by Dean Glimp, also mentioned diversity without explicitly discussing race.[410] In that report, Dean Glimp discusses socio-economic diversity and its relationship to academic credentials:

> It became clear to the Committee that students representing some of the most important elements of Harvard's socio-economic diversity— students whom the admission staff and our alumni schools committeemen were working hard to recruit— would be cut out disproportionately with much of a further narrowing of the range of measured ability.[411]

Here, Dean Glimp identified different types of students who would be affected by strict academic requirements: "students from seriously disadvantaged backgrounds, from rural areas, and from blue-collar families."[412] The reference to "disadvantaged backgrounds" may have been an indirect reference to black students but the report does not explicitly mention race.[413]

That Cox limited his citations to these two Harvard College authorities that do not explicitly discuss how Harvard's affirmative action program was operating is especially surprising given that Harvard had a very developed system of racial preferences at this point.[414] As discussed in Part II.B, Harvard led the development of affirmative action in higher education in the 1950s and 60s,[415] and by the time of the 1968 Dean Glimp report, Harvard had in place a roughly 200 SAT preference for black applicants.[416] Additionally, by the time of the *Bakke* brief, Harvard had what appeared to be a rigid quota in place, having yielded the exact same percentage of black students (seven) for eight of the last nine years (the only exception is that the 1976 class was eight percent black).[417] But there is nothing in the Cox *DeFunis* brief, or in the Powell *Bakke* opinion, about how Harvard's

---

408. *Id.*
409. *Id.*
410. Glimp, *supra* note 405, at 114-15.
411. *Id.* at 105-06.
412. *Id.* at 106.
413. *Id.* at 106.
414. KARABEL, *supra* note 178, at 379.
415. *See supra* Part II.B.
416. KARABEL, *supra* note 178, at 404.
417. Dershowitz & Hanft, *supra* note 375, at 383 n.13. It is notable that the jump to seven percent was in the 1969 class, which, as discussed previously, is when Harvard formally agreed to try to satisfy the BSAY's demand for the twelve percent quota. *See* KARABEL, *supra* note 178, at 390-91.

affirmative action program consisted of a roughly 200 SAT point preference and a seven percent racial quota.

Despite Cox's inaccurate portrayal of Harvard College admissions in his amicus brief, Justice Powell apparently treated it as though it were a reliable and quasi-official Harvard document, merely describing the ins and outs of the college's admissions operations.[418] Justice Powell's reliance on the Cox amicus brief is particularly significant in terms of what it teaches us about the most famous part of the *Bakke* Appendix: the statement that, under the model Harvard admissions program, race matters in the same way as region.

Here is the relevant language from the *Bakke* Appendix:

> When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.[419]

Professor Oppenheimer has discovered from Justice Powell's archives that this analogy between race and region played a critical role in Justice Powell's decision-making. Indeed, his clerk's *Bakke* "memo extensively discusse[d] the diversity rationale for race-conscious affirmative action, repeatedly cite[d] as authority the 'Brief for Harvard College in DeFunis,' and refer[red] to the 'Idaho farm boy' analogy."[420] According to Professor Oppenheimer, Justice Powell even intended in the *Bakke* oral argument to ask Cox, who argued on behalf of UC Davis, "how Harvard went about choosing an Idaho farm boy over a Boston first-family son, and whether there was a guarantee of a certain number of seats for farm boys."[421] Unfortunately, Justice Powell "didn't get to the question before time ran out."[422]

This would have been an excellent question for Justice Powell to ask, for we know that there was no comparable program at Harvard for Idaho farm boys, or for rural applicants in general.[423] Indeed, there was no formal recruitment program for rural applicants and seemingly no admissions preference whatsoever for rural applicants. Cox's analogy between black

418. *Bakke*, 438 U.S. at 316-17.

419. *Id.* at 316 (quoting Appendix to Brief of Columbia Univ. et al. as Amici Curiae at 1-2, *Bakke*, 438 U.S. at 265 (No. 76-811)).

420. Oppenheimer, *supra* note 181, at 173.

421. *Id.* at 180.

422. *Id*.

423. Dershowitz & Hanft, *supra* note 375, at 399-400.

students and "Idaho farm boys" was a lawyer's argument about how to justify racial preferences as part of a holistic, individualized interest in academic diversity. It was not a factual description of how the Harvard affirmative action program actually operated.

Nevertheless, a lasting legacy of the *Bakke* case is that Cox's normative analogy is treated as a factual description. In Oppenheimer's words, "Justice Powell's quotation of that line in his Bakke opinion would become one of the most widely recognized quotes about affirmative action in the decades of debates that followed."[424] Over 40 years of affirmative action law have been shaped by an advocate's analogy with little to no basis in how Harvard's admissions program actually operated.

3. The Ideological Orientation of Justice Powell's Opinion

Scholars often treat Justice Powell's opinion as a centrist or middle-ground position, a sort of compromise between liberal permissiveness toward affirmative action and conservative hostility toward affirmative action.[425] This conventional understanding of Justice Powell's opinion is certainly understandable. Justice Powell was, after all, the swing Justice at the time.[426] And his *Bakke* opinion was, moreover, a concurring opinion, siding with a conservative block that wanted to reject all forms of affirmative action, but reasoning in a way that offered some room for liberals to uphold future affirmative action programs.[427] Indeed, the opinion explicitly permitted what seemed like a narrower and more racially neutral form of affirmative action than the quotas at issue in the case.[428] Under Powell's reasoning, then, it would seem that the only affirmative action measures that would survive would be those that truly considered race to be just as significant as factors like region, class, religiosity, and political perspective.[429]

But that of course is not what happened. Affirmative action became exactly what Alan Dershowitz predicted it would become, in his article written just a year after *Bakke*. Indeed, as Dershowitz predicted, the "diversity-discretion model" endorsed in Justice Powell's concurrence would have the effect of legitimizing "an admissions process that is inherently capable of gross abuse and that . . . has in fact been deliberately manipulated

---

424. Oppenheimer, *supra* note 181, at 171.

425. See, e.g., Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 Mich. L. Rev. 1854 (1995).

426. Al Kamen, *Justice Powell Resigns, Was Supreme Court's Pivotal Vote*, Wash. Post, June 27, 1987, at A01.

427. Adam Harris, *How Lewis Powell Changed Affirmative Action*, THE ATL.: EDUC. (Oct. 13, 2018), https://www.theatlantic.com/education/archive/2018/10/how-lewis-powell-changed-affirmative-action/572938/.

428. *Id.*

429. *Id.*

for the specific purpose of perpetuating religious and ethnic discrimination in college admissions."[430] Indeed, as will be discussed below, the *Bakke* "diversity-discretion model" has allowed affirmative action to expand even beyond what explicit quotas would have permitted, because under the "diversity-discretion model," universities have been able to shield their practices from public and judicial scrutiny.[431] Far from being a "middle-ground" opinion, Justice Powell's diversity rationale provided exactly what affirmative action programs would need to expand in the face of increased criticism in the coming decades.[432]

C. The Legacy of Bakke: From Grutter to Fisher

Even in the decades after *Bakke*, many schools stuck to rigid points systems, whereby certain racial groups were given additional points to account for group performance differences on standardized tests.[433] Many colleges prefer these points systems over individualized systems because they are much easier and cheaper to operate.[434] The University of Michigan cases brought this issue to the forefront, with the undergraduate case using a rigid points system,[435] and the law school using a system that looked much more like the Harvard "diversity-discretion model."[436] The result of what the different admissions systems produced was almost exactly the same, in that in any given year both systems awarded black applicants a roughly standard deviation preference on the relevant standardized tests,[437] but the methods looked different, in that the undergraduate system had a formal policy of awarding a certain number of points, and the law school system had a more individualized system, something the law school admissions process could handle given the fact that it was dealing with a much smaller pool of applicants.[438] Justice O'Connor, citing the *Bakke* opinion as controlling precedent, upheld the law school program but invalidated the undergraduate one.[439] After these decisions, it was clear that the "diversity-discretion model" was the only game in town.[440]

---

430. Dershowitz & Hanft, *supra* note 375, at 385.
431. *See infra* Part IV.C.
432. Oppenheimer, *supra* note 181, at 198-99.
433. *See, e.g.*, *Gratz*, 539 U.S. at 244.
434. LUMINA FOUND. & CENTURY FOUND., THE FUTURE OF AFFIRMATIVE ACTION 22 (Richard D. Kalenbert ed., 2014).
435. *Gratz*, 539 U.S. at 254-55.
436. *Grutter*, 539 U.S. at 314.
437. *Gratz*, 539 U.S. at 298 (Ginsburg, J., dissenting).
438. *Compare id.* at 254-55 (majority opinion) *with Grutter*, 539 U.S. at 314.
439. *Grutter*, 539 U.S. at 343; *Gratz*, 539 U.S. at 276-77 (O'Connor, J., concurring).
440. Oppenheimer, *supra* note 181, at 202.

After *Grutter*, affirmative action became all about diversity.[441] As universities and human resources departments across the country adopted the term, it began even to enter public discourse.[442] This is illustrated poignantly in President George W. Bush's statement following the decision.[443] President Bush applauded the decision on the ground that it struck a "careful balance between the goal of campus diversity and the fundamental principle of equal treatment under the law," and he proclaimed that "diversity is one of America's greatest strengths."[444] This was a striking statement in 2003, but within the next 15 years, it would become commonplace to say that "diversity is our greatest strength,"[445] even in the face of tragedy.[446]

During this period, affirmative action preferences strengthened even beyond the 200-point preferences that the Big Three adopted in the 1960s. Indeed, according to an extensive study of affirmative action by Thomas J. Espenshade and Alexandria Walton Radford, in 1997 black applicants to private colleges had a 310 SAT advantage over white applicants – meaning that "[a] black candidate with an SAT score of 1250 could be expected to have the same chance of being admitted as a white student whose SAT score is 1560, all other things equal."[447] Other studies of other cateogires of higher

441. *Id.* at 201.

442. See Frederick R. Lynch, The Diversity Machine: The Drive to Change the "White Male Workplace" (2005).

443. *See* Statement on the Supreme Court Decision on the Michigan Affirmative Action Cases, 1 Pub. Papers 676-677 (June 23, 2003).

444. *Id.*

445. For example, in his 2016 speech on the 15th anniversary of the 9/11 attacks, former President Obama proclaimed: "We know that our diversity, our patchwork heritage is not a weakness, it is still and always will be one of our greatest strengths." Kevin Freking, *Obama Calls on Americans to Embrace Diversity on 9/11*, PBS: NEWSHOUR WEEKEND (Sept. 11, 2016, 9:03 AM), https://www.pbs.org/newshour/nation/pentagon-watch-live-911-obama. In April 2016, Hillary Clinton, speaking to Al Sharpton's National Action Network, told the crowd: "We know our diversity is a strength, not a weakness." Postmaster, *Clinton Calls on NAN*, MANHATTAN TIMES (Apr. 14, 2016), https://www.manhattantimesnews.com/clinton-calls-on-nan/. Likewise, in Bernie Sanders' speech at the 2016 Democratic National Convention, endorsing Hillary Clinton as the democratic presidential nominee, Sanders asserted: "Hillary Clinton understands that our diversity is one of our greatest strengths." *READ: Bernie Sanders' Speech at the Democratic Convention*, NPR: POLITICS (July 25, 2016, 10:42 PM), https://www.npr.org/2016/07/25/487426056/read-bernie-sanders-prepared-remarks-at-the-dnc.

446. One of the more notable examples arose in the wake of the Fort Hood massacre, the deadliest mass shooting on an American military base. After Nidal Hasan shot and killed 13 people, injuring more than 30 others, the Army Chief of Staff, General George W. Casey Jr., proclaimed: "Our diversity, not only in our Army, but in our country, is a strength." Casey went on to assert that the nation's diversity was even more important than these murders: "And as horrific as this tragedy was, if our diversity becomes a casualty, I think that's worse." Will Dunham, *Army Chief Fears Backlash for Muslim U.S. Soldiers*, REUTERS: U.S. NEWS (Nov. 8, 2009, 11:38 AM), https://www.reuters.com/article/us-texas-shooting-casey/army-chief-fears-backlash-for-muslim-u-s-soldiers-idUSTRE5A71AJ20091108.

447. Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 93 (2009).

education and in different application years have found similar SAT preferences.[448]

By the time the *Fisher* case came to the Supreme Court, affirmative action had been a part of federal policy and university admissions for over two generations, and during this time, affirmative action had not only spread through American corporate, academic, and public affairs, but it had strengthened over that time. It was therefore of no significance that the Texas program challenged in *Fisher* had the effect of preferring black applicants from private high schools over Hispanic applicants from public schools,.[449] Nor did it matter that, in the first round of *Fisher*, what has come to be known as *Fisher I*, the Supreme Court vacated the Fifth Circuit's decision and remanded the case back to the Fifth Circuit, with the order to apply strict scrutiny consistent with the Supreme Court's precedents.[450] By the time the case came back to the Supreme Court, in 2016, after the Fifth Circuit applied a mild version of strict scrutiny that deferred to university discretion, it was clear that the Supreme Court would affirm the Fifth Circuit's weakened version of strict scrutiny.[451]

What this signaled, of course, was that while strict scrutiny would still apply in form, universities would in effect have free reign under the "diversity-discretion model" developed in *Bakke*.[452] *Fisher* is the last affirmative action to come before the Supreme Court, and the last five years of silence substantiate the unwritten rule of affirmative action law: No matter what the public thinks, what laws are passed, and what the Supreme Court says, affirmative action is here to stay.

CONCLUSION

This Article has demonstrated how affirmative action has changed over the last 75 years – from a *post hoc* administrative tool for eliminating discrimination in public employment, to a proactive Great Society program for the achievement of proportionate representation in limited areas of academic and professional life, to a judicially enforceable bipartisan tool for economic and social reform, and finally to a program designed to diversify a wide range of American public and private affairs.[453] These four phases have served to secure the place of affirmative action in American law and politics. Three recent changes suggest that we may be entering a fifth phase, putting affirmative action even further beyond the reach of public scrutiny.

---

448. *See id*. at 93 n. 30.
449. *Id.* at 305-06.
450. *Fisher*, 570 U.S. at 314-15 (majority opinion).
451. *Fisher*, 136 S.Ct. at 2214-15.
452. Oppenheimer, *supra* note 181, at 201-02.
453. *See supra* Parts I-IV.

One change has to do with how American higher education operates – namely, how university administrators increasingly see their function to be enmeshed with a diversity mission.[454] Consider a fascinating article by Professor Lauren Foley, based on her interviews of University of Michigan administrators after the state had passed a constitutional referendum banning affirmative action.[455] Foley found that University of Michigan administrators were not seeking to defy the Michigan ban; in fact, they expressed a desire to comply with it.[456] But they used the *Bakke* diversity rationale as the basis for getting around what appeared to be an unambiguous ban on affirmative action practices.[457]

Even more interestingly, Professor Foley found that the Michigan administrators interpreted racial diversity as defining the purpose of the University of Michigan admissions system and even defining their own professional identities. One admissions administrator proclaimed, for example, that the University of Michigan's mission to racial diversity is "way beyond the law"[458] and is "way beyond everything that anyone can put on us."[459] Racial diversity was even proclaimed to be the very identity of the college: "It's part of us. It's what this place was built on. If you don't believe in that you shouldn't be here."[460] Another administrator reported that you become an admissions person at Michigan "not just to do a job," but "because you believe in the institution's mission [of prioritizing racial diversity]."[461] According to another administrator, "[t]he value of diversity was 'hardwired in the mind."[462] Professor Foley observed how "[a]dministrators spoke of their commitment [to racial diversity] with existential conviction," even proclaiming, almost religiously, that diversity issues "are part of my being."[463] The recent conflicts on American campuses strongly suggest that Michigan is not an outlier here.[464] There is a national trend of higher education administrators seeing their jobs as part of a larger racial mission.[465]

---

454. *See* Eugene T. Parker, *Chief Diversity Officers Play a Vital Role If Appropriately Positioned and Supported*, Inside Higher Ed (Aug. 20, 2020, 3:00 AM), https://www.insidehighered.com/print/views/2020/08/20/chief-diversity-officers-play-vital-role-if-appropriately-positioned-and-supported.

455. *See generally* Lauren S. Foley, *By Other Means: The Continuation of Affirmative Action Policy at the University of Michigan*, 80 STUD. L., POL., & SOC'Y 3 (2019).

456. *Id.* at 15.

457. *Id.*

458. *Id.* at 14.

459. *Id.*

460. Foley, *supra* note 455, at 14-15.

461. *Id.* at 14.

462. *Id.* at 15.

463. *Id.* at 15.

464. *Id.* at 22.

465. Parker, *supra* note 454.

A second trend, indicating that we are entering a new phase of affirmative action, is that diversity is decreasingly defended as a policy or educational tool, subject to empirical inquiry. It is instead asserted as a categorical moral value, one that transcends empirical inquiry. We can see evidence of that in the quasi-religious content of some of the quotes collected in Professor Foley's interviews.[466] This view of diversity as a moral value is in sharp contrast with the *Bakke* reasoning, which defended affirmative action as the most effective way to promote diversity and defended diversity as an empirically defensible way of providing various educational and professional services.[467] In the 21st century, by contrast, diversity has come to be a vision of the American identity itself—a vision that defines the very purpose of why governmental, educational, and corporate institutions exist in the first place. Affirmative action is thus becoming valuable not so much as a policy tool that could be tested through empirical study (in terms, for example, of whether admitting more black medical students leads to better health-care services provided in black communities) but as a moral value that transcends empirical testing.[468]

A third and related trend is that, as diversity has become unmoored from empirical inquiry, affirmative action has become unmoored from notions of proportional representation. In the *Bakke* diversity phase, a critical question was *how much* diversity affirmative action produced and *what kind* of diversity it produced.[469] Indeed, as discussed in Part IV, Justice Powell seemed genuinely interested in *Bakke* to learn how Harvard recruited "Idaho farm boys."[470] While the Cox brief was surely not being forthcoming with the Court in suggesting that a comparison could be made between Harvard's race-based affirmative action program and its desire for regional and class diversity, there was at least *some truth* in this analogy, in the sense that it was almost certainly the case that Harvard did care about regional diversity to some extent.[471] To be sure, Harvard did not care enough about rural representation to create a 200 SAT point difference between rural and non-rural applicants, or to create specific recruitment programs for rural students, or even to collect data about the number of rural students attending the college. But it was almost certainly true, at least in the abstract, that Cox was right that Harvard administrators viewed rural students as part of the diversity equation,[472] because it was widely accepted at the time that any factor that

466. Foley, *supra* note 455, at 14-15.
467. *Bakke*, 418 U.S. at 311-12.
468. Richard Sander, *A Collective Path Upward*, *in* THE FUTURE OF AFFIRMATIVE ACTION 215-16 (Richard D. Kahlenberg ed., 2014).
469. Harris, *supra* note 428.
470. *Bakke*, 438 U.S. at 323.
471. Appendix to Brief of Columbia Univ. et al. as Amici Curiae, *supra* note 390, at 2-3.
472. *Id.*

facilitated the free exchange of information, so as to broaden the epistemological framework of an academic institution, was valuable.[473]

That is no longer the way that affirmative action discourse works, suggesting that we are entering, or perhaps already have entered, a new phase of affirmative action, one that is more interested in race as such than the concept of diversity. Ironically, Harvard, the very institution that Justice Powell used as the basis for initiating Phase 4 affirmative action, is a good illustration of how affirmative action works in this fifth phase.[474]

Consider a 2015 Harvard Crimson article, revealing that Harvard has strikingly few rural students, to the point that these few students are made to feel like outsiders and are regularly derided as being backwards.[475] In fact, not only does Harvard admit only a few rural students, but a Crimson study found a stilted regional representation altogether: "of the Class of 2017, fewer than 12 percent of respondents identified as coming from Georgia and the rest of the Southeast region, while 41.1 percent of students called the Northeast home."[476] Nevertheless, despite this lack of geographic proportionality, "[t]he College's Admissions Office does not have plans to create proportioned quotas for states or geographic regions."[477] Likewise, a survey of Harvard's Class of 2022 students found that "64 percent of survey takers identified as Democrats," and "just 11 percent reported being Republicans."[478]

Contrast these findings with recent data on Harvard's racial demographics. The ongoing Harvard litigation has showed that, under Harvard's affirmative action program, white students constituted only 37.61 percent of the admitted students and black students constituted 15.81 percent of the admitted students.[479] Given that whites currently constitute roughly 60 percent of the American population overall, and blacks constitute roughly 13 percent,[480] that means that whites are now the most *under*represented racial group at Harvard (in terms of national numbers) and blacks are now an

473. *Id.* at 2.

474. Alexandra A. Chaidez & Samuel W. Zwickel, *Class of 2022 by the Numbers*, The Harv. Crimson, https://features.thecrimson.com/2018/freshman-survey/makeup-narrative/.

475. C. Ramsey Fahs & Forrest K. Lewis, *Beyond Boston: Regional Diversity at Harvard*, The Harv. Crimson (Mar. 26, 2015), https://www.thecrimson.com/article/2015/3/26/regional-diversity-scrutiny/.

476. *Id.*

477. *Id.*

478. Shera S. Avi-Yonah & Delano R. Franklin, *The Class of 2022 by the Numbers*, THE HARV. CRIMSON, https://features.thecrimson.com/2018/freshman-survey/lifestyle-narrative/.

479. Rebuttal Expert Report of Peter S. Arcidiacono at 110, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d 126 (D. Mass. 2019), *found at* https://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Doc-415-2-Arcidiacono-Rebuttal-Report.pdf [hereinafter Rebuttal Expert Report].

480. See William H. Frey, *The Nation Is Diversifying Even Faster Than Predicted, According to New Census Data,* BROOKINGS, https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/.

*over*represented group (in terms of national numbers). The Harvard litigation illustrates how affirmative action is no longer about diversity as such or even proportional representation of various ethnic groups. Affirmative action is now, at a fundamental level, about constructing a particular vision of American race relations.

That brings us back to the original question presented in the Introduction: How has affirmative action managed to be the only program in American law that has strengthened and broadened outside the sanction of public opinion, the federal judiciary, and state law? The answer lies in how courts and political officials have adapted its applications and justifications to changing racial conflicts. Affirmative action is thus best understood not as a short-term measure for redressing past injustices but as a critical tool for managing America's most intractable problem—its race problem.

Through the different phases, affirmative action has become enmeshed in how business, governmental, and academic institutions operate, making it increasingly likely that in the coming decades affirmative action will face resistance only at the margins. That is not to say that we will not continue to see public resistance against affirmative action. And that is not to say that courts will not continue to condemn affirmative action and perhaps even strike down some programs. But it to say that affirmative action has become so deeply embedded in elite institutional practices and cultural values that any significant resistance will be in form and not in substance.

This is a testament to both judicial power and its limits. As discussed in Part III, courts played a critical role in entrenching affirmative action, and as discussed in Part IV, courts played a central role in shifting affirmative action to become focused on diversity. But once affirmative action became entrenched in American law and politics, and diversity became its defining rationale, courts lost the power to control its trajectory. Affirmative action discourse has thus become unmoored from the *Bakke* opinion itself. In this new system, in which racial diversity has become a moral value that not only transcends empirical inquiry but also defines how many institutions and administrators operate, it is almost unthinkable as an intellectual matter, and perhaps even impossible as a practical matter, that courts can suddenly put the brakes on affirmative action.

So while there is much uncertainty over how affirmative action will change in the coming years, including how the fifth phase will develop and how the Harvard case will eventually be resolved, the fact that racial diversity now constitutes the American ethos tells us more than any particular Supreme Court case can tell us about the future of affirmative action. In other words, so long as racial diversity is held to be at the very core of the American identity, it does not matter what happens in the Harvard case – whatever the Supreme Court decides, affirmative action is here to stay.