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06

AFFIRMATIVE DISCRIMINATION

On November 3, 1983, Thomas Sowell appeared on *Firing Line*, the long-running point-counterpoint public affairs show hosted by William F. Buckley Jr. Sowell is a breathtakingly prolific intellectual based at Stanford University's Hoover Institution, and his scholarship over the past four decades is uncommonly broad, covering everything from economics to education to the history of ideas. During the 1970s and early '80s, in books like *Black Education: Myths and Tragedies*, *Race and Economics*, and *Markets and Minorities*, he established himself as something of a maverick thinker, especially when it came to questioning the basic

assumptions behind popular public policies aimed at racial and ethnic minorities.

The format of *Firing Line* varied over the course of its three-decade run, but in 1983 most shows would begin with Buckley interviewing a guest on a given subject in front of a small studio audience. Then another person, typically someone with an opposing view, would question the guest. The exchanges often were sharp, but this was not combat television of the type that later would dominate cable news commentary. The tone was respectful and the pace was unhurried. Sowell's appearance coincided with the publication of his most recent book, *The Economics and Politics of Race*, a pioneering international study of discrimination. And during the first part of the program he and Buckley covered, among other things, Sowell's opposition to using racial preferences to assist poor blacks.

"The net effect of the preferential treatment, which is preferential in intention more so than in results, is that those blacks who are particularly disadvantaged have fallen further behind under these policies," Sowell declared. "Affirmative action has typically benefited people who were already well off and made them better off." As usual, Sowell cited research to support his claim.

> *For example, blacks who have relatively less work experience, lower levels of education, black female-headed families—all these groups have fallen further behind during a decade or more of affirmative action. Black female-headed households have had an absolute decline in real income over this span and have fallen further behind white female-headed families. At the same time, black couples who are both college educated earn higher incomes than white couples who are both college educated.*

Sowell's cross-examiner that day was Robert Lekachman, a professor of economics at Lehman College of the City University of New York, who argued that racial preferences nevertheless are justified on moral and historical grounds:

> *Has there not been throughout our history a whole set of formal, informal affirmative actions for white males, for Episcopalians, for graduates of Ivy League colleges . . . various clubs which are engaged in affirmative action for limited groups of their own members? In all of these clubs important business is transacted to the benefit of the members and to the exclusion of people who are not. We have affirmative action of all kinds in this country addressed to the interests of the stronger groups. Now comes a moment in our history when affirmative action, for a bit, is advanced for the benefit of groups which have been traditionally at the short end of the distribution of good things in our society, and there is considerable revulsion against it. Isn't this just a bit of historical justice that's being advanced?*

Sowell was having none of it. His point, he reminded Lekachman, was that the data showed affirmative action wasn't helping the intended beneficiaries. "I simply do not see the justice in making people who are badly off worse off, in the name of advancing them."

Lekachman next challenged Sowell's claim that affirmative-action policies had been ineffective. Specifically, he took issue with Sowell contrasting black experiences in the 1960s and the 1970s, given the economic turmoil of the latter decade. "What this suggests to me is that the gains of affirmative action are extraordinarily precarious if you run an economy at low levels of activity,"

said Lekachman, ignoring Sowell's point that the lag in the 1970s among poor blacks had been not only absolute but also relative to that of comparable whites.

> *It's a bad comparison because the '60s were a period of expansion. With or without affirmative action, given the presence of the 1965 Civil Rights Act, given the 1954* Brown *decision and the general climate of opinion. . . . Do you really think, these considerations taken into mind, that the '70s disproved the efficacy of affirmative action?*

Sowell asked why the burden of proof is on affirmative action's skeptics. "I think that when one makes a profound change in a society, arousing enormous passions across the board, that the burden of proof should be on those who think that this is beneficial," he said. "I have been listening very carefully and have yet to hear the benefit to disadvantaged blacks that has been empirically discovered after affirmative action."

Then the following exchange occurred:

> LEKACHMAN: *Well, how quickly do you expect the changes? . . . The problems have been of long standing in our society. The remedy of affirmative action is a novel one. . . .*
>
> SOWELL: *It's fascinating. . . . I see this happening on all sorts of issues, from Federal Reserve policies on across the board. You'll say, "Here's this wonderful program and it will do wonderful things, and the burden of proof is on others to show that it will not do those things." And no matter how long it's been going on, it's never long enough. If it failed, there just wasn't enough commitment, the budget wasn't big enough. It should have had a larger staff, wider powers.*

But there is never any sense of a burden of proof on you to say—when you've made this change that has caused such furor in this country, and has gotten people at each other's throats, including people who have been allies in the past, such as blacks and the Jews—there is never any sense of a need for you to advance the empirical evidence to support what you've been doing.

LEKACHMAN: *I'm perfectly happy to subject the affirmative-action policies to reasonable statistical evaluation, given a sufficient period.*

SOWELL: *What is a sufficient [period]?. . . You said "for a bit." And now we're talking a "sufficient period." And I have difficulty with these, uh, what temporal units are you talking about? Centuries? Decades?*

LEKACHMAN: *I would think of twenty to twenty-five years as a reasonable period.*

Of course, race-conscious public policies are no longer novel, and they have persisted for much longer than a quarter of a century, as have Lekachman's arguments for keeping them in place. In a 2003 landmark decision upholding the use of race in college admissions, the Supreme Court declared, like Lekachman did two decades earlier, that affirmative-action policies just needed a little more time to work their magic. "We expect that 25 years from now, the use of racial preferences will no longer be necessary," wrote Justice Sandra Day O'Connor in her majority opinion.

Several major Supreme Court rulings regarding affirmative action have involved higher education, but the concept originated in American law in response to employment discrimination. And while the beneficiaries of these policies would later include other

groups—most notably, women—the impetus for the legislation was the plight of black workers.

> *It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin,*

reads the Civil Rights Act of 1964. As for enforcement, the law says that if a court

> *finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.*

Some opponents of the bill were concerned that it would lead to quotas and timetables that required employers to hire or promote specific numbers of minorities. During the legislative debate, defenders insisted that this would not happen. Attempting to address skeptics, Senator Hubert Humphrey, the lead sponsor, noted that the measure "does not require an employer to achieve any kind of racial balance in his work force by giving any kind of preferential treatment to any individual or group." The legislation, he said, required "an intention to discriminate" before an employer would be considered in violation of the law. But as federal courts and government agencies began enforcing the new civil rights law, it didn't take long for the concept of equal opportunity to fall by the

wayside, to be replaced by a concept of equal results. Policies that initially said people must be judged without regard to race and sex evolved into policies that required the consideration of those characteristics. The goalposts had moved. A year after the Civil Rights Act passed Lyndon Johnson announced that it was time for the "next and more profound stage of the battle," which he described as a battle for "not just equality as a right and a theory but equality as a fact and equality as a result."

Equal outcomes may be a noble objective, but nothing in human history suggests that they are realistic. Different groups have different backgrounds and interests and skills and sensibilities. Success and failure is not randomly distributed. By moving the public-policy emphasis away from equal opportunity, where it belonged, and toward some fanciful notion of racially proportionate results, Johnson was laying the groundwork for a civil rights industry that to this day insists that racially disparate policy outcomes are proof of discrimination, regardless of the policy's intentions.

In the American legal system, the burden of proof is on the prosecution in criminal cases and on the plaintiff in civil cases. But civil rights cases began to deviate from this tradition in 1971, when the Supreme Court handed down its decision in *Griggs v. Duke Power Co.* At issue in the case was Duke's hiring criteria for certain jobs, which included a high-school diploma and a minimal score on an IQ test. The plaintiffs argued that those requirements disqualified too many black job applicants, and amounted to employment discrimination. The court agreed, ruling that the burden of proof is on the employer when hiring criteria has a "disparate impact" on minorities. If minorities were underrepresented in a company's workforce, the employer now had to prove that discrimination was not the reason. The court said that even if the hiring requirements

were "neutral on their face, and even neutral in terms of intent," they could still violate the 1964 Civil Rights Act. Differences in outcomes were now prima facie evidence of discrimination. We had moved from a focus on the rights of minority individuals to the preferential treatment of minority groups. In less than a decade, the goal had shifted from equal opportunity to statistical parity. And people who initially had been sympathetic to the black civil rights movement would feel betrayed.

"The expectation of color-blindness that was paramount in the mid-1960s has been replaced by policies setting a rigid frame of numerical requirements. They are what we have in mind today when we speak of affirmative action," wrote Nathan Glazer, the Harvard sociologist, back in 1987. "Whatever the term meant in the 1960s, since the 1970s affirmative action means quotas and goals and timetables."[1] Glazer's analysis is still true, only more so. In 2011 the Congressional Research Service, which provides policy analysis to Congress, issued a report titled "Survey of Federal Laws Containing Goals, Set-Asides, Priorities, or Other Preferences Based on Race, Gender, or Ethnicity." The document is thirty-six pages in length, and the summary describes it as "a broad, but by no means exhaustive, survey of federal statutes that specifically refer to race, gender, or ethnicity as factors to be considered in the administration of any federal program. Such measures may include, but are not limited to, goals, timetables, set-asides, quotas, priorities, and preferences, as those terms are generally (however imperfectly) understood."

Commenting on the report, Peter Kirsanow, a member of the U.S. Commission on Civil Rights, noted that in 1995 there were 172 federal statutes that granted "preferences in employment, contracting, or awarding federal benefits on the basis of membership

in a preferred class." By 2011 that number had climbed to 276, said Kirsanow, writing:

> *When first employed more than 40 years ago, part of the rationale for affirmative-action programs was that they were necessary to remedy specific instances of discrimination by the federal government against certain minority groups. Yet the further we get from the era of widespread discrimination against certain minority groups, the more the federal government discriminates in favor of such groups.*[2]

No matter its original meaning or intent, affirmative action in practice today is racial discrimination. Some supporters will even admit this—and they get annoyed when fellow supporters pretend otherwise. In his book *The Audacity of Hope*, Barack Obama posits that affirmative-action programs, when properly structured, "can open up opportunities otherwise closed to qualified minorities without diminishing opportunities for white students." Randall Kennedy, a Harvard law professor and affirmative-action advocate, takes Obama to task for denying the obvious: When special efforts are made to accommodate some, you are necessarily diminishing opportunities for others.

> *Acutely sensitive to charges that he supports racial favoritism that discriminates against whites, Obama defines affirmative action in a fashion meant to drain it of controversy. . . . Racial affirmative action* does *distinguish between people on a racial basis. It* does *discriminate. It* does *redistribute resources. It* does *favor preferred racial categories of candidates, promoting some racial minorities over whites with superior records. It* does

generate stigma and resentment. These issues cannot usefully be hidden for long behind verbal tricks.[3]

A key difference between Kennedy and Obama is that the latter is a politician trying to obscure the true nature of affirmative-action policies in order to maintain public support for them. A *New York Times* poll in 2013 showed that "more than half of Americans, 53 percent, favor affirmative action programs for minorities in college admissions and hiring," but the story added that "other surveys that frame the question in terms of giving minorities 'preference' find less support."[4] Thus, Obama's description of affirmative action wins far more public support than Kennedy's. Put another way, the more accurately you describe affirmative action, the worse it polls.

In fact, surveys going back decades—even those that avoid words like "preferences" but frame the question fairly—have shown that most people, including a majority of blacks, oppose racial double standards. A 2001 *Washington Post* poll asked: "In order to give minorities more opportunity, do you believe race or ethnicity should be a factor when deciding who is hired, promoted, or admitted to college, or that hiring, promotions, and college admissions should be based strictly on merit and qualifications other than race or ethnicity?" Ninety-two percent of all respondents, and 86 percent of blacks, answered that such decisions "should be based strictly on merit and qualifications other than race/ethnicity." Similarly, a 1997 *New York Times/CBS News* poll found that 69 percent of all respondents, and 63 percent of blacks, said that "race should not be a factor" when asked how "equally qualified college applicants" should be assessed. "Despite its wide currency," wrote journalist Stuart Taylor, "'affirmative action' is a misleading phrase, because most Americans interpret it as including aggressive anti-discrimination measures, recruitment and outreach efforts, and

preferences for poor people to promote genuine equality of opportunity—policies that are in fact supported by almost all opponents of racial preferences."[5]

Foes of racial preferences have been waiting for decades for the Supreme Court to denounce this subsequent perversion of legislation, originally intended only to ensure that everyone got a fair shot. "It seems that almost every year since the middle 1970s," wrote Glazer,

> *we have awaited with hope or anxiety the determination of some major case by the Supreme Court, which would either tell us that affirmative action transgressed the "equal protection of the laws" guaranteed by the Fourteenth Amendment and the apparent commitment to color-blindness of the Civil Rights Act of 1964, or, on the contrary, determine that this was a legitimate approach to overcoming the heritage of discrimination and segregation and raising the position of American blacks."*[6]

The high court's 2003 decision in *Grutter v. Bollinger* upheld the use of a race-conscious admissions policy at the University of Michigan Law School. The court said that "student body diversity is a compelling state interest" that can trump the Constitution's core equal protection principles. Helpfully, it added that "all governmental use of race must have a logical end point." Unhelpfully, it failed to impose one.

Fisher v. the University of Texas at Austin, a 2013 decision, was yet another Supreme Court punt. The plaintiff, Abigail Fisher, said that the university had discriminated against her as a white woman in rejecting her application. The justices remanded the case to a lower court to review the issue under a new legal standard. As the

New York Times reported, "The 7-to-1 decision avoided giving a direct answer about the constitutionality" of the school's affirmative-action program.[7]

Justice Clarence Thomas's concurrence in *Fisher* noted that he would have not only held that the University of Texas's admissions program violated the Equal Protection Clause of the Constitution but also struck down the diversity rationale for racial preferences that the court countenanced in *Grutter*. For Thomas, state-sponsored racial discrimination is state-sponsored racial discrimination. And whether it's being advocated by 1950s-era white segregationists or twenty-first-century black liberal elites like Barack Obama and Randall Kennedy, it's unconstitutional. He wrote:

> *Unfortunately for the University, the educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest. Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's, but emphatically rejected by this Court. And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then . . . the alleged educational benefits of diversity cannot justify racial discrimination today.*

Thomas then went a step further, getting at the essence of what affirmative-action advocates are really positing:

> *While I find the theory advanced by the University to justify racial discrimination facially inadequate, I also believe that its use of race has little to do with the alleged educational benefits of diversity. I suspect that the University's program is instead based on the benighted notion that it is possible to tell when*

discrimination helps, rather than hurts, racial minorities. . . . The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities.

In an earlier opinion, *Adarand Constructors, Inc. v. Peña*, which involved racial preferences for minority businesses, Thomas also took on affirmative-action do-gooders.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.

Affirmative action is now approaching middle age. We are nearly five decades into this exercise in social engineering. And aside from the question of its constitutionality, there remains the matter of its effectiveness. Do racial preferences work? What is the track record? Have they in fact helped the intended beneficiaries? How much credit do they deserve for the minority gains that have occurred? Russell Nieli, a political scientist at Princeton, wrote:

While the first of the national "affirmative-action" initiatives—Richard Nixon's Philadelphia Plan for opening up jobs in the urban construction industry—did focus on the black inner-city poor, it proved to be the exception as recipients of racial preferences quickly came to be the better-off, not the truly needy. . . . Those who once occupied the preeminent place in public policy

concern—those "hobbled by chains," as Lyndon Johnson called them in his Howard University address, or the "truly disadvantaged," as William Julius Wilson later described them—fell off of the national radar screen."[8]

There is no question that black poverty fell and that the professional class swelled in the decades following the implementation of racial preferences. In 1970 blacks comprised 2.2 percent of physicians, 1.3 percent of lawyers, and 1.2 percent of engineers, according to census data. By 1990 those percentages had more than doubled. In 1967, just 5.8 percent of the black population earned more than $50,000 per year. By 1992 the proportion had climbed to 13 percent. Liberals automatically credit affirmative action, of course, but note what was already happening prior to the introduction of preferential policies in the late 1960s and early 1970s.

"By 1970 over a fifth of African-American men and over a third of black women were in middle-class occupations, *four times* as many as in 1940 in the case of men and *six times* as many in the case of women," wrote Stephan and Abigail Thernstrom, coauthors of *America in Black and White.* The authors note that between 1940 and 1970 the number of black schoolteachers nearly quadrupled, to almost a quarter of a million, while the number of social workers and registered nurses rose by even more.

Thus, there was a substantial black middle class already in existence by the end of the 1960s. In the years since, it has continued to grow, but not at a more rapid pace *than in the preceding three decades, despite a common impression to the contrary. Great occupational advances were made by African Americans before preferential policies were introduced.*[9]

The drop in black poverty that preceded the war was even more dramatic. In 1940 the black poverty rate was 87 percent. By 1960 it had fallen to 47 percent, a 40-point drop that predated not only affirmative action but the passage of landmark civil rights bills that liberals would later credit with the steep decline in black poverty. Did affirmative action play a role in reducing the percentage of poor blacks? If so, it wasn't much of one. In 1970, 33.5 percent of blacks would be living below the official poverty line. In 1990, two full decades of affirmative action later, it would be 31.9 percent. Affirmative action deserves about as much credit for the decline in black poverty as it deserves for the rise of the black middle class. In both cases, racial preferences at best continued a trend that had already begun. And in both cases the trend was considerably stronger in the decades immediately preceding affirmative-action policies than in the decades immediately following their implementation. If, as the NAACP claims every time someone spots a Confederate flag at a parade, white racism is a major barrier to group progress, how can it be that black people were rising out of poverty and into the middle class at a *faster* clip when racism in the United States was legal, socially acceptable, and rampant—none of which is the case today?

Blacks as a group, and poor blacks in particular, have performed better in the *absence* of government schemes like affirmative action. That's not an argument for returning to Jim Crow; civil rights are fundamental to a free society, and it was wrong to deny them to blacks. But it does suggest that there are limits to social engineering that arrogant politicians and public-policy makers continue to ignore.

The growth of minority professionals is encouraging, but affirmative-action policies were sold as a way to remedy the plight of the black

underclass. And empirical data continue to show that isn't happening. Under affirmative action, low-income blacks have fallen farther behind. Between 1967 and 1992, incomes for the wealthiest 20 percent of blacks rose at approximately the same rate as their white counterparts. But the poorest 20 percent of blacks saw their incomes *decline*, at more than double the rate of comparable whites over the same time period. Income disparity among blacks increased at a faster rate than income disparity among whites.[10] This trend, which social scientists call "income segregation," has actually worsened in more recent years.

"Segregation by income among black families was lower than among white families in 1970, but grew four times as much between 1970 and 2007," according to a 2011 study by two Stanford University scholars. "By 2007, income segregation among black families was 60 percent greater than among white families. Although income segregation among blacks grew substantially in the 1970s and 1980s, it grew at an ever faster rate from 2000 to 2007, after declining slightly in the 1990s."[11] Again, empirical data showed that in an era of racial preferences, quotas, and set-asides ostensibly intended to help the black poor, that subset had regressed.

Of course, liberals would much rather accentuate the positive, or at least what they believe to be the beneficial results of color-conscious policies. Hence, proponents credit affirmative action with the increase in black college students and contend that ending double standards in admissions would reduce their numbers and decimate the black middle class. But is this another example of affirmative action being oversold as crucial to the success of blacks?

Affirmative action in higher education initially meant greater outreach. Until the early 1970s the goal was to seek out minorities in areas—such as the black inner city—that college recruiters at elite institutions had previously ignored. But it soon became clear that

these schools couldn't possibly find a critical mass of blacks who were qualified, so they began lowering the admissions requirements for black applicants. The history of affirmative action in academia since the 1970s is a history of trying to justify holding blacks to lower standards in the name of helping them.

It's no great shock that top schools would have trouble finding blacks with the same qualifications as Asian and white applicants. Black children are more likely to attend the lowest-performing elementary schools. They leave high school with the reading and math skills of an eighth grader. And anti-intellectualism permeates black culture. "Although inequality in academic preparation is not surprising, the magnitude of the gaps is startling," wrote University of Chicago sociologists Richard Arum and Josipa Roksa, who conducted a survey for their 2011 book, *Academically Adrift.*

> *Twenty-five percent of white students reported taking no AP courses in high school, but almost twice as many (45 percent) African-American students reported no AP experience. . . . With respect to high school GPA, white students clearly fared the best: only 11 percent were in the bottom quintile of the secondary school GPA distribution. In contrast, 49 percent of African-American students and 37 percent of Hispanic students had high school GPAs in the bottom quintile. While these gaps are troubling, the gaps in SAT/ACT scores are even more so. Only 9 percent of white students scored in the bottom quintile of the SAT/ACT distribution. In contrast, more than six times as many (59 percent) African-American students scored in the bottom quintile.*[12]

Affirmative-action advocates generally downplay the racial achievement gap among entering college freshmen, but it is pronounced—particularly at more selective colleges—and has been

for decades. In the early 1980s, when a perfect SAT score was 1600 and college freshmen at selective schools were averaging scores of around 1200, very few blacks came close to meeting that standard. In 1981 seventy thousand blacks took the SAT, and fewer than one thousand of them (1.2 percent) scored as high as 600 (out of 800) on the verbal portion. By comparison, nearly fifty-eight thousand white test takers, or 8 percent of the total, had verbal scores that high, which put the ratio of whites to blacks at 61 to 1. And the racial differences in math were even larger.[13]

Between 1978 and 1988 the scores of black freshmen at the University of California, Berkeley, trailed white test scores by between 250 and 332 points on average. The gap between whites and Asians over the same period averaged between 54 and 91 points, with whites leading in some years and Asians leading in others.[14] Berkeley is a selective school, and in the late 1980s and early 1990s a typical freshman there had an SAT score in excess of 1200 points. Yet between 1990 and 1994 the nationwide SAT score among whites and Asians averaged around 945. Among blacks, it was about 740. That gives you some indication of how difficult it would have been for Berkeley to find black students who met its normal standards. And while Berkeley is selective, it's not Harvard or Yale or Stanford or MIT, where average SAT scores in the 1990s were closer to 1300.

By 1995 blacks had made gains, but the racial gap remained quite large. The percentage of blacks scoring above 600 on the verbal section of the SAT that year rose to 1.7 percent, versus 9.6 percent among whites. So for every black student who scored that high, there were thirty-seven whites who did the same. The SAT added a writing portion in 2006, and blacks have lagged badly in that category as well. The 2012 black test scores trailed white test scores by 99 points in reading, 108 points in math, and 98

points in writing—and were well below the national average in all three categories.

These gaps and ratios are relevant because defenders of racial preferences like to pretend that affirmative action is an innocuous policy that simply gives a slight edge to otherwise qualified black applicants. Or they insist that race is just one factor among many that colleges consider. But if race were simply being used as a tiebreaker by admissions officers, there is no way the nation's top schools could boast as many black students as they do. In 2011 the percentage of black freshmen at the nation's eight Ivy League colleges ranged from 7.9 percent at Cornell to 12.5 percent at Columbia. Other very selective schools, including Duke, Vanderbilt, Stanford, and MIT, also reported freshman classes in 2011 that were more than 8 percent black.[15]

As the *Journal of Blacks in Higher Education* noted in 2005, these outcomes are all but impossible if black applicants are held to the same standards as whites and Asians.

> *In a race-neutral competition for the approximately 50,000 places for first-year students at the nation's 25 top-ranked universities, high-scoring blacks would be buried by a huge mountain of high-scoring non-black students. Today, under prevailing affirmative action admissions policies, there are about 3,000 black first-year students matriculating at these 25 high-ranking universities, about 6 percent of all first-year students at these institutions. But if these schools operated under a strict race-neutral admissions policy where SAT scores were the most important qualifying yardstick, these universities could fill their freshman classes almost exclusively with students who score at the very top of the SAT scoring scale. As shown previously,*

black students make up at best between 1 and 2 percent of these high-scoring groups.

Obviously there is nothing wrong with top schools wanting to attract students from different backgrounds, but how they pursue that goal is important. "If there was a way to enroll more underrepresented minorities without considering race, we'd do it," said the dean of the University of Michigan's law school. "It's not that we like being race-conscious."[16] But that begs the question of whose interests are being served. Black law-school graduates fail the bar exam at four times the white rate. Michigan's law school likes to tout its diversity, but is it doing black students any favors by admitting them with lower standards and setting them up to fail? The left believes that the large black-white gap in academic credentials among college freshmen doesn't matter, or that racial and ethnic diversity is a bigger concern. Schools go out of their way to hide information on admissions and student outcomes. But what if these efforts to color-code campuses at any cost are not so benign? Putting aside the constitutionality of race-based college admissions, a separate question is whether black students are helped or harmed when they are admitted to a school with lower qualifications than those required of other students at the same institution. Fortunately, we don't have to speculate about the answer, because some states have banned the use of race in college admissions, and enough time has now elapsed to evaluate the results.

In 2013 the *New York Times* ran a front-page story on the University of California system's efforts to maintain a racially and ethnically diverse student body without using group quotas, which had been banned in the state seventeen years earlier. "California was one of

the first states to abolish affirmative action, after voters approved Proposition 209 in 1996," wrote the *Times*. "Across the University of California system, Latinos fell to 12 percent of newly enrolled state residents in the mid-1990s from more than 15 percent, and blacks declined to 3 percent from 4 percent. At the most competitive campuses, at Berkeley and Los Angeles, the decline was much steeper." The article went on to acknowledge that "eventually, the numbers rebounded" and that "a similar pattern of decline and recovery followed at other state universities that eliminated race as a factor in admissions."[17] And given all of the dire predictions made at the time, it's nice to see that the worse-case scenarios didn't come to pass. But the too-seldom-told story of affirmative action in the University of California system is the black *gains* that have occurred since it was abolished.

In their book, *Mismatch*, authors Richard Sander and Stuart Taylor Jr. tell this good-news story by comparing the pre- and post-Proposition 209 eras. Here is a sample of their findings:

- *The number of blacks entering UC as freshmen in 2000 through 2003 is, on average, only 2 percent below pre-209 levels, and black enrollment jumps when we take into account transfers and lower attrition.*
- *The number of Hispanic freshmen is up by 22 percent over the same period, and again more when we include transfers.*
- *The number of blacks receiving bachelor degrees from UC schools rose from an average of 812 in 1998–2001 (the final cohorts entirely comprised of pre-209 entrants) to an average of 904 in 2004–2007 (the first cohorts entirely comprised of post-209 entrants). For UC Hispanics, the numbers rose from 3,317 to 4,428.*

- *The number of UC black and Hispanic freshmen who went on to graduate in four years rose 55 percent from 1995–1997 to 2001–2003.*
- *The number of UC black and Hispanic freshmen who went on to graduate in four years with STEM [science, technology, engineering, and math] degrees rose 51 percent from 1995–1997 to 2001–2003.*
- *The number of UC black and Hispanic freshmen who went on to graduate in four years with GPAs of 3.5 or higher rose by 63 percent from 1995–1997 to 2001–2003.*
- *Doctorates and STEM graduate degrees earned by blacks and Hispanics combined rose by one-quarter from cohorts starting in 1995–1997 to cohorts starting in 1998–2000.*[18]

Prior to the passage of Proposition 209, blacks and Hispanics in California were steered into schools where they were underprepared relative to the other students. They were being "mismatched" to satisfy the cosmetic concerns of administrators, to embellish photographs in school brochures. "Diversity" was deemed more important than learning. Proponents of racial preferences weren't overly concerned with whether these minorities actually graduated, and many of them didn't (or only did so by switching to a less demanding major). After race preferences were banned, blacks and Hispanics were more likely to attend a school where they could handle the work, and as a result many more of them have flourished academically.

Yes, fewer minorities attended Berkeley and UCLA in the wake of the new policy, and instead matriculated at less selective places like UC Santa Cruz, but more minorities overall not only graduated, but obtained degrees in engineering and science. What's more important? Once again empirical data show blacks doing better in

the absence of a government policy originally put in place to help them. Once again the political left, which has a vested interest in convincing black people that group success is highly dependent on policies like affirmative action, has ignored or downplayed results at odds with its agenda.

Members of the U.S. Commission on Civil Rights have noted the "extensive empirical research indicating that students who attend schools where their entering academic credentials put them in the bottom of the class are less likely to follow through with an ambition to major in science or engineering than similarly-credentialed students who attend schools where their credentials put them in the middle or top of the class. Affirmative action thus works to the detriment of its supposed beneficiaries." Furthermore, "students, regardless of race, are less likely to graduate from law school and pass the bar if they are the beneficiaries of preferential treatment in admissions than if they attend a law school at which their entering academic credentials are like the average student's."[19] Researchers at Duke University, where blacks are admitted with SAT scores much lower than those of whites and Asians, found that more than 76 percent of black male freshmen intended to major in the hard sciences, which made them more likely than their white peers to pick those majors. The *Weekly Standard* reported:

> *But more than half of those would-be black science majors switched track in the course of their studies, while less than 8 percent of white males did, so that by senior year, only 35 percent of black males graduated with a science or economics degree, while more than 63 percent of white males did. Had those minority students who gave up their science aspirations taken Introductory Chemistry among students with similar levels of academic preparation, they would more likely have continued*

with their original course of study, as the unmatched record of [generally less selective] historically black colleges in graduating science majors suggests.[20]

Most of these students are capable of succeeding in majors of their choosing at good schools that are less selective. But affirmative-action policies work against them. As Sander and Taylor noted,

It is not lack of talent or innate ability that drives these students to drop out of school, flee rigorous courses, or abandon aspirations to be scientists or scholars; it is, rather, an unintended side effect of large racial preferences, which systematically put minority students in academic environments where they feel overwhelmed . . .

The student who would flourish at, say, Wake Forest or the University of Richmond, instead finds herself at Duke, where professors are not teaching at a pace designed for her—they are teaching to the "middle" of the class, introducing terms and concepts at a speed that is challenging even to the best-prepared student.[21]

In addition to producing fewer black professionals than we would have under race-neutral policies, affirmative action comes with a stigma and reinforces ugly stereotypes of black inferiority. "When few Jews could get into Ivy League schools, and Jewish students had to be superqualified to gain admission, a Jewish stereotype was created: Jews are smart," wrote Stephan and Abigail Thernstrom. "Admitting black students by *lower* standards has precisely the opposite effect: It reinforces the pernicious notion that blacks are not academically talented."[22] Some liberals claim that these concerns are trivial, or outweighed by social-justice aims of affirmative-action

policies. "I do not feel belittled by this," wrote Randall Kennedy, explaining how racial preferences were responsible for his admission to Yale Law School and any number of professional organizations:

> *Nor am I wracked by angst or guilt or self-doubt. I applaud the effort to rectify wrongs and extend and deepen desegregation in every aspect of American life.*
>
> *There will be those, I suspect, who will put a mental asterisk next to my name upon learning that my race (almost certainly) counted as a plus in selecting me for induction into these organizations. If they do, then they should also insist upon putting a mental asterisk next to the name of any white person who prevailed in any competition from which minorities were excluded.*[23]

Or, as Thurgood Marshall once put it to fellow Supreme Court Justice William Douglas, "You guys have been practicing discrimination for years. Now it's our turn."[24]

But others are less glib. In *Reflections of an Affirmative Action Baby*, Stephen Carter relates the experience of initially being denied admission to Harvard Law School in the late 1970s, but then being accepted after the school realized he was black. Several days after receiving his rejection letter, "two different Harvard officials and a professor" phoned him to apologize. "We assumed from your record that you were white," one of them said.

"Naturally, I was insulted," wrote Carter, adding,

> *Stephen Carter, the white male, was not good enough for the Harvard Law School; Stephen Carter, the black male, not only was good enough but rated agonized telephone calls urging him to attend. And Stephen Carter, color unknown, must have been white: How else could he have achieved what he did in*

college? Except that my college achievements were obviously not sufficiently spectacular to merit acceptance had I been white.[25]

Carter would go on to attend Yale Law School instead, where future Supreme Court Justice Clarence Thomas had recently obtained his law degree after doing undergraduate work at the College of the Holy Cross. In Thomas's memoir he wrote about the evolution of affirmative-action policies in the 1970s and how they impacted black outcomes. "My class at Holy Cross had contained only six blacks, but none of us failed to graduate on time, and most did very well academically," he noted.

By the time I joined the board of trustees in 1978, though, very few of the black students who came to Holy Cross graduated in the top half of their classes, and the attrition rate for blacks in predominantly white colleges and universities throughout America was disturbingly high. Almost half failed to graduate on time, if at all.[26]

Thomas wrote that when he left law school and tried to find a job, employers assumed that he had benefited from preferential treatment and couldn't do the work, notwithstanding his good grades and fancy degree. "Now I knew what a law degree from Yale was worth when it bore the taint of racial preferences. I was humiliated."[27]

Of course, blacks aren't the only ones who struggle with the ambiguous benefits of group preferences. In 2012, when Harvard Law professor Elizabeth Warren was accused of claiming Native American ancestry to take advantage of hiring policies that favor minorities, she became indignant. Warren, a liberal Democrat who was running for the U.S. Senate when news broke that she self-

identified as Native American in legal directories and that Harvard had showcased her as a Native American professor in the 1990s, responded to the revelations by telling everyone who would listen that she was hired based on merit alone. "I got what I got because of the work I've done," she said.[28] Supporters of affirmative action say there's no shame in being hired to meet a racial or ethnic quota instead of for your job skills alone, or in being admitted to a college with SAT scores well below those of your white and Asian peers. But the reality is that nobody who has any pride wants to be that "diversity" hire in the office or that token minority on campus, especially if it allows others to dismiss your accomplishments as having resulted from a tilted playing field.

Finally, affirmative-action debates, particularly in higher education, tend to focus on how whites, blacks, and Hispanics are impacted. But increasingly the group that has the most to lose in our racial spoils system is Asians. In 2012, when the Supreme Court agreed to hear *Fisher v. University of Texas*, four Asian American organizations filed a brief urging the court to ban race-conscious admissions.[29] The brief argued that racial preferences intended to help black applicants are detrimental not only to whites but also to Asians. It said that admission to the nation's top schools is a zero-sum proposition.

> *As aspiring applicants capable of graduating from these institutions outnumber available seats, the utilization of race as a "plus factor" for some inexorably applies race as a "minus factor" against those on the other side of the equation. Particularly hard-hit are Asian-American students, who demonstrate academic excellence at disproportionately high rates but often find the value of their work discounted on account of either their race, or nebulous criteria alluding to it.*[30]

In the past Asian advocacy groups typically have stood with their black and Latino counterparts to support racial preferences in college admissions, even though Asians have the most to gain from the elimination of these policies. More selective institutions especially are worried about Asian students being overrepresented on campus, so they find ways to cap their numbers. In 1995, for example, Asian freshman enrollment at Berkeley was about 37 percent. The next year California banned racial preferences, and by 2005 Asians comprised nearly 47 percent of Berkeley's freshman class. Going forward, defenders of affirmative action will have to explain why blacks deserve preference over Asians to address the past behavior of whites.

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