LETTERS from Santa Fe

St. John's College—Santa Fe, New Mexico Volume III, Issue 2

INSIDE

Education, Equality and Race

When has America not been divided, harassed and harmed by the race issue? The best instinct of the Founders—that all men are created equal—was undercut and submerged by the irrepressible fact of slavery. The lives of thousands given in the service of abolition were forgotten in the years of segregation, black codes and Jim Crow. And now (with the best of intentions we are told) the vision of a nation where race doesn't matter will not materialize—now and in the future people will be helped or hindered because of their complexion. Dwell on race. Count by race. Classify by race. Take race "into account." Reward by race. Harm by race.

Worst of all, leadership in this new policy lies not in the ranks of the former agents of ill will but in the one place America has looked to for civility, for enlightenment, and even for wisdom: our colleges. Has the resegregation of America happened anywhere else with the fury—and the design—that we see on college campuses?

Part of this is imposed on our campuses by threat and fear: The university will be brought to a halt if we do not have a separate Black Student Union; the college will be harassed if we do not increase the funding for minority studies. . . . Universities are easily pushed around, and perhaps they should be forgiven when, repeatedly, they give in to threats and force. One only wishes they had enough character to admit they gave in to force and not pretend to love and support their intimidators.

But part of the evil, the greater part, is the colleges' own doing. Shall we treat people equally, without regard to color? Well, no. Not if, as at one school, you decide to pay for all campus visits, but only for black applicants. Not if, as at another college, you decide to give full financial aid to all minority students, regardless of need. Not if, as many colleges proclaim, you let minority students work less, or take out fewer loans, than non-minority students and make up the difference with college funds. Not if, as at one major university, you decide to enhance the salaries of candidates for faculty positions, so long as they are women and minorities. Not if, in following the lead of the Department of Education, schools decide that racially-based scholarships are perfectly okay; that public money can be given to some people and denied to others simply on the basis of their race. *(continued on page 2)*

Having taught people to judge by race and prefer by race, why are we surprised when they do?

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(continued from page 1)

The philosophical objections to these actions are immense. The moral conscience of most Americans, whether they acted on it or not, has always known that judging, rewarding, denying and promoting by race has no place in decent civil society. Color is an accidental, not essential characteristic; it does not make a person better or more worthy or finer, lesser or debased or degraded. To judge merit on the basis of race is to judge irrationally. Notice how the moral sense rebels at the thought, for example, of a store that charged one race more than another for the same goods; or if the government decided that some people, because of their complexion, could pay less in taxes. Yet, are we doing anything different in our colleges and universities?

Today, we are told, schools and colleges can have "race-conscious" and "race-targeted" policies because now there is something afoot more important than racial impartiality: "diversity." So long as it is in the service of campus diversity, virtually any form of racial preference is allowed. (Or, rather, is diversity the means of achieving racial preferencing? Sure is hard to say.) This means, of course, racial preferences in admissions, in faculty hiring and retention, in minority-based scholarships, in reduced loan burdens, and in reduced student work hours but at higher pay—all for preferred groups.

Let us not be quick to argue that these policies are wrong because they violate the "rights" of the majority. They are wrong not because of damage they do to majority groups but because of the damage they do to the principle of equality and non-discrimination, a principle that benefits all people. And, as is becoming so painfully clear, the real losers in race-based preferences are often not members of some putative majority, but members of some not-now-preferred minority.

My guess is that not long ago, the best educators and administrators in America were wholeheartedly and correctly on the side of non-discrimination and color-blindness. When we first embraced affirmative action policies, it was as they were originally and rightly conceived—as a way of casting the widest net, of looking here and everywhere, for the finest candidates regardless of race or ethnicity. Unlike today's discriminatory affirmative action, nondiscriminatory affirmative action was a wise and just policy, one that sought to find the best regardless of race.

To see how pernicious distinctions and rewards based on race really are, consider the response often given in support of such programs—"The university favors children of alumni, it has sports scholarships, it has 'merit' scholarships for academically gifted students. The university consistently classifies students and treats them differently, so why not do the same for minorities?" But why is it that one's moral sense would be indignant, would rebel, if the policy were not "alumni preference," but "alumni preference, as long as they're white," or "sports scholarships, but not for Jews," or "non-Asian merit scholarships." See what a difference race makes? See how categorizing and rewarding by race repels? In America, race matters. Race is the single most divisive fact in our nation. And we lie to ourselves if we say we are doing good when we separate,

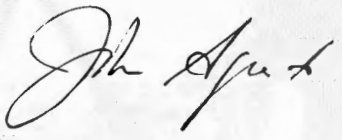
reward and punish by race.

Not uncommonly, when we discard a great and good principle—in this case the principle of equality and non-discrimination—bad things happen. And on our campuses, bad things are happening with a vengeance. Have racial incidents, or racism itself, ever been higher? Having taught people to judge by race and prefer by race, why are we surprised when they do?

Speaking practically, what do we colleges and universities teach when we decide, admit and reward by race? Have we treated each of our students as responsible individuals, with individual and unique minds? Or, having judged peoples' minds and outlooks by their pigmentation, have we taught students to categorize and pigeonhole by race? Have we prepared our students for the world of work they'll soon enter? Shall they expect to be hired, promoted or retained on the basis of color? And, having said to America for so long, do not judge by race, do not prefer by race, we now say dwell on race, and see how the spoils of society are divisible through race competition.

Not too long ago we worried about the "two cultures" in the academy—about the gap between scientists and humanists. But now there are two new cultures bedeviling education, and the gulf between them is immense: I mean the antagonism between contemporary education and the public. In narrowness of scholarship, in smallness of vision, in our unwillingness to promote or often even to understand civic needs, a large part of the academy sets itself up in conscious opposition to the common sense of the American public. And, in the area of race, we see how far behind the decent moral sense of the American people our schools and colleges can be.

Whatever the motive—because it seems easy and currently acceptable, or because everyone's doing it, or because they feel intimidated by threats or epithets—categorizing, judging and rewarding by race is all the rage in higher education. But we on this campus find in our documents words that say that admissions, appointments, promotions, honors, salaries and aid will be carried out without regard to race, color, sex or creed. *Without regard*. Just two little words, but two words that teach the best that we can teach.



John Agresto

We are here; and this is our country; and the question for the philosophers and the statesmen of the land ought to be, What principles should dictate the policy of the action towards us? We shall neither die out, nor be driven out; but shall go with this people, either as a testimony against them, or as an evidence in their favor throughout their generations. . . .

It is evident that white and black "must fall or flourish together." In the light of this great truth, laws ought to be enacted, and institutions established—all distinctions, founded on complexion, ought to be repealed, repudiated, and forever abolished—and every right, privilege, and immunity, now enjoyed by the white man, ought to be as freely granted to the man of color....

Frederick Douglass, from
The North Star,
November 16, 1849

BROWN V. BOARD OF EDUCATION

Brown *did not immediately concern itself with higher education. Nevertheless, the core statement of* Brown, *that in the field of race "separate" cannot mean "equal," has been both the focal point and, now it seems, the point to be avoided in campus discussions on race. —J.A.*

Excerpted from
Brown et al. v. Board of Education of Topeka et al.
May 17, 1954.

Mr. Chief Justice Warren:

Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment—even though the physical facilities and other "tangible" factors of white and Negro schools may be equal.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws.

* * * * *

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

THE CIVIL RIGHTS ACT

Excerpted from
The Civil Rights Act,
July 2, 1964.

Title VI, Sec. 601

No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.

Title VII, Sec. 703

(a) It shall be an unlawful employment practice for an employer

(1) 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; or

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Title VII, Sec. 704

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.

THE AMBIGUOUS LEGACY OF BROWN V. THE BOARD OF EDUCATION

by
Diane Ravitch

Thus it was that the idea of a color-blind society fell out of fashion almost as soon as it was enacted into law and well before it became part of custom. Those who continue to defend the belief that individuals should not be judged in relation to their race, religion, sex, or national origin sense that they are fighting, at least for the time, a losing battle.

In 1954, the Supreme Court declared in the *Brown* decision that state-imposed school segregation was unconstitutional and invalidated state laws which classified and assigned children to schools on the basis of their race. Today, the *Brown* decision is cited as authority for a network of judicial decisions, laws, and administrative regulations that specifically require institutions to classify people on the basis of their group identity and to deal with them accordingly. How the civil rights movement, the judiciary, and the government moved from the goal of equal treatment for all, regardless of group affiliation, to present practices is one of the most significant trends of the past quarter century.

By removing from the states the power to use race to differentiate among their citizens, the *Brown* decision provided a strong precedent to bar racial discrimination in every realm of civic and public activity. Its coverage was strengthened and extended by the Civil Rights Act of 1964, which prohibited discrimination based on race, color, religion, sex, or national origin. The Civil Rights Act embodied the fundamental principle that everyone should be considered as an individual without regard to social origin. This ideal attracted the support of a broad alliance composed of blacks, liberals, organized labor, Catholics, Jews, and others who perceived that the black cause was the common cause of everyone who wanted to eliminate group bias from American life. The particular genius of the civil rights movement was its successful forging of a coalition led by blacks but far more numerous than blacks alone; at the height of its power, in 1964-65, the coalition was potent enough to win passage of the Civil Rights Act, federal aid to education, the Voting Rights Act, and the anti-poverty program.

The relatively recent shift in focus from anti-discrimination to group preferences has splintered the civil rights coalition of the 1960s and has changed the nature of civil rights issues. The issues of the 1980s are far more complex than were those of the 1950s and 1960s, when the public could readily understand the denial of the civil and political rights of black people. In 1984, the issues are not capable of generating folk heroes like Rosa Parks, James Meredith, and Autherine Lucy, or charismatic leaders like Martin Luther King, Jr., or villains like Eugene "Bull" Connor. Police brutality and racially closed primaries were powerful emotional symbols precisely because they presented so little ambiguity; to those concerned about the realization of American democratic ideals, there was only one side to be on. Today, it is by no means simple to sort out the right side and the wrong side of such issues as racial balancing, busing, affirmative action, and quotas, and people of good will of all races and sexes are to be found on different sides of these questions.

If one-time allies in the struggle for universalism and equal rights now disagree, it is not simply because the issues today are com-

plicated, but also because there is an essential dilemma, which is all too rarely recognized as judicial decisions and bureaucratic regulations reinforce one another: The group-based concepts of the present are in conflict with the historic efforts of the civil rights movement to remove group classifications from public policy. And at the heart of this dilemma is the *Brown* decision, which exemplified in its history the ideals of the civil rights movement and the transition from "color-blind" to "color-conscious" policies.

* * * * *

When the *Brown* decision was announced on May 17, 1954, it was a unanimous victory for the civil rights forces. It struck down the *Plessy v. Ferguson* doctrine of "separate but equal"; it declared that "separate educational facilities are inherently unequal"; and it ruled that segregation in public education was unconstitutional. It appeared that the grounds for the decision were more sociological than constitutional, which in retrospect seems surprising in light of the solidity of the constitutional argument and the controvertible nature of the sociological evidence. The Court did not, in its *Brown* decision, declare the Constitution to be color-blind, which explains some of the present day confusion about the meaning of the decision. The decision can be read, as it was then, as removing from the states the power to use race as a factor in assigning children to public schools; and it can be read, as it is now, as a mandate to bring about racial integration in the public schools by taking race into account in making assignments.

Today the *Brown* decision is considered the progenitor of a host of color-conscious and group-specific policies. The concept of group rights, as distinct from individual rights, has become commonplace. The decision that was supported to remove from the states the power to assign children to school on the basis of race has become the authority for assigning children to school solely on the basis of race, even where official segregation never existed. One Western school district, which contains 19 variants of the HEW-designated minority groups (blacks, Hispanics, Native Americans, and Asian Americans), has voluntarily undertaken to maintain a racial and ethnic balance in its schools for both students and teachers. How such efforts grew out of a decision that was sought in order to eliminate group labels from public policy is one of the fascinating paradoxes of our time.

For at least the first ten years after the *Brown* decision was rendered, belief in color-blind policy was the animating force behind the civil rights movement.

Not long after Congress passed into law the color-blind principle embodied in the Civil Rights Act of 1964, several trends converged to undermine it.

First, white Southern intransigence had effectively preserved the status quo despite the *Brown* decision. The dismantling of state-segregated school systems was occurring at a snail's pace; by 1964, only two percent of the black students in the Deep South attended schools with white students. . . . Thus, the nearly complete failure of the white South to comply with the *Brown* decision or to make any good faith efforts to desegregate created pressures to find some mechanism to bring an end to their resistance to the law of the land.

Second, the Civil Rights Act of 1964 authorized federal officials to cut off federal funds from districts that failed to desegregate their schools. This meant little in 1964, when federal funds for elementary and secondary schools were limited, but it became a powerful weapon to compel desegregation after 1965, when federal aid to education was passed by Congress.

Third, just as the federal bureaucracy and the federal judiciary began to abandon the color-blind principle, the black power movement emerged. Black power spokesmen ridiculed the leaders of the civil rights movement as Uncle Toms and accommodationists. It was not their rejection of integration that gave them mass appeal, however, but rather their open advocacy of black self-interest. While civil rights leaders championed policies of non-discrimination, the black advocacy movement demanded black principals, black teachers, specific jobs, here and now, period. How could the civil rights movement, so long as it stood by the color-blind principle, hope to compete with the organizations that sought tangible black gains?

Fourth, the color-blind principle lost much of its luster for the civil rights organizations as soon as it was established in law. Once it was a fact, it ceased to be a goal; organizations either generate new goals or become defunct. A new agenda was required, one which was tailored to the pressing economic needs of the black masses.

Fifth, some of those who had led the fight against segregation came to the view that color-blindness is an abstract principle with no

power to alter the status quo and no possibility of making up for the effects of past discrimination, either in institutional or in personal terms.

Thus it was that the idea of a color-blind society fell out of fashion almost as soon as it was enacted into law and well before it became part of custom. Those who continue to defend the belief that individuals should not be judged in relation to their race, religion, sex, or national origin sense that they are fighting, at least for the time, a losing battle. Those in Washington who write the regulations have apparently decided that social origin and group identity are appropriate grounds by which to determine a citizen's eligibility to participate in governmental programs.

This is a turn of events that is not without consequence for American society. We do not have a universalistic civil rights movement in the United States precisely because the only common purpose that could bind dozens of minorities together is the goal of preventing discrimination against *all* minorities. The fight to ban discrimination, which gathered to its banners a powerful coalition of diverse groups, has been replaced for now by groupism, or every interest group for itself. Blacks demand more for blacks, Hispanics more for Hispanics, women more for women, and so on. Competition, all against all, takes the place of cooperation. In the present atmosphere, the idea of universalism is in retreat, an idea whose time came and went with amazing rapidity.

* * * * *

Whether it is possible to treat people as individuals rather than as group members is as uncertain today as it was in 1954. And whether it is possible to achieve an integrated society without distributing jobs and school places on the basis of group identity is equally uncertain. What does seem likely, though, is that the trend towards formalizing group distinctions in public policy has contributed to a sharpening of group consciousness and group conflict. As a people, we are still far from that sense of common humanity to which the civil rights movement appealed; still not a community in which everyone feels responsibility for the well-being of his fellow citizen; still unpersuaded that our many separate islands are part of the same mainland. We may yet find that just such a spirit is required to advance a generous and broad sense of the needs and purposes of American society as a whole.

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Excerpted from "The Ambiguous Legacy of Brown vs. Board of Education," New Perspectives, Summer 1984, U.S. Commission on Civil Rights. Reprinted with permission.

UNIVERSITY OF CALIFORNIA V. ALLAN BAKKE

More than anything else, the Bakke case opened the door for affirmative action, for preferential treatment based on race and for minority scholarships. But how it did so remains one of the most amazing stories in American jurisprudence.

A majority of the court—Powell, Stevens, Burger, Stewart and Rehnquist—rejected the university's affirmative action plan. Four judges—Blackmun, White, Marshall and Brennan—dissented on various grounds, but centering on the belief that the university was engaged in a good faith effort to remedy the evil effects of racism and segregation and that the quotas were benign.

Powell wrote an opinion which said that "the attainment of a diverse student body" was "a constitutionally permissible goal for an institution of higher education," and that race or ethnic background can be viewed as a "plus" in the selection process. Not one other justice thought this analysis constitutionally weighty and none joined Powell in this view. Yet, the four dissenters were happy to agree with Powell's conclusion that, therefore, sometimes race can be used in higher education's policy on admission and rewards. Spurning the argument, they nonetheless accepted the conclusions. And racial preferencing became licit.

Though the University of California did not push the notion and no other justice supported it, "diversity" soon became the important—and only necessary—argument for racial preference on campus. Rather than the older, standard argument of the dissenters—that we must remedy the disadvantage caused by past discrimination—a new and more pervasive position arose: Colleges and their programs and curricula can, and perhaps must, take "diversity" into account; and toward that end racial preferences, once maligned for their injustice, now became constitutionally enshrined when in the service of particular curricular and educational reform.

Because of its importance, I have reprinted below much of the central parts of Powell's position. —J.A.

Excerpted from
Regents of the University of California,
Petitioner, v. Allan Bakke,
June 28, 1978.

Mr. Justice Powell:

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. . . . Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each medical school class. The special program consisted of a separate admissions system operating in coordination with the regular admissions process.

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. On the 1974 form the question was whether [candidates] wished to be considered as members of a "minority group," which the medical school apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." If these questions were answered affirmatively, the application was forwarded to the special admissions

committee. . . . Having passed this initial hurdle, the applicants then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cut-off applied to regular applicants. The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was eight; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16.

* * * * *

Allan Bakke [respondent] is a white male who applied to the Davis Medical School [petitioner] in both 1973 and 1974.

In both years, applicants were admitted under the special program with grade point averages, MCAT scores, and bench mark scores significantly lower than Bakke's.

The trial court found that the special program operated as a racial quota, because minority applicants in the special program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that the university could not take race into account in making admissions decisions, the trial court held the challenged program violative of the federal Constitution, the state constitution, and Title VI [of The Civil Rights Act of 1964].

The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issue involved. ". . . Although the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests . . . the California court held that the Equal Protection Clause of the Fourteenth Amendment required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race."

* * * * *

The parties disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1983). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the "rights established [by the Fourteenth Amendment] are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

En route to this crucial battle over the scope of judicial review, the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the medical school. Respondent, echoing the courts below, labels it as a racist quota.

This semantic distinction is beside the point: The special admissions program is undeniably a classification based on race and ethnic background.

The guarantees of the Fourteenth Amendment extend to persons. Its language is explicit: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. They are personal rights." The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions programs because white males, such as the respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian process. *Carolene Products Co., supra*, at 152-153, n. 4. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny.

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi*, 320 U.S., at 100.
>
> ". . . [A]ll legal restrictions which curtail the rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject

them to the most rigid scrutiny." *Korematsu*, 323 U.S., at 216.

The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

* * * * *

The Court's initial view of the Fourteenth Amendment was that its "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised dominion over him."

As a nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. . . . The guarantees of equal protection, said the Court in *Yick Wo*, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude.

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign."

Justice Brennan [with Justice White, Blackmun and Marshall]

Dissenting Opinion:

Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area. . . .

Against this background, claims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot . . . let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

* * * * *

Properly construed . . . our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.

* * * * *

Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be second-class citizens because of their color. This distinction does not mean that the exclusion of a white resulting from preferential use of race is not sufficiently serious to require justification; but it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone.

* * * * *

There are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. . . . Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without the special protection based on a factor having no relationship to individual worth. *DeFunis v. Odegaard*, 416 U.S. 312, 343 (Douglas, J., dissenting). Third, there is a measure of inequality in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces.

* * * * *

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. . . . [Nonetheless], we have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.

* * * * *

Petitioner identifies, as another purpose of its program, improving the delivery of health care services to communities currently underserved. . . . But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.

[A final] goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education.

". . . 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.' . . ."

The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. Even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

* * * * *

The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.

The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end.

"In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students."

"In Harvard College admissions

the Committee has not set target quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . [Rather] the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students."

In such an admissions program, race and ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

* * * * *

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or "Chicano" that they are totally excluded from a specific percentage of the seats in an entering class. . . .

[W]hen a state's distribution of benefits or imposition of burden hinges on the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

* * * * *

In enjoining petitioner from ever considering the race of any applicant, however, the courts below have failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

Justice Stevens, Chief Justice Berger, Justice Stewart, and Justice Rehnquist

Dissenting Opinion:

Title VI is an integral part of the far reaching Civil Rights Act of 1964. No doubt, when this legislation was being debated, Congress was not directly concerned with the legality of "reverse discrimination" or "affirmative action" programs. Its attention was focused on the problem at hand, the "glaring . . . discrimination against Negroes which exists throughout our Nation," and, with respect to Title VI, the federal funding of segregated facilities. The genesis of the legisla- tion, however, did not limit the breadth of the solution adopted. Just as Congress responded to the problem of employment discrimina-tion by enacting a provision that protects all races, so too, its answer to the problem of federal funding of segregated facilities stands as a broad prohibition against the exclusion of any individual from a federally funded program "on the ground of race." In the words of the House Report, Title VI stands for "the general principle that no person . . . be excluded from par- ticipation . . . on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance."

* * * * *

The University's special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the Medical School because of his race.

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: Discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution."

Alexander Bickel, The Morality of Consent.

WHY RACIAL PREFERENCE IS ILLEGAL AND IMMORAL

by
Carl Cohen

This article appeared in Commentary *in 1979. Although it focused on the then-pending Weber case, I've tried to excerpt from the piece those arguments that have wider scope. —J.A.*

So long-lasting and self-perpetuating have been the damages done to the many blacks and others by discrimination that some corrective steps must be undertaken. . . . [But] in the passion to make social restitution, sensitive and otherwise fair-minded people have gotten the moral claims of living persons badly confused.

[D]eliberately visiting the sins of the fathers upon their innocent sons and grandsons, to the special advantage of persons not connected with the original sinning, is conduct neither lawful nor morally right. To suppose that both the beneficiaries of redress and those who are made to carry its burden are properly identified by race is, to be plain, racism. It is simplistic because, on this view, race by itself—without consideration of the nature or degrees of past injuries, present advantages, or future pains—is sufficient to trigger the preferential device. The mistaken view in question is therefore properly entitled *simplistic ethical racism.*

Injuries are suffered in fact, claims made and burdens carried, by individual persons. Civil society is constituted to protect the rights of the individuals; the sacrifice of fundamental individual rights cannot be justified by the desire to advance the well-being of any ethnic group. Precisely such justification is precluded by the Fourteenth Amendment of our Constitution, whose words—no state "shall deny to any person within its jurisdiction the equal protection of the laws"—express no mere legalism but a philosophical principle of the deepest importance. Explicating that clause, in a now famous passage, the Supreme Court wrote: "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. . . . Equal protection of the laws is not advanced through indiscriminate imposition of inequalities" (*Shelly v. Kraemer* 334 U.S. 1, 22 [1948]).

The nature and degree of the injury done to many Americans because they were black or brown or yellow varies greatly from case to case. Some such injuries may justify compensatory advantage now to those injured. But the calculation of who is due what from whom is a very sticky business; compensatory instruments are likely to compound injustice unless the individual circumstances of all involved—those who were originally hurt, those who benefit now, and those who will bear the cost—are carefully considered. Whatever compensatory advantage may be given—in employment or elsewhere—it must be given to all and only those who have suffered like injury, without regard to their race. What we may not do, constitutionally or morally, is announce in effect: "No matter that you, X, were innocent and gained no advantage; you are white and

[D]eliberately visiting the sins of the fathers upon their innocent sons and grandsons, to the special advantage of persons not connected with the original sinning, is conduct neither lawful nor morally right.

therefore lose points. No matter whether you, Z, were damaged or not; you are black and therefore gain points." If the moral ground for compensatory affirmative action is the redress of injury, the uninjured have no claim to it, and all those individuals of whatever ethnic group who have suffered the injury in question have an equal claim to it.

Racially based numerical instruments have this grave and unavoidable defect: they cannot make the morally crucial distinctions between the blameworthy and the blameless, between the deserving and the undeserving. As compensatory devices they are under-inclusive in failing to remedy the same damage when it has been done to persons of the non-favored races; they are over-inclusive in benefiting some in the favored categories who are without claims, often at substantial cost to innocent persons.

* * * * *

Affirmative steps to eliminate racially discriminatory practices rightly win the assent of all. Affirmative efforts to recruit fairly (whether for on-the-job training programs or for professional schools), affirmative inquiry to determine whether testing is job-related and to ensure that evaluation of performance is not racially infected—in such forms affirmative action is of unquestionable merit. But when, in the name of affirmative action for racial equality, the deliberately unequal treatment of the races is introduced, we suffer a national epidemic of double-speak. Employment advertisements everywhere exhibit this duplicity with an almost ritualized motto: "An equal opportunity/affirmative action employer." The very term "affirmative action" has lost its honor and has become, for most, a euphemism for racial preference.

Nothing is more indicative of the true spirit of a community than the character of the instruments it permits, and of those it precludes, in advancing public policy. Police surveillance to root out spies, the suppression of speech (radical or conservative) to protect the peace —all such instruments are rejected in a decent society. Civil libertarians wisely insist that we forswear instruments that invade the rights of individuals, even when forswearing proves inconvenient. The use of such instruments is precluded, forbidden not just to evil people but to all people. Preference by race is one of the forbidden instruments. The very high priority given to this exclusionary principle, and its applicability to all including the state itself, marks it as *constitutional* in the most profound sense.

Efforts to cut constitutional corners—however well intentioned — corrupt a civil society. The means we use penetrate the ends we achieve; when the instrument is unjust, the outcome will be infected by that injustice. This lesson even civil libertarians have always been relearning.

* * * * *

Defenses of racial preference—by efforts to reinterpret the law, by confused arguments based on "societal discrimination," by claim of executive order—all collapse. It is important to see why they *should* collapse. The defenders, conscious of their own righteous pursuit of racial justice, little doubt that the tools they wish to employ would have the good consequences they hope for. To question the merit of those tools is for them almost a betrayal of the oppressed in whose behalf they claim to battle. In their eyes the conflict is only over whether they are to be permitted to do a good deed—i.e., give preference to racial minorities—not whether it is a good deed, or whether its consequences will be good.

Decency of motivation, however does not insure the goodness of the immediate object, or the goodness of its consequences. Racial justice is an aim that all share; it is distorted when transformed into formulas for ethnic proportionality. . . . Federal appellate courts have not been oblivious to the evils that ensue:

> There are good reasons why the use of racial criteria should be strictly scrutinized and given legal sanction only where a compelling need for remedial action can be shown. . . . Government recognition and sanction of racial classifications may be inherently divisive, reinforcing prejudices, confirming perceived differences between the races, and weakening the government's educative role on behalf of equality and neutrality. It may also have unexpected results, such as the development of indicia for placing individuals into different racial categories. Once racial classifications are embedded in the law, their purpose may become perverted: a benign preference under certain conditions may shade into malignant preference at other times. Moreover, a racial preference for members of one minority might result in discrimination against another

minority, a higher proportion of whose members had previously enjoyed access to a certain opportunity (*Associated General Contractors of Massachusetts Inc. v. Altshuler* 490 F. 2d 9, 17-18 [1973]).

In this spirit three Federal Circuit Courts have repeatedly refused to approve racial quotas in the absence of proved past discriminatory practice dictating that specific remedy.

Racial classifications have insidious long-term results: anger and envy flowing from rewards or penalties based on race; solidification of racial barriers and the encouragement of racial separatism; inappropriate entry of race into unrelated intellectual or economic matters; the indirect support of condescension and invidious judgments among ethnic groups—in sum, the promotion of all the conditions that produce racial *dis*harmony and racial *dis*integration.

* * * * *

All arguments thus far explored incorporate the realization that individuals are indeed injured when disadvantaged solely because of their race. . . . It is callous to minimize the injury done when rights are not respected.

When the ground of that disrespect is race, the injury is particularly offensive. Entitlements in themselves minor . . . become matters of grave concern when manipulated for racial reasons. Where one must sit on a bus or go to the toilet understandably becomes a source of rage and an issue of constitutional proportions when the determination is made by race. Protests over segregated lunch counters had as their target not the culinary opportunities denied, but the immoral character of the ground of their denial.

Applicants to a competitive program have a right to evaluation on some set of relevant criteria—past performance, intellectual promise, character, or whatever—and if deserving on the basis of those criteria, ought not be deprived of place because of race.

* * * * *

The villain . . . is preference by race. [We have] the moral and constitutional commitment to govern ourselves without preference to any by reason of color, or religion, or national origin. If we undermine that commitment—even though it be in an honest effort to do good—we will reap the whirlwind.

Carl Cohen is a professor of philosophy at the University of Michigan in Ann Arbor, and the author of Democracy *and of* Civil Disobedience.

Excerpted from "Why Racial Preference is Illegal and Immoral." Commentary, *June 1979. Reprinted with permission.*

RACIAL PREFERENCES? SO WHAT?

by
Stephen L. Carter

Those of us who have graduated from professional school over the past 15 to 20 years and are not white travel a career path that is frequently bumpy with suspicions that we did not earn the right to be where we are. We bristle when others raise what might be called the affirmative action question "Did you get into a school because of a special program?" That prickly sensitivity reveals a rarely mentioned cost of racial preferences. The cost I have in mind is to the psyches of the beneficiaries themselves, who simultaneously want racial preferences to be preserved and to force the world to pretend that no one benefits from them. And therein hangs a tale.

* * * * *

For my part, the matter is simple: I got into law school because I'm black. And I can prove it.

As a senior at Stanford, I applied to about a half dozen law schools. Yale, where I would ultimately enroll, came through fairly early with an acceptance. So did all but one of the others. The last school, Harvard, dawdled and dawdled. Finally, toward the end of the admission season, I received a letter of rejection.

Then within days, two different Harvard officials and a professor contacted me by telephone to apologize. They were quite frank in their explanation for the "error." I was told by one official that the school had initially rejected me because "we assumed from your record that you were white." (The words have always stuck in my mind, a tantalizing reminder of what is expected of me.) Suddenly coy, he went on to say that the school had obtained "additional information that should have been counted in your favor"—that is, Harvard had discovered the color of my skin. And if I had already made a deposit to confirm my decision to go elsewhere, well, that, I was told, would "not be allowed" to stand in my way should I enroll at Harvard.

Naturally, I was insulted by this miracle. 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. In other words, my academic record was too good for a black Stanford undergraduate but not good enough for a white Harvard Law student. Because I turned out to be black, however, Harvard was quite happy to scrape me from what it apparently considered the bottom of the barrel.

My objective is not to single out Harvard for special criticism; on the contrary, I make no claim that a white student with my record would have been admitted to any of the leading law schools. The insult that I felt came from the pain of being reminded so forcefully that I was good enough for a top law school only because I happened to be black.

* * * * *

Naturally, I should not have been insulted at all; that is what racial preferences are for—racial preference. But I was insulted and went off to Yale instead, even though I have now and had then absolutely no reason to imagine that Yale's judgment was based on different criteria than Harvard's. Because Yale is far more selective, the chances are very good that I was admitted at Yale for essentially the same reason that I was admitted at Harvard—the color of my skin made up for evident deficiencies in my academic record.

So I am unable to fool myself: Without that leg up, the thumb on the scale, the extra points due to skin color—choose your own metaphor—I would not be where I am today. And I too must be able to say, "So what?" and go on from there.

Whatever the pain it might cause, the affirmative action question, whether at Yale more than a decade ago or at Chicago last year, should come as no surprise. And if those of us who have benefited from racial preferences are not prepared to treat the question in a serious manner, to admit to the advantage that we have been given, then we are not after all the beneficiaries of affirmative action: We are its victims.

Stephen L. Carter is a professor at Yale Law School.

INSIDE AMERICAN EDUCATION

by
Thomas Sowell

Since the 1960s, another category of preferentially admitted students has been added—racial and ethnic minorities. In the controversies which have arisen around the issue of preferential admissions by race or ethnicity, those on both sides of the issue have often argued as if the circumstances—and especially the academic failures—of minority students were unique social phenomena with unique causes. In reality, there is nothing uncommon about a high failure rate among people preferentially admitted to college. This pattern has long been common among college athletes, whether they were white or black. Even a highly privileged group like alumni sons at Harvard, during the era when more than half of those sons who applied were admitted, were disproportionately represented among students who flunked out.

In short, preferential admissions tend to lead to substandard academic performance, whether those admitted are privileged or underprivileged. What has been unique about students preferentially admitted by race has been the large numbers involved, the magnitude of the preferences, the magnitude of the hypocrisy, and the magnitude of the academic and social disasters which have followed.

"NEW RACISM" AND OLD DOGMATISM

Increasing hostility toward blacks and other racial minorities on college campuses has become so widespread that the term "the new racism" has been coined to describe it. For example, a dean at Middlebury College in Vermont reported that for the first time in 19 years, she was now being asked by white students not to assign them black roommates. There have been reports of similar trends in attitudes elsewhere. A professor at the University of California at Berkeley observed: "I've been teaching at U.C. Berkeley now for 18 years and it's only within the last three or four years that I've seen racist graffiti for the first time." Another Berkeley professor, recalling support for the civil rights movement on the campuses of the 1960s and 1970s, commented: "Twenty years later, what have we got? Hate mail and racist talk."

Much uglier incidents, including outright violence, have erupted on many campuses where such behavior was unheard of, just a decade or two earlier. At the University of Massachusetts, for example, white students beat up a black student in 1986 and a large mob of whites chased about 20 blacks. A well-known college guide quotes a Tufts University student as saying, "Many of my friends wouldn't care if they never saw a black person again in their lives."

Racism, as such, is not new. What is new are the frequency, the places, and the class of the people involved in an unprecedented escalation of overt racial hostility among middle class young people, on predominantly liberal or radical campuses. Painful and ugly as these episodes are, they should not be surprising. A number of people predicted such things many years ago, when colleges' current racial policies began to take shape. They also predicted some of the other bad consequences of those policies. These predictions and warnings were ignored, dismissed, or ridiculed by those who believed the prevailing dogmas on which academic racial policies were based. Now that these predictions are coming true, the dogmatists insist that the only solution is a more intensive application of their dogmas.

PREDICTIONS VERSUS DOGMAS

When the idea of special, preferential admissions for racial and ethnic minorities became an issue during the 1960s, two fundamentally different ways of evaluating such proposals emerged. One approach was to discuss the *goals* of preferential admissions, such as the benefits assumed to be received by minority students, by the groups from which they came, by the institutions they would attend, and by American society as a whole. This became the prevailing approach, which dominated both intellectual discourse and academic policy-making.

Another approach was to ask: What *incentives* and *circumstances* were being created—for the minority students, for their fellow students, for college administrators, and for others—and what were the likely consequences of such incentives and circumstances? When the issue was approached in this way, many negative potentials of preferential policies became apparent. However, relatively few people risked moral condemnation by asking such questions in public, so that there was little need for those with a goals-oriented approach to answer them. Now history has answered those questions, and these answers have provided

both abundant and painful confirmation of the original misgivings, based on examining the incentives and constraints of the academic racial policies.

The issue is not one of a simple, direct reaction to preferential admissions policy, though that by itself generates considerable resentment. The many academic and emotional ramifications of such policies set in motion complex reactions which pit minority and non-minority students against each other, and generate stresses and reactions among the faculty, administrators, and outside interests. Though many colleges and universities have been caught by surprise and have been unable to cope with the unexpected problems—or have responded in ways which have created new and worse problems—much of what has happened has followed a scenario set forth by critics more than two decades ago, and much of the intervening time has seen a steady building of tensions toward the ugly episodes of recent years, which have now been christened, "the new racism."

What was at issue, then and now, is not whether there should be larger or smaller numbers of minority students attending college, but whether preferential admissions policies should be the *mechanism* for making a college education available to more minority students. There are other ways of increasing the number of minority students—not only in theory, but as a matter of historical fact. Between 1940 and 1947, for example, there was a 64 percent increase in the number of non-white students attending postsecondary institutions due to financial aid under the G.I. Bill for veterans returning from World War II. This made a college education available to the black masses for the first time. During a corresponding period of the 1960s—from 1960 to 1967—there was a 49 percent increase in the number of black students attending college, but this later increase was often accompanied by preferential admissions policies, while the earlier and larger percentage increase had been accomplished simply through more financial support.

The point here is that a substantial increase in minority student enrollment in higher education can be achieved with or without preferential admissions policies. Money is the crucial factor, given the lower incomes of blacks and some other minority groups. The case for preferential admissions policies must therefore stand or fall on its own merits, though the proponents of such policies often argue as if preferential admissions were the only possible way to increase substantially the numbers of minority students in college. Unfortunately, proponents of preferential admissions policies have not only ignored history; they have ignored much of what has happened in the wake of these polices.

* * * * *

Both false and true racial incidents reveal something of the atmosphere on college campuses, an atmosphere whose complex crosscurrents derive ultimately from the needless pressures generated by double standards and double talk, both of which poison the atmosphere required for people to get along. As race relations have worsened in the wake of policies designed to make them better, there has been no rethinking of the original assumptions on which these policies were based.

* * * * *

The obvious self-serving nature of the usual administrative responses to racial incidents—free speech restrictions, making ethnic studies courses mandatory, larger quotas for minority students and faculty—provide an impetus to new and ever-escalating rounds of double standards and racial backlash. Where will this self-reinforcing spiral end? . . . The growing evidences of racial hostility and sporadic outbreaks of violence which we in the United States call "the new racism" may be an early warning that we are heading in the same direction as other countries which have promoted preferences and quotas longer and more strongly. But the prevailing dogmatism among academics suggests that the real meaning of these early warnings may not be understood until long after it is too late.

Thomas Sowell is a senior fellow at the Hoover Institution.

Excerpted from Inside American Education, *New York: Free Press, 1993. Reprinted with permission.*

Minority Scholarships: A Chronology

From: The Chronicle of Higher Education
November 9, 1994

December 1990

Michael L. Williams, assistant secretary of education for civil rights, writes to the sponsoring committee of the Fiesta Bowl, saying that its plan to establish minority scholarships at the two universities competing in that year's game would probably violate federal anti-bias laws. In interviews following the release of the letter, Mr. Williams says the department generally considers it illegal for colleges to reserve scholarships for members of particular ethnic or racial groups.

December 1990

Following widespread criticism of Mr. Williams' statements, the Education Department issues a new policy. The department says that colleges may not use their own money for minority scholarships, but may use state funds or private donations to finance the awards.

March 1991

Lamar Alexander, newly installed as education secretary, says colleges can ignore both policies announced by the Education Department in December 1990. He promises to review the legal issues involved and says that colleges may maintain their policies during the review.

May 1991

Federal District Court Judge J. Frederick Motz rejects a Hispanic student's challenge of a scholarship program for black students at the University of Maryland at College Park. Judge Motz rules that the program is justified as part of a court-ordered desegregation plan. The student, Daniel J. Podberesky, appeals.

December 1991

Secretary Alexander proposes regulations to ban minority scholarships unless the awards are for programs created by Congress, designed to remedy past discrimination that has been certified by a federal court or agency, or established by private donors who restrict their gift to minority scholarships.

February 1992

A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit unanimously orders a new trial of Mr. Podberesky's lawsuit. The appeals court says that past discrimination alone is not enough to justify minority scholarships and that the University of Maryland would have to demonstrate existing effects of discrimination.

June 1992

Secretary Alexander agrees to delay issuing final regulations on minority scholarships until the General Accounting Office has time to study the issue. Members of Congress sympathetic to the scholarships had requested the delay, hoping it would prevent any final rules from being issued by the Bush administration.

November 1992

Bill Clinton is elected president.

January 1993

During his confirmation hearings to become education secretary, Richard W. Riley says he believes minority scholarships are "valid, good and legal."

November 1993

Judge Motz, following a second trial of the Podberesky case, again rules in favor of the University of Maryland's scholarship program. The judge finds that the university demonstrated a connection between its past discrimination and its current difficulties in recruiting and retaining black students.

January 1994

The G.A.O. [General Accounting Office] releases its study on minority scholarships. It finds that two-thirds of undergraduate colleges offer at least one such scholarship, but that only five percent of all awards for undergraduates are restricted to minority students.

February 1994

Secretary Riley issues guidelines on minority scholarships, stating that they are legal if they are designed to remedy past discrimination or to promote diversity.

October 1994

A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit unanimously reversed Judge Motz's November 1993 ruling and orders the University of Maryland to reconsider Mr. Podberesky's application for a scholarship—without regard to his race. *(See pages 28-30 of this issue.)*

COLOR-BLINDED

by
***the Editors of* The New Republic**

It is hard to argue that a scholarship restricted to blacks can be acceptable if a scholarship restricted to whites is not. On the other hand, university catalogues are full of scholarships based on inherited characteristics unrelated to the merit of the recipients—such as scholarships for children of alumni, or for people from Alaska or Guam, or for the offspring of fire fighters.

On the most abstract level of moral reasoning, there is no real difference between these distinctions and the racial ones. But because race is the most dangerous divide in American society, any sort of discrimination on the basis of race carries the potential for damage to the social fabric. America's ugly history of negative discrimination, which is the most powerful argument in favor of "reverse" or "positive" discrimination, is also the most powerful argument against it.

The controversy is not only about abstract principles but also about practical public policy, and as such it ought to be informed by empirical facts. . . . At Penn State, under a program still in effect but about to be modified, all minority students who earn a 2.5 grade point average receive $620 a year, and all who earn a 2.75 average get $1,240, regardless of need. Whites, regardless of need, receive no such bonus. Harvard does not give race-based undergraduate scholarships, but does provide full tuition, room, and board to minority graduate students, regardless of need. Columbia has a $25 million scholarship fund established by the Kluge Foundation exclusively for minorities, though the university says that no needy student is denied aid.

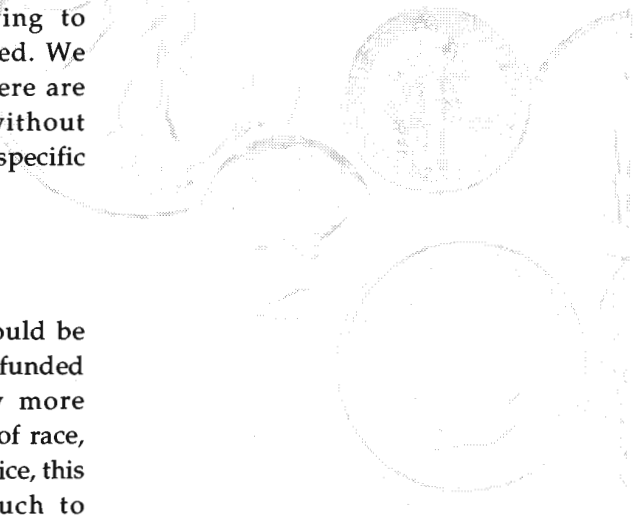
But it is not clear that any of these students would lose their educational opportunity if purely race-based scholarships were abolished. And it is clear that blacks and Hispanics would continue to be the major beneficiaries of scholarships awarded primarily on the basis of need. Recognizing this, some make a different argument. Richard Rosser, president of the National Association of Independent Colleges and Universities, contends that race-based scholarships are a university's way of saying to minorities, "You are valued. We want you." But surely there are ways of saying that without restricting scholarships to specific races.

* * * * *

The best [outcome] would be the expansion of federally funded scholarship aid to allow more needy students, regardless of race, to get an education. In practice, this would do at least as much to encourage and support a minority presence at our colleges and universities as racially based scholarships. It would have the added advantage of not provoking the resentment that racial discrimination, whatever its goal, inevitably arouses.

The controversy over race-based scholarships is of a familiar kind: in a recessionary climate, people increasingly divide themselves into racial and ethnic teams to fight over dwindling economic and social goods. What is needed is not ever more exquisitely calibrated measurements of racial and ethnic entitlement. What is needed is the will to make the whole society both richer and more equitable.

We need racial diversity on our campuses, just as we need a diversity of religions, political creeds, artistic talents, and intellectual inclinations. But the encouragement of that diversity should be conditioned by merit and by need, not by racial exclusivity.



RACE-TARGETED AID

Excerpted from a news release on race-targeted aid, issued by Richard W. Riley, Secretary of Education, February 17, 1994.

U.S. Secretary of Education Richard W. Riley today announced that the department is clarifying the circumstances under which race-targeted financial assistance may be used.

"We want the doors to post-secondary education to remain open for minority students," Riley said. "This policy helps to achieve that goal in a manner that is consistent with the law. We have taken into account the recent GAO [General Accounting Office] report, as well as extensive public comments, and developed a policy that will help ensure all students access to higher education."

Shortly after taking office, Riley expressed support for colleges and universities that have accepted the challenge of providing diversity on their campuses. The secretary directed his staff to prepare a policy that would be fair to all students, would be based on a study of current scholarship practices, and would guide colleges and universities to successful compliance with the civil rights statutes. The new policy accomplishes all three goals.

Riley said his review concluded that colleges can use financial aid to remedy past discrimination and to promote campus diversity without violating federal anti-discrimination laws.

Permissible under the final policy guidance:

-aid to disadvantaged students, without regard to race or national origin, even if the awards go disproportionately to minority students;

—aid awarded on the basis of race or national origin when authorized by a particular federal statute such as the Patricia Roberts Harris Fellowship Program;

—aid on the basis of race or national origin to remedy past discrimination;

—aid on the basis of race or national origin if it is narrowly tailored to achieve a diverse student body at the college or university;

—aid accepted by a school from private sources and restricted by race or national origin, if used to remedy discrimination or achieve diversity, consistent with the other principles in the guidance.

The policy guidance replaces a proposed policy published by the department in December 1991. The major changes are:

(1) postsecondary institutions need not wait for a formal finding by a court, legislative body or administrative agency such as OCR before taking steps to remedy their past discrimination;

(2) efforts to achieve diversity need not be limited to using race as one among several competitive factors if the institution can justify that using race as an eligibility criterion is a narrowly tailored part of those efforts;

(3) historically black colleges and universities may participate in third-party programs for black students that are also open to other students at other institutions.

The department expects most colleges that target some of their financial aid to minority students will be able to justify their programs under this guidance. However, if a college or university has a student aid program that cannot be justified, it will have up to two years to bring the program into compliance with Title VI [of The Civil Rights Act of 1964].

A LETTER TO THE SECRETARY OF EDUCATION

What lesson do we teach our students if we say that their color makes them worthy of a benefit—a benefit denied to others because they are a different color? Does this prepare them well for the world of work that they'll soon enter?

St. John's College
Santa Fe, New Mexico
The President

March 22, 1994

Mr. Richard Riley
Secretary of Education
United States Department
of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-0100

Dear Dick:

I was saddened to read about your stand on minority scholarships. Right now, because most of us still believe in a nation where race should be an irrelevant characteristic, most colleges give students money on the basis of need, or need and merit, not on the basis of color. With the blessing your office has given to racial scholarships, I now fear they'll become part of the norm rather than, as now, the great exception.

What lesson do we teach our students if we say that their color makes them worthy of a benefit—a benefit denied to others because they are a different color? Does this prepare them well for the world of work that they'll soon enter?

Moreover, it puts those of us who proudly say in our college catalogues that everything is "without regard to race, creed, color, sex or national origin" in a very awkward position. Shall we now swallow our principles and act "with regard" to these characteristics? Will we be seen as racist for trying hard not to take race into account?

On a practical level, this action will decrease racial diversity in many places. If we stick to our ideals of color-blindness and other colleges and universities "buy" people of color because of their color through their scholarship programs, do you think we can compete on an even ground? The department's actions now have the effect of penalizing colleges for their high-mindedness.

For ages, the general public has looked to higher education to be a light to society, a leader in helping us reach the public good. Yet now, just as we teach each other to put color aside, to forget about rewarding and punishing on the basis of race, we have colleges and universities saying and doing the opposite: Dwell on race. Reward people on the basis of race. Give them expectations that benefits are due to them because of their race. And take money that was meant to help the poor go to college and give it away on the basis of exactly those kinds of distinctions we hoped to overcome. It is a seriously flawed policy.

Sincerely,

John Agresto

RESPONSE FROM THE SECRETARY OF EDUCATION

United States Department of Education
The Secretary

April 26, 1994

President John Agresto
St. John's College
Santa Fe, New Mexico 87501

Dear John:

Thank you for your thoughtful letter dated March 22, 1994, in which you expressed your views concerning the U.S. Department of Education's (Department) guidance on race-targeted financial aid. I also appreciate your offer to print information on the department's policy in your newsletter. Please feel free to print this letter as a statement of the department's position.

I can assure you that the department carefully considered every aspect of this policy guidance as it was developed, taking into account the concerns expressed by students, higher education officials, civil rights organizations, and other parties interested in the subject. The department reviewed nearly 600 written comments from the public before issuing the final policy guidance, most of which supported the use of race-targeted financial aid to promote diversity and minority access to postsecondary education. The department also considered the findings made by the General Accounting Office (GAO) in a report on minority-targeted scholarships released on January 14, 1994. According to the GAO report, race-targeted scholarships constitute a very small percentage of the scholarships awarded to students at postsecondary institutions, but are considered to be an important tool for the recruitment and retention of minority students.

The guidance identifies and discusses five principles under which the consideration of race or national origin in the award of financial aid is permissible. The guidance does not require colleges to adopt race-targeted aid programs; it merely states the circumstances under which such programs are permissible under Title VI. These principles apply to financial aid for students of all races and national origin groups.

As stated in the guidance, I also encourage the use by postsecondary institutions of other efforts to recruit and retain minority students, which are not affected by the policy guidance.

I understand and appreciate your concerns, and I too look forward to the day when no college will need to consider race in order to provide equal access and a diverse educational environment and experience. Indeed, the department is strongly committed to the goal of ensuring equal access for all students regardless of race, color, or national origin, and has recognized this paramount goal in its mission statement. At this point in time, however, I do not believe that we have achieved this important objective. Due to a long history of discrimination and limited access to higher education for many groups of students, I believe that it may still be necessary for colleges to consider race under certain circumstances when awarding financial aid, and (as explained in the legal analysis in the policy guidance) that the law does support this limited consideration. Note also, however, that the policy guidance explicitly calls for periodic reassessment by colleges of their race-targeted financial aid programs to ensure that they are used only when necessary to achieve legally recognized objectives.

Thank you again for taking the time to write and for sharing your thoughts with me on this important subject.

Yours sincerely,

Richard W. Riley

RACE, SCHOLARSHIPS AND THE AMERICAN WAY

by
Lamar Alexander

. . . the most stubborn barrier of all may be the very notion that our rights and liberties are somehow rooted in groups, not in individuals, so that people should be rewarded or restricted on the basis of race.

The Clinton Administration recently ruled that colleges may award scholarships based exclusively on race. It made me think of my late friend Alex Haley, who wrote *Roots* and helped write *The Autobiography of Malcolm X*.

One of Alex's most wonderful stories was about his father Simon and how he made his way through college. Simon was the only child "wasted" by his sharecropper parents, that is, allowed to graduate from high school rather than work in the fields. After a difficult two years at AT&T College in Greensboro, N.C., Simon found a summer job as a porter on the train between Buffalo and Pittsburgh. Late one night, a man having trouble sleeping rang the bell to request a glass of warm milk. Young Simon brought it. An extended conversation ensued. There was a good tip, but Simon thought nothing more about it.

Simon returned to campus reluctantly in the fall. Other students were making fun of his one pair of pants and shoes. It was a struggle to make passing grades without textbooks and while working outside jobs. He was about to give it up. Then word came that the college president wanted to see him. Simon went to the administration office. The president handed him an envelope containing a $500 check, exactly enough to pay for his tuition and expenses. The check had come from the man on the train.

When I was president of the University of Tennessee, we wanted to commemorate the story of "The Man on the Train" with a Simon P. Haley scholarship. Someone said, "Alex, we'll make it for young black men just like your father."

Alex thought for a minute, and then he said "No. The scholarships should be for everybody."

I remembered what Alex said when President Bush appointed me U.S. secretary of education in early 1991 and I found on my desk the question: Does Title VI of the Civil Rights Act of 1964 permit a college receiving federal aid to award or deny scholarships solely on the race of a student?

The statutory language seemed clear enough: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

So I said no, college scholarships should be for everybody. Now my successor, Dick Riley, has "straightened out" that decision by ruling that a college may, after all, discriminate on the basis of race. He doesn't mean it this way, but it's an invitation to quotas and it's a mistake.

Let's be clear: There is no disagreement about helping needy students. Half of all U.S. college students have a federal grant or loan to help pay for college, almost always based on financial need. Such awards go disproportionately to minorities. What's more, any college president with a warm heart

and a little common sense has many other ways under the law to help a deserving student without focusing on his or her skin color.

What we don't agree about is whether U.S. national policy should be that it's okay to choose one race over another in the granting of scholarships. I believe that this is wrong.

Should, for example, the University of California say to Roosevelt High School seniors in Los Angeles, "We have a scholarship for the Latino, but not for the African-American, one for the Asian student but not for the white student?"

The answer to such questions goes straight to the heart of the kind of university that we want. And what kind of country we want.

Racial preferences and quotas are almost never a good idea. They're an especially bad idea on college and university campuses, too many of which are bewitched by a cult of enforced diversity that feeds straight into an ugly mood of separatism and resentment.

I much prefer—most of us do—campuses that attract people of many different backgrounds. But there are ample ways to achieve that result without scholarships based on race. (In fact, it is hard to imagine a student eligible for a race-exclusive scholarship who might not be eligible for some other scholarship based on need, or merit, or upon an effort to create campus diversity or to remedy past discrimination, or even a scholarship that is funded privately or created specifically by federal law. My decision in 1991 pointed out that the law permits all of these options.)

Growing up in the South, I understand why many Americans feel moved to offer race-based financial aid. I have spent much of my adult life—as college newspaper editor, governor, university president and citizen—creating ways to knock down barriers that closed doors, especially to black Americans.

But the most stubborn barrier of all may be the very notion that our rights and liberties are somehow rooted in groups, not in individuals, so that people should be rewarded or restricted on the basis of race.

That's not the promise of American life. Abraham Lincoln did not speak of preferences based on race. Martin Luther King, Jr. said that men and women should be judged by the content of their character, not the color of their skin. Our constitution speaks of equal protection.

When we give that up, we give up a great deal. There are too many examples of how quotas become ceilings and how preference for one becomes denial for another. Looking around the world, we can see what happens to societies that become preoccupied with race, ethnicity or group.

Simon Haley discovered that, especially in America, education is the best way back toward the front of the line. He graduated first in his class from college and went on to Cornell to pursue his master's degree. He raised children who include an architect, the current chairman of the U.S. Postal Rate Commission, a music teacher, and a Pulitzer Prize-winning writer. We should be trying to create opportunities like Simon's for every young American, regardless of race.

Instead, on this as on many other matters, the Clinton Administration is leading the country—with mounting speed and certainty—in exactly the wrong direction. This time, they're leading us away from the dream of making one people from many. Instead of bringing us together, they're tugging us apart, inevitably pitting us one against the other. If that is what we are teaching, no wonder so many of our children and grandchildren are doubting the American Dream. It is hard to see the promise of American life if the leaders of our country cannot remember what the promise is.

My friend Alex said it best. Opportunities, such as scholarships, should be for everybody.

Lamar Alexander has been U.S. secretary of education, president of the University of Tennessee, and governor of Tennessee.

Excerpted from "Of race, scholarships and the American way," The Washington Times, *Wednesday, March 16, 1994. Reprinted with permission.*

PODBERESKY V. UNIVERSITY OF MARYLAND AT COLLEGE PARK

Let's end this issue of Letters *with the most recent minority-scholarship case,* Podberesky v. University of Maryland. *In upholding the right of Daniel Podberesky not to be excluded from scholarship competition because of his ethnicity (Hispanic), the U.S. Court of Appeals for the Fourth Circuit restated and reaffirmed the old American notion that, except in the narrowest of circumstances, "race-neutral solutions" are to be preferred to those that are race-exclusive. Whether this decision will stand remains to be seen. —J.A.*

Excerpted from
Daniel J. Podberesky v.
University of Maryland at College Park
October 27, 1994.

Mr. Widener, Circuit Judge:

The issue in this case is whether the University of Maryland at College Park may maintain a separate scholarship program that it voluntarily established for which only African-American students are eligible. Because we find that the district court erred in finding that the university had sufficient evidence of present effects of past discrimination to justify the program and in finding that the program is narrowly tailored to serve its stated objectives, we reverse the district court's grant of summary judgment to the university. We further reverse the district court's denial of Podberesky's motion for summary judgment, and we remand for entry of judgment in favor of Podberesky.

* * * * *

As we have said before,

"Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (plurality opinion) (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J.)). The rationale for this stringent standard is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome. . . . It thus remains our constitutional premise that race is an impermissible arbiter of human fortunes." *Maryland Troopers Ass'n v. Evans*, 993 F. 2d 1072, 1076 (4th Cir. 1993).

* * * * *

We have established a two-step analysis for determining whether a particular race-conscious remedial

measure can be sustained under the Constitution: (1) the proponent of the measure must demonstrate a "strong basis in evidence for its conclusion that remedial action [is] necessary;" and (2) the remedial measure must be narrowly tailored to meet the remedial goal.

* * * * *

[W]e disagree with the district court that the first effect, a poor reputation in the African-American community, and the fourth effect, a climate on campus that is perceived as being racially hostile, are sufficient, standing alone, to justify the single-race Banneker Program. As the district court's opinion makes clear, any poor reputation the university may have in the African-American community is tied solely to knowledge of the university's discrimination before it admitted African-American students. There is no doubt that many Maryland residents, as well as some citizens in other states, know the university's past segregation, and that fact cannot be denied. However, mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this one. Our decisions do not permit such results.

The hostile climate effect proffered by the university suffers from another flaw, however. The main support for the university's assertion that the campus climate is hostile to African-American students is contained in a survey of student attitudes and reported results of student focus groups. For an articulated effect to justify the program, however, there must be a connection between the past discrimination and the effect. . . . The district court appears to have found the connection between the university's previous discriminatory acts and the present attitudes obvious, but we have not so found it. The frequency and regularity of the incidents, as well as claimed instance of backlash to remedial measures, do not necessarily implicate past discrimination on the part of the university, as opposed to present societal discrimination, which the district court implicitly held.

When we begin by assuming that every predominately white college or university discriminated in the past, whether or not true, we are no longer talking about the kind of discrimination for which race-conscious remedy may be prescribed. Instead, we are confronting societal discrimination, which cannot be used as a basis for supporting a race-conscious remedy. There is no doubt that racial tensions still exist in American society, including the campuses of our institutions of higher learning. However, these tensions and attitudes are not sufficient ground for employing a race-conscious remedy at the University of Maryland.

* * * * *

We turn next to the two effects that rely on statistical data: under representation of African-American students at the university and low retention and graduation rates for African-American students. The district court found that there was strong evidence of African-American underrepresentation in the university's entering-student classes. With respect to the low retention and graduation rates, the district court found that the statistics showed that African-American students had higher attrition rates than any other identifiable group on campus.

* * * * *

Even if we assumed that the university had demonstrated that African-Americans were underrepresented at the university and that the higher attrition rate was related to past discrimination, we could not uphold the Banneker Program. It is not narrowly tailored to remedy the under representation and attrition problems.

* * * * *

The district court found that the Banneker Program attracted "high-achieving black students" to the university, which "directly increases the number of African-Americans who are admitted and likely to stay through graduation. Even more importantly, the Program helps to build a base of strong, supportive alumni, combat racial stereotypes and provide mentors and role models for other African-American students. Continuation of the Program thus serves to enhance [the university's] reputation in the African-American community, increase the number of African-American students who might apply to the university, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on campus." In sum, the district court found that the Banneker Program is employed by the university as an effective recruiting tool that draws high-achieving African-Americans to the university. The district court fur-

ther noted that the university's "success in curing the vestiges of its past discrimination depends upon it attracting high-achieving African-Americans to the College Park campus." . . . If the purpose of the program was to draw only high-achieving African-American students to the university, it could not be sustained. High-achievers, whether African-American or not, are not the group against which the university discriminated in the past.

* * * * *

The district court found the program to be narrowly tailored to increasing representation because an increase in the number of high-achieving African-American students would remedy the under representation problem. The district court so found because it reasoned that the Banneker Scholars would serve as mentors and role models for other African-American students, thereby attracting more African-American students. The Supreme Court has expressly rejected the role-model theory as a basis for implementing a race-conscious remedy, as do we.

We are thus of opinion that, as analyzed by the district court, the program more resembles outright racial balancing than a tailored remedy program. As such, it is not narrowly tailored to remedy past discrimination. In fact, it is not tailored at all.

* * * * *

The causes of the low retention rates submitted both by Podberesky and the university and found by the district court have little, if anything, to do with the Banneker Program. To the extent that the district court's opinion can be read as having found a connection between the university's poor reputation and hostile environment and the Banneker Program, it is on either a role model theory or a societal discrimination theory, neither of which can be sustained. In addition, there is no connection between the Banneker Program and shared experience with family members, African-American faculty members, or jobs and housing. Even if there is some connection between the two, the university has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem. Thus, the university's choice of a race-exclusive merit scholarship program as a remedy cannot be sustained.

Because we find that the university has not shown that its programs and quota goals are narrowly tailored, we reverse the district court's grant of summary judgment to the university. We also reverse the district court's denial of Podberesky's summary judgment motion.

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Santa Fe, New Mexico

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