

SAVING AFFIRMATIVE ACTION
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SAVING AFFIRMATIVE ACTION

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In 1929, my father was admitted to Harvard College. Proud but poor, he showed up to apply for financial aid. He was told he was ineligible because he had failed to submit a photograph with his original application. After all, the school had already admitted one black student. Harvard College had a quota for blacks, a quota of one. Many schools had similar quotas to keep out Jews as well.

Quotas are arbitrary ceilings or rigid and fixed numerical floors. Quotas are typically used to exclude people because they belong to a stigmatized racial or ethnic group. Quotas are presumably offensive not only because they are exclusionary but because they treat people as members of a low-status and unwanted group, and not as individuals.

In her majority opinion in *Barbara Grutter v. Lee Bollinger, et al.* (the University of Michigan Law School affirmative action case), Justice Sandra Day O'Connor takes pains to distinguish between a commitment to diversity as a compelling governmental interest and the unconstitutional use of quotas. Only justices Clarence Thomas and Antonin Scalia attack the idea of diversity itself, leading some legal scholars to go so far as to characterize this as a "7-2" victory for diversity. Whatever the count, the court has enough hammers to nail shut the coffin on the rhetorical assaults from the right that seek to equate race with quotas: Not every consideration of race impermissibly excludes; race can be a relevant factor without becoming an illegal quota. Presumably, my father would now would be constitutionally eligible for financial aid.

There is much to celebrate about the affirmative action decisions upholding the principle that diversity is a compelling governmental interest. But after pairing them with the ruling three days later in the Georgia voting rights case, also authored by O'Connor, one cannot avoid seeing a parallel structure of elitism in the justifications for both opinions.

In the Michigan Law School affirmative action case, O'Connor applauds a holistic and individualized assessment where admissions officers and law school deans, in whom she places great faith, count race as one of many relevant factors as they select a law school class. She writes, "the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity." She expects, rather quixotically, that 25 years from now, that path to leadership will no longer be blocked.

But certainly for the time being, considerations of race are essential in shaping the next generation of leaders. Political science, sociology, and criminal justice researchers find that race correlates strongly with wealth, political viewpoints, ability to get a mortgage,

employment opportunities, and police stops on the New Jersey Turnpike. A recent M.I.T./University of Chicago study, for example, found that identical resumes with white-sounding names such as Bill or Sue were 50 percent more likely to generate interview invitations than resumes with black-sounding names like Tyrone and Tamika. This was true whether the application was for a position as a clerk or as a manager. Other studies show that even with comparable incomes, middle-income whites have net financial assets nearly 55 times greater than those of their black counterparts.

Because race has political, economic, and social components, the court finds that diversity benefits white and nonwhite students alike. Access to classrooms and faculties for a critical mass of students of color promotes learning outcomes for everyone, as students expand their intellectual horizons and improve their capacity to participate in our multiracial democracy.

Moreover, the law school policy, which the court upholds, acknowledges that the numbers we often associate with merit, such as LSAT scores, are imperfect predictors of academic success in law school. As a result, according to the O'Connor opinion, admissions officials look beyond grades and test scores to other criteria that are important to the school's educational objectives. The so-called soft variables help admissions officers evaluate an "applicant's likely contributions to the intellectual and social life of the institution," she writes. While O'Connor does not cite it in her opinion, the case record also contains evidence that these soft variables may be even better in assessing an applicant's likely contributions to the larger society once he or she graduates.

O'Connor offers a view of merit that encompasses a more robust understanding of what it means to be qualified. This is good, not only for blacks and Latinos but for poor and working-class whites. Excessive reliance on the hard variables, which correlate with parental affluence more than academic performance, skews the distribution of scarce slots in prestigious universities toward those with money. As Tony Carnevale, vice president of the Educational Testing Service (ETS), says, higher education, especially at public institutions that rely heavily on taxpayer dollars, has become "a gift the poor give to the rich." A more dynamic view of merit is therefore welcome news for those of us committed to teaching in institutions that look like America and that graduate students committed to making America better.

The question in a democracy, however, is who should decide who gets to walk the path of leadership? O'Connor answers in a way that is disturbing both in the affirmative action decision and in her opinion in *Georgia v. Ashcroft*, the Georgia redistricting case that the Supreme court handed down on June 26. The issue raised by the case was: Should the voters get to choose whether they want to be represented by someone directly accountable to them or someone who is mildly sympathetic but chosen primarily by others? O'Connor is confident that the judgment of state legislators can be trusted in this matter. The representatives, she writes, "have some knowledge about how voters will probably act," and can be relied on to determine whether "minority voters' effective exercise of the electoral franchise" will be adversely affected.

At first blush there seems nothing wrong with relying on elected officials to be knowledgeable about the voting patterns of residents in their districts. After all, politicians are motivated to remain in office, and to do so they need the support of at least some of their constituents. But whether that support is a fair measure of the voters' freely given choice--or if the voters have even been given a choice--is a question the court considers scarcely worth asking. To ask that question would mean coming to terms with the fact that control of the redistricting process rests in the hands of politicians. They narrowly tailor the voters' choices based on the combination of voters most likely to re-elect friends or unseat foes. It is most often the incumbent politicians, not the voters, who choose the representatives.

Justice Thomas joins O'Connor's opinion in the Georgia redistricting case. He dissents from her opinion in the Michigan Law School case. Buried in his dissent is an insight that captures much about both cases. Thomas asks who gets to choose and for whose benefit they are making these choices.

Trusted decision makers are now freer to make choices without a great deal of transparency. In the Georgia case, under the Voting Rights Act, blacks can be "virtually" represented--by the presence of Democrats in the state legislature as a whole. Black voters may have more overall influence on the legislative process if sympathetic legislators--chosen by others--seem to represent their interests. Similarly, in the Michigan cases, under the Fourteenth Amendment, the court defers to trusted educational decision makers to choose which blacks are most qualified to serve the institution's compelling interest in diversity.

The court can distinguish good choices from bad ones in both the voting case and the higher-education admissions cases because, as O'Connor writes in an earlier decision, sometimes "appearances do matter." In his opinion in the Michigan case, Thomas calls this "racial aesthetics" driven by "a faddish slogan of the cognoscenti." While his rhetoric is harsh, he is onto something. By their presence, people of color legitimate our institutions. And sometimes, as in Georgia, they need not even be physically present, as long as people with sympathetic sentiments are there to represent them. It is the state's "political choice," O'Connor writes, whether "substantive or descriptive representation is preferable." There is little about accountability to the voters or the public in either the voting-rights or the affirmative action opinions.

As long as the process of decision making by elites remains opaque, whether in district designation or university admissions, race becomes the lens through which voters or disgruntled white applicants understand it. Race is the neon light, the one variable that remains highly visible. If admissions decisions, like redistricting decisions, are to be made in a more democratic fashion--that is, with transparency and accountability to the institution's public mission and to the taxpayers who subsidize it--then much more than the physical aesthetics need be obvious. As both justices Ginsburg and Souter conclude, in explaining why they, unlike the court majority, supported both the Michigan Law School's individualized assessment and the undergraduate point system, "If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative

action program is preferable to achieving similar numbers through winks, nods, and disguises."

The worry is that as long as colleges and universities obscure the criteria on which they admit students, the elite are free to choose themselves and then legitimate those choices with a critical mass of people of color. If that is the case, working-class whites and poor people generally will continue to be underrepresented in these institutions. This is not the fault of affirmative action. It is the fundamental flaw in the admissions process, and it occurs at the settled core of decision making, not along the margins.

As college is an increasingly scarce and expensive resource, access to selective institutions is also highly competitive. And this scarce resource--for now, at least--is overwhelmingly given to those with money and privilege. A recent study by ETS's Carnevale and Stephen Rose found that 74 percent of the students at the 146 most selective colleges and universities come from the upper 25 percent of the socioeconomic status indicators. Only 3 percent come from the bottom 25 percent, and a total of 10 percent come from the bottom half. This study demonstrates that it is the testocracy, and not affirmative action, that excludes poor and working-class whites. The so-called hard variables allow the elite to monopolize the admissions process based on indicia of merit that are weak predictors of academic success and sometimes correlate negatively with likelihood to contribute to the community.

Given these self-replicating tendencies in both the academy and the legislature, the court's credulous deference to elites to choose who is admitted or who can be elected should give us pause. For this reason, Thomas's aim is off the mark: This is not about diversity as aesthetics but diversity as a fig leaf to camouflage privilege.

In both a state legislature and a law school classroom, the Supreme Court tells us in flowing prose that racial diversity is a compelling governmental interest. Considerations of race are currently needed, as the Georgia ruling states, "to foster our transformation to a society that is no longer fixated on race." The Voting Rights Act, in the Georgia case, like the Equal Protection Clause in the Michigan cases, "should encourage the transition to a society where race no longer matters." This is a society in which "integration and color blindness are not just qualities to be proud of but are simple facts of life."

To become such a society, we need to take account of race. At the same time the court makes clear that racial diversity is an interest best managed by elites. Those already privileged handpick who is best qualified to join them. Of course it is a good thing when the select few are motivated by considerations of inclusion, and knowledgeable experts often make fine decisions. But undue deference to local elites at Michigan's law school and in Georgia's state legislature creates the dangerous moral hazard that those already privileged may seek only to reproduce themselves.

While the law school trains a national elite and the Georgia legislature selects a local political elite, the path to leadership will be neither an escalator nor even a bridge. It will become a toll road in the absence of a commitment to democratic accountability. And

although Harvard now enjoys, under last week's Supreme Court opinions, the constitutional green light to give my father financial aid, he still would be too poor to attend Harvard if they said no.