

Summer 7-1-2017

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Recommended Citation

Mark S. Brodin. "From Dog-Whistle to Megaphone: The Trump Regime's Cynical Assault on Affirmative Action." *National Lawyers Guild Review* 74, no.2 (2017): 65-71.

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Mark S. Brodin

**FROM DOG-WHISTLE TO
MEGAPHONE: THE TRUMP
REGIME'S CYNICAL ASSAULT
ON AFFIRMATIVE ACTION**

The Civil Rights Movement of the 1960s transformed our society, most certainly for the better. It opened the door to minorities and women who had long been unjustly excluded from educational and employment opportunities, relegated to an inferior social and political status as a consequence of our ugly history of racism and sexism. Pressure from the bottom up, from the streets of Birmingham and Selma, as well as the emergence of inspirational leaders like Dr. Martin Luther King, Malcolm X, and John Lewis, finally moved previously hostile, or at least indifferent, political leaders to embrace The Cause. President John F. Kennedy finally recognized, six months before his assassination, that

[w]e are confronted primarily with a moral issue. It is as old as the scriptures and as clear as the American Constitution. The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.¹

When his successor Lyndon B. Johnson introduced the Voting Rights Act, he spoke movingly to Congress and the American people:

I speak tonight for the dignity of man and the destiny of Democracy. I urge every member of both parties, Americans of all religions and of all colors, from every section of this country, to join me in that cause.

At times, history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama. There, long suffering men and women peacefully protested the denial of their rights as Americans. Many of them were brutally assaulted. One good man—a man of God—was killed. . . .

[To] deny a man his hopes because of his color or race or his religion or the place of his birth is not only to do injustice, it is to deny Americans and to dishonor the dead who gave their lives for American freedom. Our fathers believed that if this noble view of the rights of man was to flourish it must be

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rooted in democracy. This most basic right of all was the right to choose your own leaders. The history of this country in large measure is the history of expansion of the right to all of our people. . . .

But even if we pass this bill the battle will not be over. What happened in Selma is part of a far larger movement which reaches into every section and state of America. It is the effort of American Negroes to secure for themselves the full blessings of American life. Their cause must be our cause too. Because it's not just Negroes, but really it's all of us, who must overcome the crippling legacy of bigotry and injustice.

And we shall overcome.²

The bravery of the protestors and the eloquence of such words inspired public support for bold initiatives to undo the hundreds of years of oppression, to at long last confront the nation's Original Sin. The Civil Rights Act of 1964, the Voting Rights Act, and the Fair Housing Act ended *de jure* Jim Crow, but it was recognized that more was needed to reverse the tragic consequences of that era. And so the notion of "affirmative action" was born³—to "wipe away the scars of centuries of egregious mistreatment,"⁴ as President Johnson put it. And so began the *very slow* progress of minorities and women in the labor market, universities, and other areas of opportunity.

But as Sir Isaac Newton taught us, every action will generate an equal and opposite reaction, in this case beginning with the so-called Reagan Revolution. Ronald Reagan launched his 1980 presidential campaign in Philadelphia, Mississippi, the site of the infamous murder of three civil rights workers by sheriffs' deputies and Ku Klux Klan terrorists, promising to restore "states' rights."⁵ Once in office, his Justice Department was staffed with conservative operatives dedicated to undoing the modest gains of the prior two decades. The Civil Rights Division of Justice warned local governments engaging in affirmative action efforts that they would be subject to federal lawsuits alleging "reverse discrimination."⁶ The federal government for the first time joined white reverse discrimination plaintiffs in their efforts to prove *they* were the real victims of race discrimination.⁷

President Donald Trump's Justice Department is now renewing the assault on race-based remedies.⁸ Attorney General Jeff Sessions—the former senator from Alabama whose nomination to the federal bench was tripped up when his racist statements and actions became the subject of his confirmation hearings—has directed his lawyers to investigate "race-based discrimination" in college admissions.⁹ No doubt this is the prelude to a broader assault.

Since *Univ. of Cal. v. Bakke*¹⁰ in 1978, in which Justice Lewis Powell wrote an influential swing opinion supporting the use of race as one factor in school admissions programs, there has been a slow but steady erosion of support

for race preference. This culminated in *Fisher v. Univ. of Texas*¹¹ in 2013. Applicant Abigail Fisher was a white woman whose mediocre record (82nd in her high school graduating class, 80th percentile on her SATs) would not have spelled success in any event. However, she persuaded a Supreme Court majority, consisting of Reagan appointees and former Justice Department officials, that she had a viable constitutional claim against the very modest weighing of race in the holistic admissions process at Texas' most elite public university (the Federal District Judge hearing the case described the role of race in UT's admissions process as "a factor of a factor of a factor of a factor").¹² Fisher had been recruited by wealthy anti-affirmative action activist Edward Blum, the hidden face behind many such cases.¹³

Most chilling about the Court's ruling to overturn two lower court decisions in favor of the University was its equation of efforts to *rectify* discrimination with actions to *pursue* and *prolong* it:

It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.¹⁴

Such is the illogic behind the "colorblind Constitution" fiction.¹⁵ Justice Clarence Thomas (himself a beneficiary of affirmative action at Holy Cross, Yale Law School, and the Supreme Court), doubled down on the equation by contending that the claims made in support of the University's program were no different than the defenses historically raised in support of slavery and Jim Crow, that the efforts to achieve diversity were no different than the most heinous forms of racial oppression.¹⁶ Ignored completely was the obvious stark contrast between using race *against* an applicant as a form of subordination and humiliation in the interest of a caste system, and weighing race or color to achieve a good-faith goal of diversity. Only on the most cynical level can race-conscious remedy be equated with racially-based hostility. The historical stigma of inferiority that follows from the latter is of course conspicuously absent in the former.

Critics of affirmative action support their claim to a colorblind Constitution with disingenuous references to Dr. Martin Luther King, Jr.,¹⁷ who famously dreamed of a time when people would be "judged not by the color of their skin but the content of their character."¹⁸ But King was denouncing a brutal regime of forced segregation, humiliation, and lynching of black citizens. There is little doubt he would find modest race preference an acceptable, indeed necessary, curative.

Fisher's “strict scrutiny” standard requires the institution seeking to justify race-preference to prove both that there is a compelling interest supporting the preference (such as a history of discrimination or exclusion), and that the preference is the only practicable means to achieve diversity. The latter will often be the most challenging, given the difficulty of proving a negative—negating all other possible avenues to diversity.

But surprisingly, when the lower courts in *Fisher* again ruled on remand in favor of the University and the case returned to the Supreme Court in 2016, a slim four-to-three majority (Justice Kagan took no part, and the Republican theft of Antonin Scalia’s seat was not yet complete) acceded to the conclusion that UT’s race-preference passed (although barely) constitutional muster.²⁰

But oh what a difference a year makes! Now Neal Gorsuch (who is already occupying whatever space there is to the right of Scalia, as well as Thomas and Alito) sits on the Court. And Donald Trump, carried into the White House by white rage he skillfully manipulated, plays out his role as “angriest white man”²¹—xenophobic, chauvinistic, misogynist, racist. He has become the darling of the white supremacists, as the Nazi and Klan violence in Charlottesville, Virginia so chillingly demonstrated.²²

The case against affirmative action is a construct of fictions, the “colorblind Constitution” and equation of remedial race preference with malicious race discrimination prime among them. But there is also the pernicious myth of merit—that affirmative action violates the sacred concept of choosing “the best applicant.” “Merit” is at best an elusive concept, but not to the critics of affirmative action. For them it is measured simply in those dubious selection devices—primarily standardized tests—that have worked so well to maintain white male dominance in universities and the workplace.²³ The evidence is legion that such tests have little predictive value of academic success or performance on the job, but inertia and their inexpensive sorting capacity keep such tests in place.²⁴

Media have perpetuated the falsehood by portraying reverse discrimination plaintiffs as champions of merit. The lawyer for the white plaintiffs who challenged the New Haven Fire Department’s scuttling of the multiple-choice test that excluded all minority candidates for promotion described the case as a “symbol for millions of Americans who are tired of seeing individual achievement and merit take a back seat to race and ethnicity.”²⁵ Rarely is the idea questioned that merit equals success on such tests, notwithstanding the obvious fact that memorizing fire and police manuals and then spitting back the text on the exam has little to do with selecting “the best candidate” for promotion.

And then there is the false presumption of causation—that whenever a white man loses out to a person of color or a woman it *must* have been because of affirmative action. In reality, admissions decisions and workplace selections are rarely attributable to one factor, but are usually a complex calculus. Abigail Fisher was, as noted above, almost certainly rejected by UT because of her singularly unimpressive application. In fact, 168 minority applicants with higher index numbers than Fisher were also denied admission.²⁶

The stark economic inequality between white and black citizens of this nation remains one of its most permanent fixtures. Median household wealth for whites stood in 2011 at about \$112,000 and for African-American families at \$7,000.²⁷ Unemployment for blacks can always be determined by multiplying the white unemployment rate by two, and persists no matter the level of educational attainment.²⁸ Yet the Justice Department Civil Rights Division will be now working on behalf of the haves to keep the have-nots from accumulating wealth.

The relentless right-wing propaganda efforts have paid off. Polls show widespread agreement among whites that they, not minorities and women, are the new victims of discrimination.²⁹

We have always had “affirmative action” for certain privileged groups, like legacies (children of alumni) and “development admits” (children of big donors), as well as for athletes, musicians (e.g., oboe players when needed for the orchestra). It is only when white privilege and status are challenged in favor of minority opportunity that the outcry follows.

Reagan’s dog-whistle to disaffected whites has become a megaphone. W.E.B. DuBois’s famous prophecy that the problem of his century would be the persistence of the color line has carried tragically into the next. As long as the Republicans continue to play the white anger card and stir resentment, and as long as the Democrats remain the proverbial deer-in-the-headlights, race preference and affirmative action, now endangered species, will experience extinction.

NOTES

1. Theodore C. Sorensen, *Televised Address* (June 11, 1963), in “LET THE WORD GO FORTH”: THE SPEECHES, STATEMENTS, AND WRITINGS OF JOHN F. KENNEDY, at 194 (1988).
2. President Lyndon B. Johnson, Voting Rights Act Address before Congress (Mar. 15, 1965), available at <http://www.historyplace.com/speeches/johnson.htm>.
3. See, e.g., Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).
4. President Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965), available at <http://teachingamericanhistory.org/library/document/commencement-address-at-howard-university-to-fulfill-these-rights/>.

5. See Jack White, *Lott, Reagan, and Republican Racism*, TIME (Dec. 14, 2002), <http://content.time.com/time/nation/article/0,8599,399921,00.html>.
6. RAYMOND WOLTERS, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AAND BLACK CIVIL RIGHTS 23 & n.113 (1996), at 23 & n.113.
7. See, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (holding that the district court erred in granting an injunction requiring white employees to be laid off before minorities); *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986) (rejecting a challenge to race-conscious consent decree for promotions in fire department).
8. Charlie Savage, "*Justice Dept. to Take on Affirmative Action in College Admissions*," THE N.Y. TIMES NEW (York Times, August 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html>.
9. *Id.*
10. 438 U.S. 265 (1978).
11. 133 S. Ct. 2411 (U.S. 2013) [hereinafter *Fisher I*].
12. *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009).
13. See Morgan Smith, *One Man Standing Against Race-Based Laws*, N.Y. TIMES, Feb. 24, 2012, at A21. Blum was also behind the successful challenge to Section 5 of the Voting Rights Act in *Shelby County v. Holder*, 133 S. Ct. 2612 (U.S. 2013). See Ari Berman, *Conservatives Take Aim at Voting Rights*, THE NATION, Feb. 25, 2013, at 11, 12.
14. *Fisher I*, 133 S. Ct. at 2417.
15. No language in the Constitution uses this phrase.
16. See *Fisher I*, 133 S. Ct. at 2426–27, 2429–30. Justice Thomas believed that race preference creates a harmful dependency in its beneficiaries, represents an offensive paternalism on the part of do-gooder whites, and puts minorities in positions they are not qualified for and will inevitably fail in. See CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 56–57, 74–75, 148–49 (2007) ("I'd graduated from one of America's top law schools, but racial preference had robbed my achievement of its true value."). Justice Sotomayor had quite the opposite personal experience with affirmative action at Princeton, where she was grateful for the chance to prove herself, as she certainly did, graduating summa cum laude. See SONIA SOTOMAYOR, MY BELOVED WORLD 191 (2013): "I had no need to apologize that the look-wider, search-more affirmative action that Princeton and Yale practiced had opened doors for me. That was its purpose: to create the conditions whereby students from disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run."
17. Associated Press, "*MLK's 'Content of Character' Quote Inspires Debate*," CBS NEWS REPORT (Jan. 20, 2013, 5:34 PM), <https://www.cbsnews.com/news/mlks-content-of-character-quote-inspires-debate>.
18. Rev. Martin Luther King, Jr., Speech at the March on Washington (Aug. 28, 1963), available at <https://www.archives.gov/files/press/exhibits/dream-speech.pdf>.
19. See *id.*
20. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (U.S. June 23, 2016) [hereinafter *Fisher II*].
21. See MICHAEL KIMMEL, ANGRY WHITE MEN: AMERICAN MASCULINITY AT THE END OF AN ERA (2015).
22. Hawes Spencer & Sheryl Gay Stolberg, "*White Nationalists March on University of Virginia*," THE N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html>.

23. See, e.g., Mark S. Brodin, Ricci v. DeStefano: *The New Haven Firefighters Case & the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161, 222–25 (2011).
24. *Id.*, at 202-221.
25. Melissa Bailey, “If You Work Hard, You Can Succeed in America,” NEW HAVEN INDEPENDENT (June 29, 2009, 3:57 PM), http://www.newhavenindependent.org/index.php/archives/entry/if_you_work_hard_you_can_succeed_in_america/.
26. See Nikole Hannah-Jones, *Race Didn’t Cost Abigail Fisher Her Spot at the University of Texas*, THE WIRE (Mar. 18, 2013), <http://www.thewire.com/national/2013/03/abigail-fisher-university-texas/63247/> (Fisher graduated eighty-second in a high school class of 674 and had undistinguished SAT scores. 168 minority applicants with higher index numbers than Fisher were also rejected, and white applicants with lower numbers were admitted). See generally Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Sselective Admissions*, 100 MICH. L. REV. 1045 (2002).
27. Laura Shin, “The Racial Wealth Gap: Why A Typical White Household Has 16 Times the Wealth of a Black One,” FORBES (Mar. 26, 2015, 8:00 AM), <https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/>.[.https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#4a1e8251f45e](https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#4a1e8251f45e)
28. John Amis, *Unemployment in Black and White*, N.Y. TIMES, Aug. 28, 2017, at A16. .
29. Jeffrey Rosen, *Affirmative Action and Public Opinion*, N.Y. TIMES (Sept. 6, 2011, 3:22 PM), <https://www.nytimes.com/roomfordebate/2011/05/22/is-anti-white-bias-a-problem/affirmative-action-and-public-opinion.> .



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