THE CHANGING MEANING OF AFFIRMATIVE ACTION

The past and the future of a long-embattled policy.

By Louis Menand, The New Yorker, 1-20-2020

The terrible paradox of the civil-rights movement is that outlawing racial discrimination made it harder to remediate its effects. Once we amended the Constitution and passed laws to protect people of color from being treated differently in ways that were harmful to them, the government had trouble enacting programs that treat people of color differently in ways that might be beneficial. We took race out of the equation only to realize that, if we truly wanted not just equality of opportunity for all Americans but equality of result, we needed to put it back in. Our name for this paradox is affirmative action.

The term was introduced to the Kennedy Administration almost sixty years ago, and its arrival was somewhat haphazard. According to Nicholas Lemann’s history of meritocracy, “The Big Test,” the man who suggested it was an African-American lawyer named Hobart Taylor, Jr. He was a Texan, and when John F. Kennedy was sworn in, in 1961, he dropped in on the inaugural ball for Texans in order to shake hands with the new Vice-President, Lyndon B. Johnson.

They chatted, and Johnson asked him to come by his office. When Taylor showed up, Johnson handed him a draft of what would become Executive Order 10925, setting up the President’s Committee on Equal Employment Opportunity, which Johnson was to chair. Taylor read the draft and said he thought it could use a little work; Johnson asked him to do a rewrite. And that is when Taylor inserted the words “affirmative
action.” He liked the phrase, he later said, because of the alliteration (or the assonance).

Taylor needed a flexible phrase because Kennedy’s committee was a bureaucratic entity with a vague mandate meant to signal the Administration’s commitment to fairness in employment. Its purview, like the purview of committees dating back to the Administration of Franklin Roosevelt, was the awarding of federal contracts, and its mandate was to see that companies the federal government did business with did not discriminate on the basis of race. The committee had no real enforcement mechanism, though, so “affirmative action” was intended to communicate to firms that needed to integrate their workforce something like “Don’t just stand there. Do something.” What they were supposed to do, aside from not discriminating, was unspecified.

“Do something” is still one of the meanings of “affirmative action” today. Many firms and educational institutions have affirmative-action or diversity officers. Their job is to insure not only that hiring and promotion are handled in a color-blind manner but that good-faith efforts are made to include racial minorities (and sometimes individuals in other categories, such as women or veterans or disabled persons) in the hiring pool, and, if they are qualified, to attempt to recruit them. In this context, “affirmative” means: demonstrate that you did your best to find and promote members of underrepresented groups. You do not have to give them preferential treatment.

Since the late nineteen-sixties, however, affirmative action has also had a more proactive meaning, as the name of an effort to attain a certain number, or, as it’s called today, “critical mass,” of underrepresented groups in a business or an educational institution by, if necessary, giving applicants from those groups preference over similarly or better qualified whites. This form of affirmative action is usually branded by those who disapprove of it with the dreaded Q-word, “quota.” After 1978, when the Supreme Court declared racial quotas unconstitutional, affirmative-action programs avoided any suggestion of the Q-word. But
that is essentially what affirmative action in this second sense entails. You can use terms like “targets” and “goals,” both of which are constitutionally legit, but if you have an idea of the point at which you would attain a critical mass then you have a quota.

Apart from stone-cold racists, everyone is happy, or claims to be happy, with affirmative action in the first sense. And many people are happy, or will say they are, with affirmative action in the second sense so far as the outcome is concerned. Legally, we want the system to be color-blind; we want everyone to have the same rights. But socially we understand that people don’t want their racial or gender identities to be ignored. They want them to be recognized and respected. People take a civic pride in having a racially diverse workplace or educational institution. It’s just that many would rather not contemplate too closely the means used to achieve it.

Of the people who like racial diversity but don’t like affirmative action in the preferential sense, there are two types. One type believes that we can ban all forms of preferential treatment and, so long as we enforce existing laws against discrimination, still achieve equality of result. These people see affirmative action as unfairly penalizing those who are not biased themselves and who have enjoyed no personal benefit from discrimination, and they see it as stigmatizing members of underrepresented groups with the suspicion that they are underqualified for the jobs they hold or the school they attend.

The other type of affirmative-action skeptic is the person who knows that this is wishful thinking but is unable to get his or her head around the idea that the way to end discrimination is by discriminating. The law professor Melvin Urofsky, in “The Affirmative Action Puzzle” (Pantheon), says he is agnostic on the issue, but he would seem to be a person of the second type. He wants racial diversity, and he knows that it is not going to come about on its own very soon, but he thinks that specific goals or targets are at odds with the rights of individuals. That’s why he calls it a puzzle.
The history of affirmative action is woven into the history of American race relations, and the history of American race relations is woven into the history of America. It is the eternal bone in the national throat. So when Urofsky takes us through the history of affirmative action—he starts with Reconstruction, but the story really begins in the nineteen-sixties—he is giving us what amounts to a history of the country from John F. Kennedy to Donald Trump.

You see the decades go past as you read, and the special flavor of each Presidency comes back: Kennedy’s uncomfortable recognition that civil rights was a moral issue that transcended his customary political pragmatism, Johnson’s miraculous emergence as the Moses of racial equality, Nixon’s inveterate scheming, Reagan’s bland duplicity, Obama’s undramatic realism. Then we get to Trump, who, Urofsky points out, “is the first Republican since the civil rights revolution to reach the White House without campaigning against affirmative action.” Urofsky doesn’t say so, but one reason Trump ignored the issue is probably that politicians who oppose affirmative action normally do so in the name of color blindness, and Trump is not color-blind. (Alternative-facts explanation: Donald Trump is the least racist person you have ever met.)

There is a whole library on racial inequality and efforts to address it, and “The Affirmative Action Puzzle” does not offer many novelties. But the book, just by the accumulation of sixty years’ worth of evidence, allows us to reach some useful conclusions, and the most important of these is that affirmative action worked. The federal government, with the backing of the courts, weaponized the 1964 Civil Rights Act and its legislative progeny—notably the Education Amendments of 1972, home to the notorious (in the R.B.G. sense) Title IX, banning sex discrimination in federally assisted educational institutions—and forced businesses to hire women and racial minorities.

And they did. Study after study suggests that it is just not the case that “it would have happened anyway.” In 1981, for example, as Urofsky
tells us, the Reagan Labor Department commissioned a report on gains in hiring among African-Americans and women. It found that between 1974 and 1980 the rate of minority employment in businesses that contracted with the federal government, and were therefore susceptible to being squeezed, rose by twenty per cent, and the rate of employment of women rose by 15.2 per cent. In companies that did not contract with the government, the rates were twelve per cent and 2.2 per cent, respectively.

This was so contrary to everything that Reagan had been saying about affirmative action that the Labor Department hired an outside consulting firm to vet its own report. When the firm returned with the news that the methods and the conclusions were valid, the Administration did the only thing it could do. It refused to release the report, thus allowing politicians to go on telling the public that affirmative action didn’t work.

But it did. And guess what? So did the War on Poverty. In 1959, the poverty rate was an estimated twenty-two per cent; in 1975, it was below twelve per cent, which is about where it is today. (That is still thirty-eight million people, more than the population of Canada.) The claim that government programs always backfire was Reagan’s campaign calling card—even though he did not eliminate a single major spending program during the eight years he was in office—and it has become one of the most dangerous canards in American politics. Politicians repeat it, and people nod their heads. Meanwhile, the rich get richer.

Did white men suffer as a result of affirmative action? That turns out to be a difficult question to answer. “There is very little hard evidence to prove that a minority hire almost always took place at the expense of a better-qualified white person,” Urofsky says. He also tells us that there are “no reliable data” on whether men were shut out of jobs that were offered to women.

“Almost always” would indeed be hard to prove. Obviously, just by the nature of the policy, some significant number of whites and males who would have been admitted or hired before affirmative-action programs
were in place were not. But, since no employer or admissions officer ever says, “You were not hired because you’re white” or “You were admitted because you’re black,” proving discrimination is complicated. Americans have come to accept that race and gender are always in the mix, but we can’t be certain that either one made the difference in any particular case.

Urofsky’s view is that, over all, white men did not go without jobs or the chance to attend college. Turned down by one place, they went someplace else. The number who were “victimized” by affirmative action, he says, is “minuscule.” Certainly this is true in the case of college admissions. Most colleges accept almost everyone who applies, so when we talk about race-conscious admissions we are talking about policies that affect a relatively small number of people. Urofsky borrows from Thomas Kane, of the Brookings Institution, an analogy to handicapped parking spaces: a driver looking to park who does not have a permit might feel “excluded” driving past an empty handicapped spot, but he or she usually finds a place to park.

The main source of Urofsky’s frustration is the Supreme Court, which, he complains, has spent fifty years kicking around the constitutionality of race-conscious hiring and admissions practices without ever coming up with what he calls “a workable jurisprudence.” There is no Brown v. Board of Education or Roe v. Wade for affirmative action, no well-established precedent. A lot of the cases that people rely on about university admissions are 5–4 decisions. And some of the Court’s opinions have suggested that, insofar as affirmative action constitutes an exception to the equal-protection clause of the Fourteenth Amendment, it will eventually time out (much as a majority of the Court recently decided, in Shelby v. Holder, that part of the Voting Rights Act has outlived our need for it).

The Court’s unpredictability in such cases not only distresses law professors like Urofsky. It also creates uncertainty in the marketplace. The judicial parameters are known: to pass constitutional muster, an
affirmative-action program must serve a compelling state interest, it must be narrowly tailored, and it must survive strict scrutiny. But one can never be sure how the Court will apply these criteria, or whether it will one day decide that all affirmative-action programs are unconstitutional per se and close out the exception. So groups that oppose racial preferences keep relitigating what is basically the same case, in the hope that a shift in the Court’s makeup will produce a definitive result. The Court is effectively inviting these lawsuits.

The marketplace matters because the biggest defenders of affirmative action are not the N.A.A.C.P. and the Democratic National Committee. The biggest defenders are corporations and the military. Thousands of firms adopted affirmative-action programs after 1969, when the Nixon Administration began insisting on diversity benchmarks for government contractors, and “in little more than a decade,” Urofsky says, “affirmative action became a way of life for many large corporations.” Once those programs were put into place, they remained.

The same thing happened with the 1964 Civil Rights Act. The most controversial part of that act was Title II, which applies to public accommodations, like restaurants and hotels. This struck at what was, along with suppression of African-American voting rights, one of the pillars of Jim Crow: social segregation. In December, 1964, five months after the Civil Rights Act was signed into law, the Supreme Court, in Heart of Atlanta Motel v. United States, upheld the constitutionality of Title II under the commerce clause. All public accommodations that fell within the reach of Congress’s power were prohibited from discriminating.

This was not a blow to business. On the contrary. From a business viewpoint, refusing to serve people who want to rent a room in your hotel or order a sandwich at your lunch counter is irrational. The only economic incentive for denying them service is a fear of their driving white customers away. Once the Court made it clear that every hotel and
lunch counter must serve every customer regardless of race, that fear was significantly reduced.

Under Jimmy Carter, affirmative-action requirements were extended to virtually all firms, educational institutions, and state and local governments that received contracts or grants from the federal government—which covers a lot of the national waterfront. By and large, the courts went along. And so did businesses. When a company is serving customers of different races, it wants to present a diversified face. If you are selling cars to African-Americans, you do not want all the salesmen in your showroom to be white.

If, to achieve this result, a company diversifies on its own, it is open to lawsuits claiming reverse discrimination. But when a company (or a police department or a fire department) adopts a race-conscious hiring program under government guidance it is immunized. When Reagan made noises about abolishing affirmative-action requirements, the National Association of Manufacturers lobbied him to leave the program alone. It was helping manufacturing companies do what they could not have done without it. The biggest problem businesses had wasn’t that they couldn’t find qualified women and minorities. It was dealing with labor unions, whose seniority systems overwhelmingly favored white male workers. (Small businesses also resented the paperwork.)

The extent of the corporate buy-in was put on dramatic display in 2003, when the Supreme Court heard Grutter v. Bollinger, another admissions case, this one involving the University of Michigan Law School. The Court received sixty-nine amicus briefs (a lot) arguing in favor of Michigan’s affirmative-action admissions program, and among the amici were General Motors, Dow Chemical, and Intel, along with the largest federation of unions in the United States, the A.F.L.-C.I.O. They supported affirmative-action admissions because they wanted universities to produce educated people for a diversified workforce.

The Court also received, in Grutter, what became known as “the military brief.” This was an amicus brief signed by big-name generals like
Norman Schwarzkopf, Wesley Clark, and John Shalikashvili; by a former Defense Secretary, William Cohen; and by former superintendents of the service academies, all of which, of course, are government agencies. “At present,” they told the Court, “the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies.” They were saying that if the Court ruled against Michigan it would be upending efforts, up to that point highly successful, to maintain a diverse officer corps. The Court voted to uphold the Michigan program, but it was a 5–4 decision.

No sector is more committed to diversity than higher education is, but it has proved to be one of the stickiest areas for affirmative action, both legally and practically. Urofsky, perhaps because he is an academic, is more patient with the trouble that universities have had in achieving diversity than he is with the problems of labor unions, to which, in general, he is uncharitable. It is true that probably the main reason Nixon promoted affirmative-action programs was to pit African-Americans against labor, both traditionally Democratic voting bases. And, by many accounts, he succeeded, and created Archie Bunker—the Reagan Democrat, a man who resents special government help for minorities. Still, the leadership of unions like the United Auto Workers, though sometimes fighting their own membership, were active in support of civil rights.

Higher education and unions have a similar problem when it comes to changing the demographics: we are dealing with a cake that cannot be unbaked. The undergraduate population turns over every four years, but the faculty turns over every forty years. When the new students arrive on campus, they often wonder where the professors of color are. The answer is: wait twenty years, and they will show up.

Even so, the lag in diversification between university faculties and their student bodies is striking. As late as 1969, less than five per cent of all professors had African or Asian ancestry, and around eighty per cent
were men. Schools like Harvard and Stanford have had trouble even getting to gender balance. In 1976, women made up 1.6 per cent of the arts and sciences faculty at Yale and one per cent at Princeton, although both schools had been admitting women for seven years. Even at Berkeley, which had been admitting women since 1871, women made up just 5.6 per cent of the faculty. Today, less than thirty per cent of all university faculty at Stanford are women, and seven per cent are classified as underrepresented minorities. At Harvard, twenty-seven per cent of tenured faculty are women, and eight per cent are underrepresented minorities.

On the other hand, student bodies, where race- and gender-conscious admissions policies can have an effect more quickly, have diversified. In 1976, eighty-three per cent of university students were white; in 2016, fifty-seven per cent were white. The percentage of black students in that period increased from ten to fourteen; the percentage of students that the government categorizes as Hispanic increased from less than four to more than eighteen. The percentage of black and Latinx graduates (as opposed to enrollees) also increased (although graduation rates for both groups are lower than for whites).

Did affirmative-action admissions help? Starting in the mid-nineties, opponents of affirmative action were able to get laws passed prohibiting the use of race in admissions at public universities in several states, including Michigan, Washington, and California. The top public universities in those states tried to attract minority students by other means, but Urofsky says that the percentage of black and Hispanic students has dropped significantly.

Do students admitted under affirmative-action criteria benefit from their educations? Historically, black students as a group have tended to underperform academically—to get lower grades than their SAT scores predict. (So do varsity athletes.) Nevertheless, William Bowen and Derek Bok showed, in “The Shape of the River” (1998)—the most rigorous statistical analysis of race-conscious college admissions to that
point—that of seven hundred black students who entered twenty-eight selective schools under race-preferential criteria in 1976, thirty-two per cent attained doctorates or professional degrees, as compared with thirty-seven per cent of white students. Nearly a hundred and twenty-five of the black students were business executives, and more than three hundred were “civic leaders” (running youth or community groups, for example). Race-conscious admissions policies, Bowen and Bok concluded, have been “highly successful” in advancing educational and societal goals.

As many writers have pointed out, when we are considering colleges and jobs, there is a pipeline problem. That’s why, as Urofsky notes, the greatest beneficiaries of affirmative action have been white women. They went to the same high schools that their brothers did (and most of them probably got better grades). That’s also why Barack Obama seemed to be focused more on improving K-12 for minority children than on expanding access to post-secondary education. The success of affirmative action in employment and university admissions has not eliminated the education and income gaps between whites and blacks. Although the poverty rate for blacks and Hispanics has dropped some since 1970, it is still more than double the rate for whites. Americans of color are starting from much farther behind. Millions never get on board a train that most whites were born on.

The Supreme Court case that admissions offices rely on today is Regents of the University of California v. Bakke. It was decided in 1978, and, despite several attempts to relitigate it, it is still the law of the land. Bakke is a good example of the jurisprudential confusion around affirmative action: the Court managed to produce six opinions in that case. The plurality opinion, by Lewis Powell, struck down an admissions program at the University of California at Davis School of Medicine, from which Allan Bakke, a white man, had been twice rejected, but it upheld the right of schools to use race-conscious admissions programs.
The problem at Davis was that the medical school basically ran two admissions processes, one for everybody and one that effectively considered only minority applicants, for whom sixteen places were set aside. Bakke was able to show that his record was superior to the records of some of the students who had been admitted through the special program.

The Davis program was obviously not narrowly tailored. One consideration that the university offered in the way of compelling state interest was its belief that minority M.D.s might end up practicing in underserved communities. Powell found no evidentiary basis for this, and it was arguably a racist assumption. The school could have investigated whether applicants had worked with underserved communities in the past. They did not, and Powell suggested that such a standard might be a better proxy than race. Another consideration Davis offered was the aim of “countering the effects of societal discrimination.” But Powell, though he allowed that specific race-conscious remedies could be justified by specific instances of discrimination, dismissed the general invocation of discrimination as “an amorphous concept of injury that may be ageless in its reach into the past.”

Still, Powell did think that the goal of a diversified medical-school class was constitutionally permissible, and he played a trump card that is almost never mentioned in discussions of the case, including Urofsky’s. Admissions programs determined by race are in violation of both the equal-protection clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act, which outlaws racial discrimination in institutions that receive federal funding. Those rights were largely on Bakke’s side: you couldn’t discriminate against whites simply because nonwhites had once been discriminated against. Powell argued, however, that another right was in play: the First Amendment; specifically, the right of academic freedom. There is no constitutional right of academic freedom, but Powell cited a 1957 case, Sweezy v. New Hampshire, in which Felix Frankfurter, in a concurring opinion, quoted
South African jurists to the effect that the principle of academic freedom allows a university to determine who will teach its classes and who will sit in its classrooms.

Powell concluded that, since Davis could reasonably decide that a diverse class provides a better learning environment, considerations of an applicant’s race—as one factor among others—can fall within the exercise of a constitutionally protected right. (Under the Court’s ruling, Bakke was admitted to Davis and he became a doctor; Urofsky says that he went on to work at the Mayo Clinic, where one of his patients was Lewis Powell.)

The Michigan case, Grutter v. Bollinger, in 2003, was basically a relitigation of Bakke. As was Fisher v. Texas, in 2013, and the second round of that case, known as Fisher II, in 2016. The Fisher cases involved a white woman who was turned down for admission to the University of Texas at Austin, U.T.’s flagship campus. Her lawyers argued that, even if she were rejected solely because of her grades and not her race, she could still claim a “Constitutional injury” from being subjected to an unfair admissions process. Each time, the Court upheld the constitutionality of using race as a factor in admissions, but they were close calls. The vote in Fisher II was 4–3.

The current Harvard College admissions case, Students for Fair Admission v. Harvard, is the same case one more time. The person behind both Fisher and the Harvard case is Edward Blum, a man who for whatever reason has decided to devote his time to preventing a small number of black and brown teen-agers from attending colleges that are desperate to have them.

Harvard won at the trial level because the judge ruled that its admissions program is consistent with other Supreme Court decisions, such as Bakke. That’s not surprising, since Powell’s decision cited the Harvard admissions program as a model. But, given the composition of the Supreme Court, it is all too likely that it will decide that the country has timed out of this particular form of remediation.
For remediation is fundamentally what affirmative action is. Affirmative action has expanded to cover many kinds of difference, and, since Bakke, to be thought of as in service to a general social commitment to diversity per se—so that now people say things like “What about diversity of ideology?,” as though that somehow presented the same moral demand as a commitment to racial diversity.

But the reason we have affirmative action is that we once had slavery and Jim Crow and redlining and racial covenants, and that we once had all-white police forces and all-white union locals and all-white college campuses and all-white law firms. To paraphrase George Shultz, Nixon’s Secretary of Labor: for hundreds of years, the United States had a racial quota. It was zero. Affirmative action is an attempt to redress an injustice done to black people. The Fourteenth Amendment protects white people, too, but that is not why it needed to be written.

The Court’s decision in Shelby v. Holder vacating a central provision of the Voting Rights Act has backfired. It turns out that, when you remove enforcement mechanisms and remedial oversight, things tend to revert to the status quo ante. The whole history of affirmative action shows, as Urofsky somewhat reluctantly admits, that when the programs are shut down minority representation drops. Diversity, however we define it, is politically constructed and politically maintained. It doesn’t just happen. It’s a choice we make as a society.

It is possible to understand the opposition to affirmative action of white conservatives, like Ronald Reagan, who regard civil-rights laws as federal overreach and affirmative action as enshrining the un-American notion of group rights. And it is possible to understand the opposition of black conservatives, like Clarence Thomas, who see it as patronizing to African-Americans.

But it is hard to understand the opposition, often diehard, of many white liberals that has persisted since the nineteen-seventies. Did these people really imagine that passing a law against discrimination would reset race relations overnight? Do they really think that white Americans,
wherever they work or go to college, do not carry a lifelong advantage because of the color of their skin? Do they really believe that there should be no sacrifice to make or price to pay for the systematic damage done to the lives of millions of American citizens and the men and women who are their ancestors?