by Joseph W. Little*

AFFIRMATIVE ACTION IN THE U.S.
Theory and Practice

Affirmative action is at the same time one of the most benign and the most controversial governmental policies now in force in the United States of America. It is benign because all Americans support the theory in its less agressive applications. It is controversial because many Americans deem its most aggressive applications to be unwise, unfair, unconstitutional, and damaging to the social fabric of our nation.

To begin this paper, I shall describe briefly what I mean by affirmative action. Then I shall relate what I deem to be the historical predicate and justification for it. Then I shall refer briefly to the great debate about extended forms of affirmative action now taking place in the United States. And, finally, I shall address, when will affirmative action end, if ever.

AFFIRMATIVE ACTION: WHAT IT IS

Affirmative action assumes numerous guises and many locuses of action and I cannot convey all its connotations in a short space. Nevertheless, the essential elements for these purposes are:

1. A plan imposed by law, either state or federal.
2. That requires governmental schools and employers, and regulated private schools and employers, to give preferential treatment in educational or job opportunities to persons of a designated race (i.e. Black rather than White).

The student admission policy of the University of Florida College of Law, where I teach, is exemplary. We reserve 10% of the seats in our classes for "minority" applicants who are primarily but not exclusively Blacks. The students admitted through this program could never be admitted under the criteria the other 90% must satisfy. Moreover, non-minority students (i.e. Whites) are not permitted to apply under the special admission criteria. (Finally you should know that not all black students apply under the affirmative action program; some apply and are admitted under the regular program.)

Affirmative action also takes on less aggressive aspects. For example, in some instances it may be nothing more than a published statement: "We are an equal opportunity employer," meaning that no distinction is made on the basis of race in choosing among applicants for jobs. Or, it may include making special efforts to attract black people to apply for jobs and to seek admission to school. These are the sorts of things that are generally deemed to be benign.

Finally, affirmative action often applies to give preferential treatment to attributes other than color and race. Initially, the theory was primarily one of reparation to a class to make up for disadvantages caused by past governmental or widespread social repression. On these bases, the traditional attributes that qualify for preferential treatment, are race, color, religion, creed and national origin. The theory is that the majority population (i.e. White, Christian) has historically repressed discrete, insular minority populations (i.e. Blacks and Jews) because of these attributes (i.e. blackness, jewishness). In more recent times other preferred attributes that do not necessarily include all the insular minority characteristics have been given preferred status. Gender protection is exemplary: females make up more than 50% of the population in the United States but, because of traditional cultural discrimination against them, are beneficiaries of affirmative action in some settings. (Marital status; sexual preference.)

Having alluded to the rich complexity of the issue, I intend to focus the remainder of my remarks on the core; namely, affirmative action for Blacks. (i.e. persons of the Negro race; some Americans now refer to themselves as "Afro-Americans.")

BACKGROUND: WHY WE NEED IT.

As you may know, the ideal of equal opportunity is deemed to be a quality of unparalleled value to the present day population of the United States. This translates generally to a legal requirement of permitting no institutional, governmental, political or cultural barriers based upon race, religion, gender, etc. to stand in the way of progress for any person. Nevertheless, as I shall demonstrate momentarily, this has not always been the practiced ideal and as a result (and perhaps for other reasons), Blacks do not occupy stations of political, economic, professional and educational prominence in numbers that are proportional to their representation in the general population. They are far underrepresented at the top and in the middle and overrepresented in the bottom tiers.

This glaring mismatch between numbers and success starkly outlines a status that now seems intolerable, but it does not explain why it came about. Central to the "why", is the history of political, economic and cultural discrimination against Blacks that is the legacy not only of practices in the United States of America but of colonial practices that began almost coincidentally with the European settlement of the Americas.

I shall examine important milestones in that history. Columbus discovered America in 1492. Soon thereafter attempts to subdue and subjugate the indigenous American Indians began. They were called "savages" and "heathens," manifesting the belief that the White, European conquerors were superior in some more funda-

mental moral and worthiness measure than in mere social advancement. This sense of white superiority is an important attribute of the colonialization of America, because it carried over without dilution toward the treatment of black slaves.

The first permanent English speaking colony was established in Jamestown, Virginia in 1607 and the first black slaves were imported in 1617. (I will digress to make this point that I have never seen acknowledged elsewhere. Of the current population of the United States, except for that tiny proportion that claims ancestry in the indigenous Indians, a far greater proportion of the Blacks than of the Whites can claim pre-American Revolutionary War heritage in the Americas.)

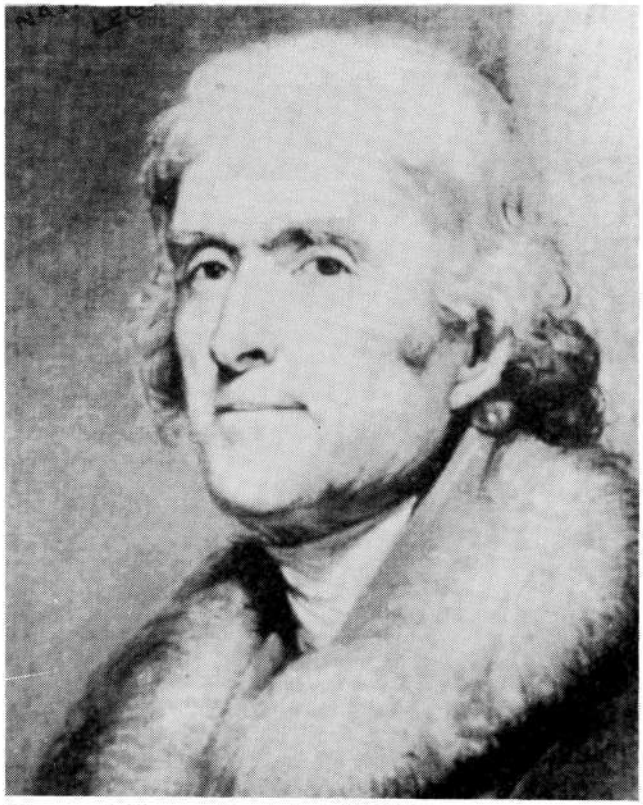
For the next 180 years, the colonization of the eastern seaboard of what is now the United States continued with the development of a black slave dependent economy in the South. The Indians, either because of their scarcity or resistance to enslavement or both, did not satisfy the demand for cheap labour, so the need was met by the importation of Black African slaves supplied by European and northern American slavers.

ASSIMILATION

Slavery was justified on the supposed ground that Blacks were morally and intellectually inferior to Whites. Biblical scriptures were often quoted to support this view. Notwithstanding this, the elemental culture of the slaves and of the slave holders, in time, grew progressively more alike. The slaves soon assimilated the language, the religion, the dress, the material values and even the names of their masters and, in the course of time, lost their own. Few modern American Blacks could trace any root to African soil. I might also mention that, from the beginning, American Blacks and Whites have lived in close physical proximity to one another. Yet, by and large, they have remained socially separated by the barrier of color.

By the 1730s an anti-slavery movement had begun in the North and it lead to the enactment of what is known as the Northwest Ordinance in 1787. This measure prohibited the introduction of slavery in to territories north of the Ohio River. Thus, began a period of turmoil that saw the United States divided geographically into slave and non-slave regions. During this same period, some of the paradoxes and divisiveness of slavery manifested itself in important historical measures.

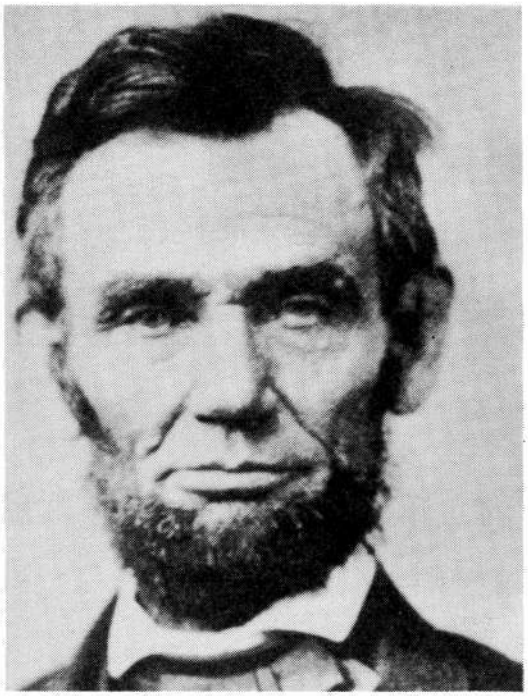
The famous American Declaration of Independence from British rule, written by Thomas Jefferson, and signed by a courageous band of American patriots on July 4, 1776 contained this high minded passage: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and pursuit of happiness." The truth is, of course, that many of the signatories, including Jefferson himself, were slave holders. (Jefferson was, on principle, opposed to slavery, but thought the time of emancipation had not yet come.) The Declaration, then, perpetuated the view that black slaves were less than "all men" in their creation. The United States of America, thus, began existence as an independent nation as a slave state for Blacks and a free state for Whites.



Thomas Jefferson. President 1801-09.

What to do about slavery was a hotly debated question in the 1787 Constitution Covention that drafted the Constitution of the United States of America. Although substantial sympathy existed to abolish slavery, the pro-slavers, especially from the South, made it plain that there could be no union of the independent states – that is, no United States of America – if slavery were to be outlawed. Thus, the great document – although without using the words "slave" or "slavery" – acknowledges its existence in at least three passages. (Article 1, s 2, par. 3 (slaves count 3/5 the value of non-slaves in computing numbers of representatives); Article 1, s 9, par. 1 (Congress may not put an end to importation of slaves before 1808); Article IV, s 2, par. 3 (fugitives from justice must be delivered up).) Nevertheless, neither the Declaration of Independence nor the original U.S. Constitution emancipated black slaves. Indeed, Abraham Lincoln once said, "All men are created equal, except Negroes". (2 Collected Works of A. Lincoln, note 1, at 323 (Basler edition 1953).) By 1787, however, slavery had been abolished in some of the northern states and populations of black freedom, as they were called, began to establish themselves there. There was, of course, a great temptation for black slaves to run away from their southern masters and seek refuge in free states. (ie Uncle Tom's Cabin; Adventures of Huckleberry Finn.)

As the American West was explored and occupied by American frontiersmen, a heated debate arose as to whether new states admitted to the Union (ie new territories admitted as states in the United States of America on equal footing with the original states) would permit or forbid slavery. This was resolved in 1820 by the adoption of what is known as the Missouri compromise. Missouri was to be admitted as a slave state but all states admitted in the future would be free states.



Abraham Lincoln. President 1861-65.

INTERNAL STRESS

In the meantime, slavery in the south of the United States and anti-slavery in the North continued to foment internal stress of great intensity. The first seminal United States Supreme Court decision on slavery was issued in 1856. In the case of **Dred Scott** v. **Sandford,** Mr Scott, a black slave in Missouri, claimed that as a citizen of the United States of America, he had become entitled to his freedom when his master took him on a journey to non-slave territories and to the free state of Illinois. (Scott's master had, of course, taken along his slave to make the master's travels easier; much as a Victorian English gentlemen would travel with a valet.) In the sad **Dred Scott** case, the Supreme Court held that a **slave** was property and **not** a citizen of the United States and, thus, because he was a mere chattel, being taken by his master to a place where slavery was prohibited gave him no just claim to manumission. **Dred Scott** reaffirmed the basest view of the quality of black slaves; they were less than fully human.

The negative reaction **Dred Scott** received in the North and other matters pertaining to trade and the economy lead the southern states to see that their slave based economy was unlikely to be sustained, if they remained in the United States of America. Consequently, after the election of Abraham Lincoln to the presidency in 1860, eleven southern states seceded from the United States and set up a new nation called the Confederate States of America. There followed the bloody American Civil War from 1860-65 to test whether secession was possible. That war ultimately saw the defeat of the confederacy and the restoration of the seceding states to the United States.

In 1863 – during the dark days of that horrible war that often pitted brother against brother – Abraham Lincoln issued the Emancipation Proclamation, freeing all the slaves in the rebellious states. His purpose was to regalvanize the flagging spirit of the North (at that time southern forces seemed to be winning) and to gain more support within the South from the slaves themselves. Eventually, the industrial capacity of the North won out and the Civil War ended in 1865. Shortly thereafter the Congress of the United States proposed a number of amendments to the constitution of the United States to do away with slavery. The 13th Amendment to the Constitution of the United Sates was ratified in 1865, abolishing and prohibiting slavery throughout all the United States. In 1868 the 14th Amendment to the Constitution was ratified, guaranteeing to all citizens of the United States – which now included the freed black slaves – the equal protection of the laws of all the states. (Remember that term, "equal protection of the laws".) In 1870 the 15th Amendment was ratified with the purpose of assuring that the freed Blacks had full voting rights. And in the late 1860s and early 70s, the Congress of the United States adopted a series of Civil Rights laws that were intended to assure enforcement of these civil rights throughout the nation. In 1964 former United States Supreme Court Justice Abraham Goldberg summed up this history as follows: "the (original) Constitution . . . delcared all men to be free and equal – except black men, who were to be neither free nor equal. This inconsistency . . . took a civil war to get right . . . (But) with the adoption of the thirteenth, fourteenth, and fifteenth amendments to the constitution freedom and equality were expressly guaranteed to all – regardless of race, color, or previous condition of servitude." Goldberg, "Equality and Governmental Action", 29 N.Y.U. Law Rev. 205, 206, 208 (1964).

AN IMPOSSIBILITY

Notwithstanding the adoption of these formal measures, the instantaneous transition of Blacks from a status of slavery to a status of equal enjoyment of political rights, much less economic, educational, and social rights, was an impossibility. The former slaves were for the most part poor, badly educated, and politically powerless. And, despite the new laws, forces were set in motion throughout the south and to a lesser extent in the North to keep them there. In an 1880 decision the United States supreme Court assessed the situation in these words: "the colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had the superior intelligence. Their training had left them mere children and as such they needed the protection which a wise government extends to those unable to protect themselves". **Strauder v West Virginia,** 100 U.S. 303, 25 L.Ed, 664, 665 (1880). For a short period of what is known as the era of "radical reconstruction", Blacks actually gained large representation in governments in some southern states, but this did not last long. After full political rights were restored to them, the former southern White rebels resumed their prewar places of prominence in politics and government and Whites soon displaced the Blacks. Furthermore, violent secret anti-Black terrorist organizations sprang up with the sole purpose of denying Blacks the political rights guaranteed them by the constitution and laws of the United States. Foremost among these was the dreaded (by Blacks) White Knights of the Ku Klux Klan.

By the 1880s and 90s both private and official measures to keep Blacks economically, politically and socially subjugated were in place throughout the United States, but especially in the South. Mississippi, for example, passed an amendment to the Mississippi state constitution in 1890 to deny the right to vote to Blacks.

SUPREME COURT DECISION

But the most devastating event of this era was another unfortunate decision of the United States Supreme Court. In 1876, the Court decided a case called **Plessy** v **Ferguson,** 163 U.S. 573 (1896). In that action, Mr Plessy, a Black, argued that a Louisiana statute that required railroad companies to provide "separate and equal" accommodations for White and Black patrons and prevented the intermingling of the two races, was unconstitutional and void. Plessy asserted that this measure denied him and other Blacks the equal protection of the laws guaranteed by the 14th Amendment.

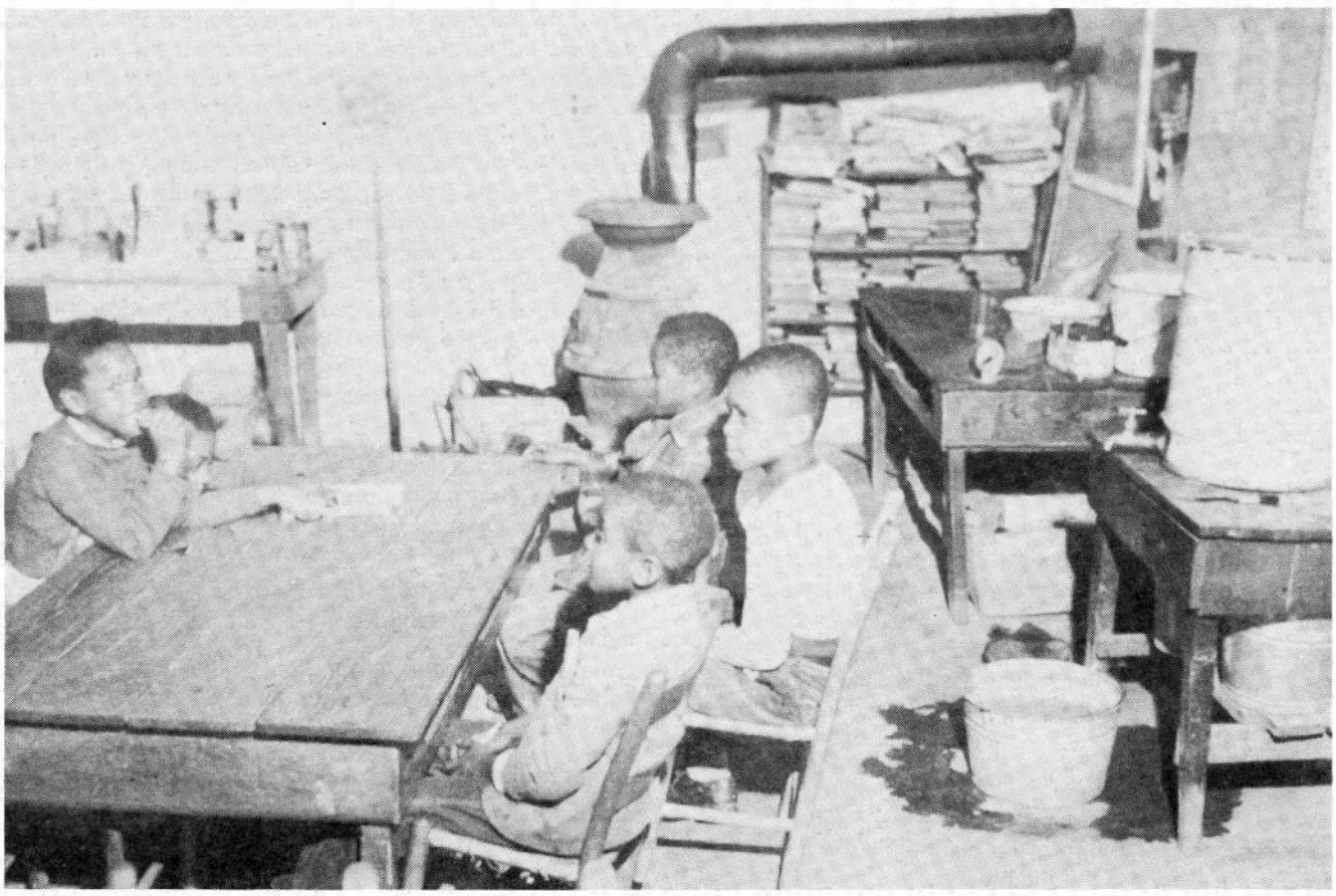
In upholding the law and dashing the political hopes of Blacks, the majority of the Supreme Court gave this cramped meaning to constitutional equal protection:

"So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with repsect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, **it is at liberty to act with reference to the established usages, customs, and tradition of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.** Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances* is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. ***. Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."

Justice Halran, the lone dissenting member of the Court, had this to say to the majority's argument:

"The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. **Our constitution is color-blind and neither knows nor tolerates classes among citizens.** In respect of civil rights, all citizens are equal before the law. the humblest is the peer of the most powerful. **The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.** It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent



INADEQUACY OF NEGRO SCHOOLS. In this one-room school in Person County, North Carolina, all the "facilities" are in view, including the "library," "running water," and "central heating." Seven classes are taught in the room. Photo by Alex Rivera, 1947.

for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."

Justice Harlan's doleful prophecies have been borne out with an ensuing half century of intentional suppression of Blacks and, after that, with a half century of strife and tumoil in a struggle to lift the yoke that **Plessy** v. **Ferguson** permitted to fall upon them. Even after the passage of more than a century, the race-based consequences of that decision continue to plague the USA. The current affirmative action controversy is just one of the fruits of the seeds sown by **Plessy** v. **Ferguson.**

Justice Harlan argued in Plessy that the 14th Amendment made the Constitution of the United States "color blind" and, therefore, it denied to all governments the power to make any law or other legal distinction based upon race. (Note that Harlan did not argue for affirmative action: but the converse, total race neutrality.) But the majority repudiated this view, and instead adopted as the constitutional standard what became known as the "separate but equal rule." That is, laws could be enacted that separated citizens by race in schools, transportation, public accommodations, etc., as long as the services provided one race were equal to those provided the other.

SEPARATE-BUT-EQUAL

Separate-but-equal treatment took hold with a vengeance, especially in the South: separate schools, separate public toilets and drinking fountains, separate places to sit on buses and trains – **but,** the equal was never forthcoming. Wherever Blacks were separated, they were provided inferior resources and services and their culture was proportionately deprived. Blacks were also precluded from entering high paid vocations and professions; and suffered economic subjugation, especially in the South. Despite this, Whites and Blacks in low paying jobs often worked side by side and Blacks and Whites often lived in close physical proximity to each other. Indeed, even under the **Plessey** view, the Supreme Court had ruled that laws forcing blacks and whites to live in separate geographical areas were unconstitutional and void. **Buchanan v Wartley,** 245 U.S. 60 (1917). The rationale, however, had to do more with property rights than with nondiscrimination. Nevertheless, the purely social interchange was rigidly forbidden, often by law and always by social mores. The unbreakable rule was that any White, including a poor White, was superior in social and political status to any Black.

This culture of **de facto** separate but **fanciful** equal treatment became known as Jim Crowism in the South and the measures that embodied it were known as Jim Crow measures. Jim Crow held sway, with gives and takes, up until the United States entered World War II in 1941. The war effort took so many white males as soldiers (the armed forces were then segregated, too) that the economy required new efforts of Blacks (and also women). As a result, Blacks gained bargaining leverage that they never before had and used it to persuade President Franklin Delano Roosevelt to issue an executive order prohibiting racial discrimination in the war industries. Also, the war ultimately broke down the racial barriers in the armed forces and put black and white soldiers and sailors on equal footing without regard to race.

"General Blotchit, you take your tanks and feint at Lynchville, General Pannick, you move into the county seat. And then in the confusion, my infantry will try to take little Luther to school!"

After the war, Jim Crow attempted to reassert itself but was met in the northern and western states by state laws, called Fair Employment Practices Acts, that prohibited racial discrimination in employment and housing in those states. But **the** true "jewel in the crown" of civil rights under law for Blacks in the United States, is the 1954 decision of the U.S. Supreme Court known as **Brown v Board of Education of Topeka, Kansas,** 347 U.S. 483 (1954). In that case, a black school girl named Brown argued that the de jure "separate and equal" treatment rule of **Plessy** that required her to attend a segregated all black school was unconstitutional; that it deprived her of social and economic values in a manner that denied her the equal protection of the laws guaranteed her by the 14th amendment.

In an unanimous decision with volcanic ramifications, the Supreme Court did not merely adjust or modify the separate and equal rule of **Plessy,** but flatly and wholly repudiated it. From the day **Brown v Board** was decided on, equal protection under the laws has meant that the states may not segregate schools and other public facilities by race. The Court no longer holds that constitutional "equal protection of the laws" could be achieved by a separate-but-equal policy. Said the Court, "To separate (black children) from others . . . because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone". 347 U.S. at 494. Moreover, the Court exhorted governmental officials everywhere to end racial segregation "with all deliberate speed". (Brown v Board) (I), 349 (1955). Obedience to that exhortation has not been easy. Affirmative action is one of the whips used to spur it on.

By the late 1950s, the reason for continued opposition to equal treatment of Blacks under the laws of the United States was no longer the belief in Black moral inferiority that had served to justify slavery, but was now grounded more in fear, racial hatred and bigotry, and perceived threats to economic status. Also, especially in the South, many people were antagonistic to the specter of remote, outside forces (i.e. the rarefied Supreme Court and northern do gooders) dictating basic social choices upon a reluctant population. The American people, by and large and especially in the South, have always believed that government should be limited – the servant and not the master of the people – and what was happening seemed to be the reverse.

Putting aside childish things. A six-year-old girl awaits arrest. (Wide World Photo, 1962)

It was not until the early 1960s, after the election of John F. Kennedy to the Presidency, that the United States Congress (the national legislature) began to enact legislation prohibiting racial discrimination in private employments and in various private accommodations held open for public custom. The watershed enactment is the Civil Rights Act of 1964 and its most far reaching element in Title VII, which prohibits discrimination on the basis of race (and religion, sex, creed and national origin) in most private employments throughout the United States. Somewhat ironically, as the federal laws and court rulings gained strength and began to dismantle legal barriers to equal opportunities in education, jobs, housing, and so forth, the realities of centuries of cultural and economic deprivation began to manifest themselves. While some Blacks immediately rose to high positions in politics, education, government (e.g. Thurgood Marshall, the first Black Justice of the United States Supreme Court) and business, much of the rank and file were ill prepared to compete. Consequently, many people – shall I say reformers – saw the need to go further: not merely to remove artificial barriers to equal opportunity but to take **Affirmative action** to put Blacks where they would have been, absent the history of discrimination.

Initially, these efforts focused upon Blacks who could demonstrate that they **individually** had suffered direct personal discrimination, most often in employment. Although the closely affected white co-employees were often disgruntled by it, the American public at large did not and does not bridle at giving these discriminatees the job positions they would otherwise have attained, had they not been discriminated against. This is another relatively benign version of affirmative action.

NEVER PERSONALLY DISCRIMINATED AGAINST

But what about Blacks who were never personally discriminated against by anyone? Those who come fresh from school and enter the job market for the first time? Are they to compete – color neutrally – with everyone else for jobs and educational opportunities, or are they to be given special favoritism because of the historic discrimination against the Black race? Far from benign, this question is inflammably controversial.

In the mid-1970s, the medical college at the University of California at Davis adopted an affirmative action student admission program similar to the one now in place at the University of Florida College of Law. A certain number of admissions were set aside exclusively for minority applicants (i.e. Blacks, Hispanics, Asians). A white applicant named Bakke failed to be admitted under the competitive non-minority plan and sought admission under the affirmative action plan. Even though his credentials were far superior to those of any of the students admitted under the plan, Bakke was denied the opportunity to compete solely because he was White. Bakke sued the State of California, alleging that the admission plan violated his 14th Amendment rights to equal treatment under the law. In sum, Bakke argued for the "color blind" constitution that Justice Harlan called for in 1896 and that many people believed the 1954 decision in **Brown** v. **Board of Education** had adopted.

The U.S. Supreme court ordered the State of California to admit Mr Bakke to medical school (and he graduated in due course), but Mr Bakke's case did not secure a decision announcing with finality that the Constitution of the United States is color blind. Instead, the Bakke decision seems to put these constraints on race based affirmative action programs: (I say "seems to" because the court was severely divided in its opinion.)

Any program that calls for the consideration of race as a criterion for admission is inherently suspect. This means that they can be valid only if necessary to achieve a compelling state goal. (i.e. a goal deemed to be beneficent by the Court).

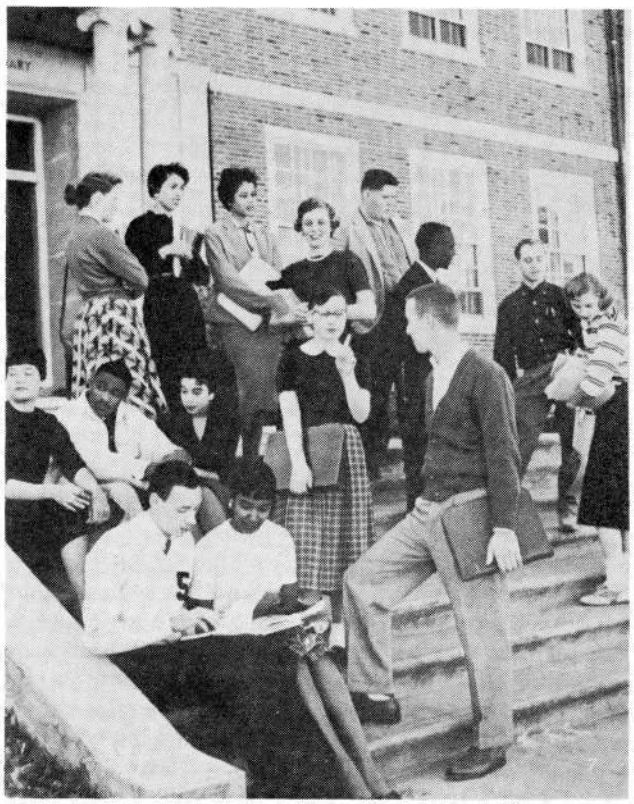
The Supreme Court ordered California to admit Mr Bakke to medical school because the State of California had not proved that the affirmative action program was necessary to achieve an important state goal. The failure was in the proof; not in the theory of affirmative action.

GUIDELINES

Bakke, thus, establishes two important points. First, race based affirmative action plans are not necessarily and always unconstitutional. Second, but the authorities must prove, and not merely proclaim; first, that the state has a compelling goal; and, second, that the affirmative action plan is necessary to achieve it. A suitable goal, in most instances, is to open up a field of study, an occupation, or a profession to members of a race that have been historically excluded from it.

Though the particular California plan failed the test, the **Bakke** decision laid out guidelines that have permitted institutions throughout the United States, but especially in the South, to adopt **Bakke**-like affirmative admission plans. In the meantime, the federal government (i.e. the

United States government) has put tremendous pressure on state schools and institutions to adopt affirmative action programs. The pressure is exerted by requiring these institutions to adopt affirmative action plans as a condition of receiving grants of federal money from the United States treasury to support their general education programs. Most schools cannot afford to turn away the money. Similarly, private contractors that do business with the federal government must adopt affirmative action employment plans as a condition of obtaining federal contracts. Few of them are willing to turn away the money to avoid the affirmative action strings.



American Faces. White and Negro college students on the steps of a hitherto entirely Negro college in Missouri, 1963.

In a sense, then, **Bakke**-like affirmative action has become a national governmental policy. The federal government enforces it indirectly by the strings tied to grants of federal money. This, of course, resulted in the growth of a massive federal bureaucracy to see that the affirmative action criteria are appropriately met. The presence of this lurking, threatening bureaucracy is resented by many people, including some who in other respects favor affirmative action goals.

COLOR BLIND

Nevertheless and notwithstanding the federal affirmative action policy, many people continue to believe that all racial preferences are wrong; that the constitution should and does require the states to be strictly color blind on racial matters. It would be wrong to assume that all the people of this mind are conservatives or, worse yet, bigots. Mr Justice William O. Douglas, now dead, was one of the most liberal and humane jurists in the history of the United States Supreme Court. Yet, this is what he said about a law school affirmative action admission plan in a 1974 opinion that preceded the **Bakke** case:

"There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of Blacks. Even a greater wrong was done the Whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior race by constitutional standards. * * * Whatever his race, (an applicant) has a right to have his application considered on its individual merits in a racially neutral manner. * * *

* * * * The State * * * may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers not their creation in order to satisfy our theory of how society ought to be organized. * * * A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end may procure that result despite its contrary intentions. One other assumption must be clearly disapproved, that Blacks or Browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer."

Defunis v. Odegaard, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). (Douglas, dissenting.)

The controversy continues, but the **Bakke** case, which just celebrated its tenth anniversary, remains the law. In the meantime, the U.S. Supreme Court has approved similar affirmative action employment plans in both governmental employment and private industry; always with heated dissenting views being expressed. These approvals have been given despite the language in the federal Equal Employment Act – that I referred to earlier – that appeared to prohibit plans that required racial goals or quotas based upon proportional numbers by race in the general population.

ACADEMIC TWIST

Most recently, the affirmative action movement has taken a curious academic twist. Two of our prestigious private universities, Stanford in the West and Duke in the Southeast, have voluntarily adopted extended affirmative action measures that have inflamed the debate. First, Stanford modified its core curriculum requirement that all students study the writings of the seminal western thinkers from the time of Classic Greece to the present to, instead, require a mixture of the classics **and** of modern ethnic and feminist writers. No lesser an official than the U.S. Secretary of Education denounced that change as a spineless dilution of intellectual values; but, as with all these issues, outspoken voices supported each side. Then, Duke announced a firm goal of hiring at least one minority (i.e. Black) faculty member in each department by a designated date. In other words, **race,** and not intellectual merit or educational preparation, was to be given primary consideration. Again, a storm of debate erupted and continues through U.S. academia.

It has not been only ultra-conservative voices that are crying out "Too Far". For example, Gertrude Himmelfarb, a distinguished professor of history at the Graduate School of the City University of New York and a reactionary by nobody's standards, recently wrote in the New York Times (May 5, 1988, p. 27)

> Separate episodes at Stanford and Duke typify a two-front attack going on quietly – and perhaps for that reason insidiously – in many universities. They illustrate a prevailing interpretation of affirmative action that perverts the original theory . . .
>
> This was the original, and proper, function of affirmative action: to seek out the best people wherever they might be found, to encourage them to do their best and to reward them for being the best. The Stanford and Duke versions of affirmative action debase the ideas they are meant to affirm and demean the faculties they are meant to serve.

In the same vein, another writer from the UCLA law school recently complained in the pages of the Chronicle of Higher Education (June 8, B1) that the extreme form of affirmative action employed at UCLA turns out lawyers of "marginal" qualifications who are of benefit to no one.

Of course, voices rise to support these extended forms of affirmative action, but the complaints are being heard more often and from more places. One critical view holds that specified members of a race, who were never themselves the victims of discrimination, should not be elevated to prestigious positions over competing whites solely because members of their race were historically repressed. An answer to it is that that the main beneficiary is not the favored individual but the less capable members of the class who will bestir themselves to greater achievement because of the visible evidence that achievement will be rewarded. Still, the Harlan-Douglas ideal of a color-blind constitution remains compelling to vast numbers of Americans, making it unlikely that extreme forms of affirmative action will ever gain permanence in United States constitutional doctrine.

FRUITS

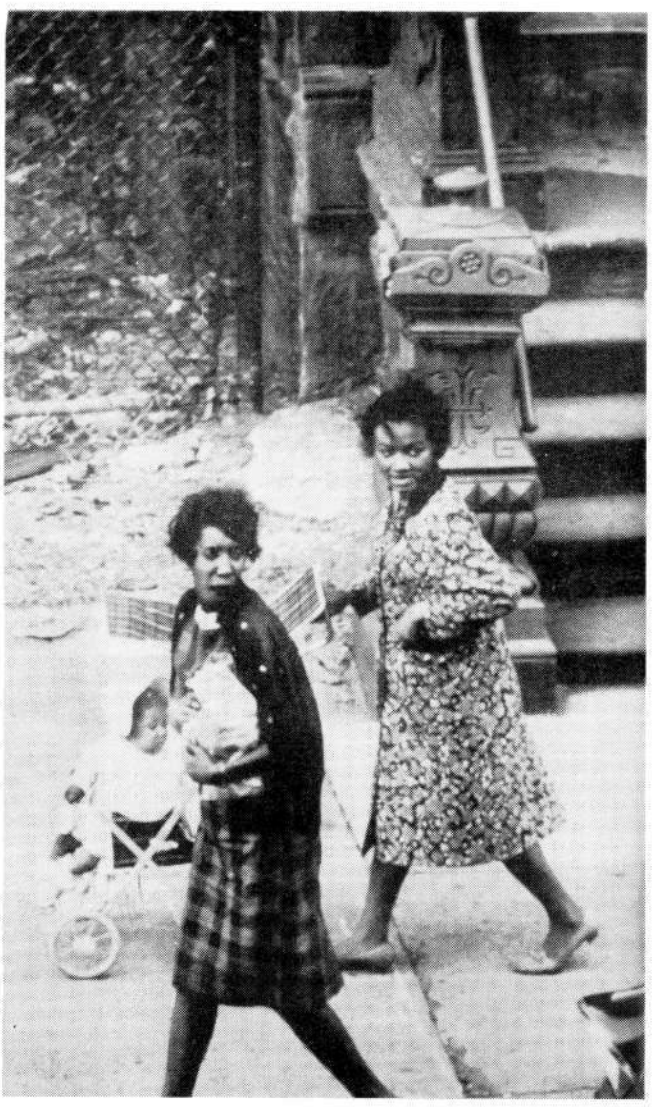
But what have been the fruits of affirmative action? No one can deny that schools and places of employment in the United States have opened up to Blacks and that is to the good. Many genuine black leaders and intellectuals have emerged – people who could not have attained prominence under Jim Crow – and that is better. Still, we do not know whether these gains are the benefits of the "color blind" mainstream of the law, or of the exceptional benefits of extreme forms of affirmative action. University of Chicago philosopher Allan Bloom holds the former view and has produced much evidence to support it. In his recent controversial book, "The Closing of the American Mind", R2. Bloom asserts that everyone knows but no one says that on the **average** black students in American universities are academically inferior to white students; that unlike every other American minority, Blacks resist assimilation in university life; and that they voluntarily maintain racially separated subcultures. Bloom also says that employers, while they must and do hire these students upon graduation, expect less of them and give them less responsibility. Bloom, of course, is speaking of the average and does not deny that many stellar black students separate themselves from the pack. Bloom also asserts that these facts – though plain and well known in private – are public taboo. One cannot publicly question "why" without risking rebuke as a racist. There is, as Bloom says, a "closing of the American mind" as to some painful matters.

Former Colorado Governor Richard Lamm, now an academician, is one of the few public people in the United States who will openly confront, in his words, "discussion of the deep racial divisions and persistent patterns of failure of some racial and ethnic groups (because they are) a taboo subject." He goes on to say:

"All sorts of buzz words must be employed to avoid stating the truth: America is a racially and ethnically divided country, and the nation's failure to assimilate blacks (and Latinos) into the mainstream is the fault of both society and those minority groups themselves.

We can no longer pretend that racial and ethnic equality will come about on its own. We now have 25 years of incontrovertible evidence that achieving racial equality will require more than mere legislation to combat discrimination.

. . . Uncomfortable as it makes us feel to criticize other people's cultures, there can be no doubt that the culture of the ghetto (and the barrio) has contributed to the failure of large numbers of blacks (and Latinos) to take their place in the American mainstream."



Harlem Street Scene.

GHETTO CULTURE

What is it about American black "ghetto" culture, as Lamm refers to it, that deserves criticism? Horance G. Davis, a Pulitzer Prize winning commentator in my hometown of Gainesville, Florida and a social progressive by any standard, recently laid out this litany of consequences:

- Blacks make up 13% of the U.S. population, but
- 50% of arrested murderers are Black
- 41% of murder victims are Black
- to be murdered is the leading cause of death of black men between ages 16 and 34
- 50% of the male prison population is black (6% of the population is black male)
- 35% of black males in urban centers are drug or alcohol addicts
- 46% of black males between ages 16 and 62 are out of the work force
- 32% of black workers earn less than the poverty level
-30% of black homes live below the poverty level
- 57% of black babies are illegitimate at birth (5 times higher than the white rate)
- 43% of black families are headed by women who are abandoned by men.

and on and on.

What does all this say about affirmative action as I have described it? Most fundamentally, of course, that the bitter fruit of 300 years of deprivation and suppression cannot be sweetened by racial preference at the upper tiers of society. That kind of maltreatment does not prepare a **minority** population (and I mean minority in numbers) for easy assimilation – top to bottom – into a modern culture which espouses both the egalitarian and the meritocratic expectations of present day American life. But as to what the future of affirmative action is to be, I observed in an article several years ago that it was a doctrine of "inherent transience". By that, I meant the need for affirmative action must necessarily erode as an inevitable consequence of its own successes. (I might also mention that I generally endorse the view that the law should be and must be color blind.) This implies that no inherent difference in capacity divide the races and that a suitable period of equal treatment salted lightly with "affirmative action" will thoroughly integrate the educational and economic cultures. Now I am more pessimistic about the timetable.

If "affirmative action" is to be truly effective, it must **not** be only of the sort that gives Blacks with inferior credentials a preference in job selection and university admissions over Whites with better credentials. Although the evidence has not yet been assembled, this at best can prove to be of limited value; at worst, it produces massive resentment and failure (ie., in 1987-88 a rise in racial disharmony has been noted on American campuses.) Effective affirmative action, if there can be such a thing, must take the uncomfortable step – to use Governor Lamm's description –of criticizing the status quo. It is not enough to criticize the attributes of black ghetto culture that breed the failures I listed above. We must candidly admit that "affirmative action" implies that the majoritarian culture on the whole, is more desirable than the culture presently enjoyed by those whom "affirmative action" is intended to move from the one to the other. We must, therefore, also, criticize the majoritarian culture to reach a shared consensus on to which objects of the action deserve the effort. I am confident that most of the attributes of majoritarian economic well-being and social civility will prevail as desirable goals. Finally, to make a genuine difference, we must do more than criticize; we must take positive steps that will make Blacks want to make the effort and will make Whites want to see them make it. Candidly, I do not know that we collectively Black and White, have the toleration and courage to do it. If we do not, our current versions of affirmative action may survive for a very long time – whether they do any good or not.□

Corrections:

The issue of September 1988 was incorrectly designated as Vol. 21 No. 6, instead of Vol. 20 No. 5.

In the same issue Rupert Taylor was incorrectly described as a lecturer in Sociology, University of the Witwatersrand. He is in fact a lecturer in Politics, University of the Witwatersrand.

Picture Acknowledgements.

pp. 3 and 4: ed Seidman, Martin and Johnson: *Zimbabwe: A New History;* ZPH, Harare, 1982 pp. 136, 139.

pp. 5, 8 and 9: *Natal Witness.*

pp. 13, 14 and 18: Buchan, Alastair: *The U.S.A.,* oup, 1963, pp. 28, 92.

p. 15 Franklin, J.H.: *From Slavery to Freedom;* Knopf, N.Y. 1956 p. 602.

pp. 16 and 19: ed. Clarke, J.H.: *Harlem USA,* Seven Seas, Berlin, 1964, pp. 97, 272.

p. 17: King, M. Luther: *Why We Can't Wait;* Signet, N.Y., 1964.

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