Acad. Quest. (2023) 36.1
DOI 10.51845.36.1.11

Review Essay

Beyond *Bakke*

Red, White, and Black: Rescuing American History from Revisionists and Race Hustlers, Robert L. Woodson, Sr., 2021, Emancipation Books, pp. 224, $16.89 hardcover.

Facing Reality: Two Truths about Race in America, Charles Murray, 2021, Encounter Books, pp. 168, $15.59 hardcover.

Classified: The Untold Story of Racial Classification in America, David E. Bernstein, Bombadier Books, 2022, pp. 250, $23.28 hardcover.

John S. Rosenberg

The "black cloud" of racial preference that has cast a dark shadow over college admissions and hiring for the past forty-five years may be about to lift, if as widely expected the Supreme Court overturns or significantly reins in the very odd 1978 *Bakke* decision.

Odd, because there was an unusual three-way split among the justices. Justice Stevens's opinion, joined by Chief Justice Burger and Justices Rehnquist and Stewart, held that the University of California Davis Medical School's preferential admission program violated Title VI of the 1964 Civil Rights Act, and thus would admit Bakke. Justice Brennan's opinion, joined by Justices Marshall, White, and Blackmun, would uphold the program, thus refusing admission to Bakke, under both the Fourteenth Amendment and Title VI

As a result, the single opinion of Justice Powell controlled the outcome. He joined the Stevens group in holding that the program should be struck down and Bakke admitted, but he agreed with the Brennan group that the Fourteenth Amendment and Title VI, whose meaning was determined by that amendment, were not completely colorblind.

John S. Rosenberg blogs at www.Discriminations.us. He last appeared in *AQ* in summer 2021 with "Affirmative Action: R.I.P. or Release 3.0?"

Where the Brennan opinion would uphold virtually any preferential treatment, including those designed to correct past "societal discrimination," Powell limited his approval to admission programs where race was only "a factor" that could "tip the balance" in close cases, and that "diversity" could be a "compelling state interest."

Three things are worth noting about the judgment in *Bakke*.

First, a majority of the Court has only held that diversity is a compelling interest in one (yes, that's right, *one*) case, *Grutter*, which the plaintiffs in the Harvard and UNC cases now before the Court seek to overturn.

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

As Allan Sindler, then dean of the Berkeley Graduate School of Public Policy, emphasized shortly after *Bakke* was decided,

> For the first time, four justices of the Supreme Court—just one short of a majority—developed and subscribed to a constitutional justification of pro-minority racial preferences and reverse discrimination that would transform the meaning of equal protection and equal opportunity. . . . This position is nothing less than a redefinition of equal opportunity in terms of group proportional equality."

The demand of "equity" advocates for proportional representation is flatly illegal under today's constitutional and statutory law, but it will not be if Democrats ever succeed in becoming a majority on the Court again.

Third, the *Bakke* judgement overturned or rejected opinions by two of the most liberal justices of the twentieth century. The Powell-Brennan alliance overturned the holding of the California Supreme

Court, whose 6-1 opinion written by Justice Stanley Mosk, widely regarded as one of the most impressive state court judges in the country, had held, "To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone."

The Powell-Brennan alliance also rejected the powerful opinion by Justice William O. Douglas, probably the most liberal justice to serve on the Supreme Court in the twentieth century, four years earlier in *DeFunis v. Odegard* (1974), a case from the University of Washington law school that foreshadowed the issues in *Bakke*. "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordion-like quality," Justice Douglas wrote.

> There is no constitutional right for any race to be preferred.... A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

The case was held moot, since by the time it reached the Court DeFunis had been admitted to law school, but Justice Douglas dissented, arguing that the issues were broad and important enough—as *Bakke* later confirmed—that it should have been decided.

Law Office History

Anticipating the demise or severe restriction of diversity-justified racial preference policies in the impending Supreme Court decision on affirmative action at Harvard and the University of North Carolina, the *New York Time Magazine* recently published a very long article by Emily Bazelon explicating, tepidly defending, but ultimately burying Justice Powell's reliance on diversity rather redressing past discrimination that gave rise to those policies. The diversity

rationale, Bazelon writes, "allowed affirmative action to endure but left it vulnerable, stripping away history and the moral underpinning to remedy racism."

Perhaps Justice Powell chose to ground his justification for racial preference in "diversity"—thus "stripping away history"—because he recognized history offered such scant support.

Nearly sixty years ago the historian Alfred Kelly popularized the term "law office history," by which he meant "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." Today, law office history is being offered in unprecedented volume in defense of affirmative action. Consider Justice Ketanji Brown Jackson's first oral argument three weeks before the arguments in the Harvard/UNC affirmative action cases. Sounding less like a freshman justice and more like a college freshman smugly declaring that she found something in her first trip to the library that no one had seen before, she offered a history lesson from the bench: when she looked closely at history and the Constitution

> it became clear to me that the framers themselves adopted the equal protection clause, the Fourteenth Amendment, the Fifteenth Amendment, in a race conscious way. That they were, in fact, trying to ensure that people who had been discriminated against, the freedmen in—during the reconstructive—reconstruction period were actually brought equal to everyone else in the society.
>
> So I looked at the report that was submitted by the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, and that report says that the entire point of the amendment was to secure rights of the freed former slaves.

The essence of this argument is that since the Freedmen's Bureau was created to help former slaves, since the framers of Reconstruction legislation and amendments designed to combat discrimination

against blacks were conscious of their color, the Fourteenth Amendment created no bar to burdening Asians and whites and benefitting blacks and Hispanics based on their race. This argument was asserted repeatedly in briefs supporting Harvard.

Among the reasons why the argument that "race-conscious" behavior to help recently freed slaves and some other blacks by Reconstruction era policymakers justifies imposing race-based burdens on Asians over a century later deserves to be labeled law office history are the following:

1. **It is myopic and flagrantly misleading.** Yes, Reconstruction era politicians knew the former slaves they intended to help were black. But the intention and effect of their remedial efforts fell far short of proportional "equity." Indeed, none of the briefs emphasizing race-conscious policies mentioned that Reconstruction Congresses established segregated schools in the District of Columbia and repeatedly rejected Sen. Charles Sumner's efforts to promote racially integrated schools.

2. **It prioritizes purpose of fighting discrimination over method chosen**. Yes, the occasion and immediate purpose of the Civil Rights Act of 1866 and the Fourteenth Amendment was to protect blacks from some forms of discrimination, but the method chosen to do that was to prohibit race-based discrimination against "all persons," not just blacks. "Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority,'" Justice Powell held in *Bakke*, "the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude." Powell cited *McDonald v. Santa Fe Trail Transp. Co*, decided just two years earlier, that concluded based on an exhaustive analysis that the Civil Rights Act of 1866 protected all races, not just blacks. *McDonald* held that the "statutory structure and legislative history persuade us that the Thirty-ninth Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."

Since it was clearly understood during Reconstruction and consistently afterward that whites are also protected from discrimination, it is fanciful to argue, as Harvard does now, that discrimination against Asians should be allowed. The *McDonald* opinion was written by Justice Thurgood Marshall, and it was ignored by all of the law office history briefs currently before the Court.

Unlikely as it might appear in 2023, today's defenders of affirmative action stand on the shoulders of dead racists. Justice John Marshall Harlan was wrong, they assert, to argue in *Plessy* that "our Constitution is colorblind." They applaud, as the Harvard brief does, the success of the racists and "moderates" in the Thirty-ninth Congress who rejected colorblind language in the Fourteenth Amendment proposed by former abolitionists Charles Sumner, Thaddeus Stevens, and the radicals, "choosing instead to guarantee 'equal protection' rather than prohibit all distinctions based on race." And what of more recent iconic liberals such as Hubert Humphrey, who did succeed in embedding colorblindness into Title VI and the rest of the 1964 Civil Rights Act? "The words of Senator Humphrey and his allies forswearing affirmative action should be understood as mere strategic feints," Harvard law professor Randall Kennedy superciliously explains in his book, *For Discrimination* (2015), at best a reflection of the limitations "of early 1960s white racial liberalism . . . that regrettably underestimated the barriers" of continued racial discrimination.

One hopes that the forthcoming judgment in the Harvard and UNC cases will revive both the letter and spirit of the opinions by Justices Mosk and Douglas quoted above—in short, of what for nearly 150 years was the liberal vision that Americans should be treated without regard to race, that the Constitution should finally be firmly held to be colorblind, and that the framers of Title VI actually meant what they said. Since today's progressives defend racial preference with the arguments of dead racists, it would be ironic and fitting for the Court's conservatives to revive the colorblind radical abolitionist tradition they abandoned.

Three important recent books can help the Court reach that destination by taking different but complementary routes through

what may be the approaching post-*Bakke* terrain. *Red, White and Black: Rescuing American History Revisionists and Race Hustlers* is in many respects a testimonial to its editor, Robert Woodson, founder in 1981 and president of the Woodson Center, which has worked tirelessly and effectively to empower people in poor neighborhoods. The twenty-six essays in Woodson's collection are uneven, ranging from impressive commentary by well-known authors such as John McWhorter, Shelby Steele, and Clarence Page to more personal testimonies. All are associated with, and discuss the themes associated with, a Woodson project, 1776 Unites, the antidote to the demoralizing pessimism of the *New York Times*'s 1619 project and the race-based policies it encouraged.

"We first came together in February of 2020," Woodson explains in his conclusion, "Keeping the Promise of 1776," "to voice our commitment to the promise of the American Founding, which rests not in nostalgia or mere patriotic sentiment, but on the knowledge that its timeless principles are vital to the future happiness and prosperity of our republic." Our essays make clear, he concludes, that the Founding and what followed were not perfect, that there have been and still are those "who have been forgotten, ignored, or even gravely harmed in and by our country. . . . Yet we are convinced that Americans fitting this description, far from being helpless victims in need of rescue, possess within themselves the very power necessary to renew their own lives and the life of our entire nation."

At the end of his essay Shelby Steele relates that after one of his "kitchen-table rants" against America as a teenager, "my father—the son of a man born in slavery—said to me, 'You know, you shouldn't underestimate America. This is a strong country.' I protested, starting on racism again. He said, 'No, it's strong enough to change.'" I hope his father was right. If he was, it will be in large part because of the work of people like Robert Woodson.

Readers familiar with Charles Murray's work will not be surprised that his recent short book, *Facing Reality: Two Truths About Race in America*, presents an impressive, readable distillation of extensive social science data. They may be surprised, however, that his first chapter, "The American Creed Imperiled," is an eloquent plea to

restore the formerly core principle, articulated by the Swedish sociologist Gunnar Myrdal in the 1940s and Martin Luther King, Jr., in the 1960s, that Americans should be treated without regard to race. The currently prevailing counter view that "it is appropriate for the government to play racial favorites," Murray writes,

> has proved to be toxic. It is based on the premise that all groups are equal in the ways that shape economic, social, and political outcomes . . . and that therefore all differences in group outcomes are artificial and indefensible. That premise is factually wrong. . . . Those of us who want to defend the American creed have been unwilling to say openly that races have significant group differences. Since we have been unwilling to say that, we have been defenseless against claims that racism is to blame for unequal outcomes.

Murray is both willing and superbly qualified to say so, which he does forcefully in the two central chapters of *Facing Reality* that document the "two truths" in the subtitle. "The first is that American Whites, Blacks, Latinos, and Asians, *as groups*, have different means and distributions of cognitive ability. The second is that American Whites, Blacks, Latinos, and Asians, *as groups*, have different rates of violent crime. Allegations of systemic racism in policing, education, and the workplace," he thus concludes, "cannot be assessed without dealing with the reality of group differences." Murray's evidence demonstrates that it is different abilities that produce disparate outcomes, not educational or employment requirements that measure them, but that argument will have little effect on "equitarians," who dismiss the need for evidence of discrimination.

David Bernstein's *Classified: The Untold Story of Racial Classification in America*, largely eschews the weeds of equal protection hermeneutics, arguing instead that our current system of racial classification falls short of Constitutional approval because its categories are "arbitrary and irrational." They "do not reflect biology, genetics, or any other objective source. Classifications such as Hispanic, Asian

American, and white combine extremely internally diverse groups in terms of appearance, culture, religion, and more under a single, arbitrary heading."

In his amicus brief based on his book submitted in the UNC case, Bernstein concludes:

> The racial and ethnic categories that Harvard, UNC, and universities across the country use in their admissions policies were created by executive-branch bureaucrats who specifically warned that they were not scientific or anthropological in nature and should not be used to determine eligibility for benefits in race- conscious policies. The categories are imprecise, over and underinclusive, and are not narrowly tailored to achieve educationally beneficial diversity. The Court should overturn *Grutter* and hold that this arbitrary system of racial and ethnic classification cannot be used to determine our children's destiny.

The three books discussed above take different paths but reach the same destination: distributing benefits and burdens based on race offends both common sense and fundamental American values and should be scrapped.