Does the 14th Amendment Mandate Affirmative Action?

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As the civil war was ending, many Americans understood that it would not be enough merely to say "No" to slavery. The need for positive action was seen to be justified; negative action--rejecting slavery--would not be enough.

The Fourteenth Amendment offered equality and justice. Along with the Amendment came several years of Freedman's Bureau legislation. To undergird freedom special benefits--land, crop aid, grants--were provided for the freed by the same Congress that drafted the Amendment's promise of Equal Protection of the Laws.

Special benefits for blacks, ex-slaves, were not said to be in violation of the Fourteenth Amendment.

Ninety years later, in 1954, the Supreme Court in the Brown decision ruled that state-imposed segregation in the schools was--and therefore had been--in conflict with the Amendment. So, too, as a series of rulings that followed made evident, were all the indignities, the damage, inflicted by a segregated society.

The flat-out disregard of the Brown decision, and the new round of frustrated hopes for interracial justice, brought a much higher and more visible level of activism in the civil rights movement, north and south. The brutal response to this helped to mold widely felt sentiment for a new and vigorous public policy. Government yielded to pressure for action to put an end to the customs and local laws that had been doing for so long what the Fourteenth Amendment forbade.

A new round of laws saying "No" was enacted. They put into dramatic focus the consequences of denial for so long of the protection that the Fourteenth Amendment had promised. There arose almost spontaneously among white civic leaders a sense of what had to be done.

In education, in business, in public life, in the more responsible segments of the media, and in the highest circles of government a new consensus developed. Not only negative enforcement was called for. Positive action was required to undo to the extent feasible the damage that had been done. That, too, became the national public policy. That was the source of the movement for what came to be called "Affirmative Action."

From coast to coast there were hundreds of local initiatives producing a positive response. One was at a medical school at the University of California campus at Davis. The sentiment for a response was enhanced by an awakening to the shocking disproportion between white and nonwhite physicians.

It was not difficult for the doctors to diagnose: a bequest from the era of disadvantage imposed after the end of Reconstruction after the Civil War. It did not matter that the medical schools were not at fault: the Davis facility was only three years old, but its administration (all white physicians) knew that they had to face the situation.

The fact was plain: the first year class had not admitted any black students--nor any Hispanic or Native Americans for that matter. The prescription devised to solve this and to comply with the national public policy was this: the next class to be admitted would have one hundred openings, and sixteen places would be reserved for minorities who did have minimum qualifications or better, but who might have test scores lower than some whites.

Alan Bakke had been trained to be and was employed at a NASA installation as a scientist. No longer as young as the average college graduate, he decided he wanted to change his career. He filed an application to the Davis campus medical school in 1973, without success. On reapplying and failing again, he had learned of the Davis Affirmative Action plan, and concluded that it was the cause. He sued.

The case was litigated in a changed national atmosphere. Now a remedial policy based on the proposition that what had been wrongfully denied should be granted, that it was in the national interest to draw disadvantaged minorities into the main channels of national life, had lost popularity. It became extremely uncomfortable for many who had advanced while blacks were out of the running to contemplate what might happen if they were given an opportunity to catch up.

The Fourteenth Amendment, the idea of equal protection of the laws, was suddenly popular among many who had hardly ever heard about it and knew little of its history. The slogan "reverse discrimination" was coined to attack programs that had been conceived and administered by white men, who had not the slightest bias against whites as a class or desire to take advantage of them.

The judgment of the Court upheld Bakke's admission to the medical school and struck down the minority admission plan. The decisive vote came from Justice Lewis Powell, who aligned himself with Associate Justice Rehnquist and three others in voting down the university's claim. This despite the significance of the historical truth with which Justice Powell introduced the discussion of the Fourteenth Amendment:

The Equal Protection Clause was "virtually strangled in infancy by post-Civil War judicial reactionism." It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract.

That succinct paragraph deserves more attention than it has received from courts or those concerned with the ultimate fate of affirmative action. It is description of a significant segment of our nation's history.

It should have been a decisive factor in cases such as Bakke's, which had to decide what to do about a constitutional clause that was dormant for so long. That and another passage in which Justice Powell's opinion acknowledged "the continued exclusion of Negroes from the mainstream of American society."

The decision of the Court rejected the University's admission rules. It did not discuss the significance of the "judicial reactionism" that "nearly strangled" the amendment. The Court had a great opportunity and failed.

No precedent dictated the result the Court should reach in Bakke's case. There was no applicable "law" as to the choice to make, in responding to a century of nullification. Since the Constitution did not contemplate that there would be such disregard for so long, it did not provide guidance as to what was to be done. There was certainly no reason to believe that the Framers of the Amendment intended that its Equal Protection Clause should go into effect immediately and with full intensity after having been violated for so long.

There being no precedent, Justice Powell patched together an opinion built on "dicta," words taken out of their context in other rulings. He declared that the right to Equal Protection was "personal," a phrase utterly meaningless when it was a group that was the victim. He said that any remedy would have to be "narrowly tailored"--a ridiculous phrase to use when a broad group had been affected. He declined to allow a remedy for "societal discrimination," when what was being judged was a nation and its Court's disregard of the very constitutional provision at stake.

The Fourteenth Amendment itself was the fruit of a necessary and wise solution for a comparable problem. The Constitution in effect in 1861 did not contemplate or provide for what was to be done should members of the Union declare themselves to be in a state of "secession" and levy war on the United States. Congress had no power under the basic law as written to enact Reconstruction laws such as one that ordered a state to ratify a constitutional amendment (in this case the Fourteenth) before being treated as a fully qualified one.

The implicit recognition of that power in those circumstances by the Court in Texas v. White and other cases after the Civil War could have been used to guide the Court in 1978.

As in previous epochs, the slim majority of the Court was following the "election returns." And as in the era of Reconstruction, toward its end, the Court's ruling in the Bakke case was used to justify the anti-affirmative action movement.

The main point lost, there was a sort of "consolation" prize. Justice Powell joined the dissenting justices on one point. A majority was put together to recognize that the role of a university in society was such that it could properly seek diversity in a student body and treat race as a plus in admitting minority members.

Over the years following 1978, the Court's opinions in a variety of affirmative action cases varied. Fractured opinions in some cases produced favorable majorities, but only for the benefit of limited groups directly affected. And the Bakke-created shibboleths--"narrowly tailored," "no societal discrimination," "equal protection personal"--were repetitiously referred to. When the elevation of Justice Rehnquist to Chief and the addition of Justice Scalia were followed by the arrival of Clarence Thomas, a combination was forged that produced the broadly negative Aderand case that has, since 1995, brought lower courts to reject even the "diversity" idea as no longer sound law.

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