

The Road Not Taken?

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“Two roads diverged in a yellow wood.” So begins Robert Frost’s famous poem, “The Road Not Taken.”

Regardless of Frost’s multiple meanings in that deceptively simple lyric, many Americans think straightforwardly, and regretfully, of the “road not taken” as they survey what has become of the civil rights movement in their country and its increasingly belligerent enforcement arm, affirmative action.

At first it seemed that the movement united the interests of blacks with the larger understanding of American justice as political equality and equality of opportunity for individuals under the rule of law. That certainly was the import of Martin Luther King Jr.’s legendary speech at the March on Washington in 1963, when he referred to the principle that “all men are created equal” from the Declaration of Independence as the “promissory note” that had not yet been fulfilled for black Americans. That note did seem finally to be redeemed in the eyes of many Americans, black and white, in the Civil Rights Acts of 1964, 1965, and 1968, outlawing discrimination based on race and other factors (more of those later).

That vision of civil rights prevailed only for a time, however, and only insofar as legal efforts supported black advancement. Soon it was clear that many movement leaders and supporters, including King at times, interpreted civil rights to mean the immediate attainment of full social and economic equality with the general white majority. They did not believe that equal opportunity by itself was sufficient for that purpose and were ready to employ other means, such as affirmative action.

As with civil rights, many at the outset understood affirmative action also to be consistent with the first understanding of equality, that is, as equality under the law,

so that no *individual* would experience discrimination on the basis of race or the other factors listed in the laws. Acting “affirmatively” at first entailed the proverbial “outreach,” for example—to focus on one aspect of advancement, higher education—advertising more widely, broadening the applicant pool for college admissions, perhaps even recruiting qualified black students and working to better prepare them. And it was meant to be only a temporary remedy until the absence of discrimination guaranteed by the Civil Rights acts resulted in more visible black advancement.

This approach brought qualified blacks into selective colleges but was criticized as “tokenism,” and gave way to the demand for a “critical mass” of minorities. This meant proportional representation by group—in effect, quotas, although the word was avoided, since Title VII of the Civil Rights Act of 1964 seemed in so many words to prohibit them. Senator Hubert Humphrey memorably declared that he would eat his hat on the floor of the Senate if anyone could find language in the bill that mandated quotas. Fortunately, he never did have to eat his no doubt unpalatable chapeau because there *is* no language in the bill that *mandates* quotas, but, as it turned out, Title VII did not furnish as solid a bulwark against quotas as Humphrey seemed to think (more on this later).

Be that as it may, the “road not taken” regarding civil rights and affirmative action consisted of a firm commitment to equality under the law coupled with an equally firm resistance to socially engineered equality of result or equality of condition, with the implicit understanding that only in a regimented society, not a free one, could all groups be made to come out the same.

But the two understandings of equality got quite muddled fairly early in the process. President Lyndon Baines Johnson made the first and most explicit demand for “equality of result” in his Howard University Commencement Address of 1965, where he may have coined the phrase itself.

Johnson began by defining American values as traditionally understood. “Freedom is the right to share, share fully and equally, in American society,” he proclaimed, “—to vote, to hold a job, to enter a public place, to go to school. It is the right to be treated in every part of our national life as a person equal in dignity and promise to all others.” And he saw these things as being secured for blacks through civil rights legislation. So far so good, but then he added some fateful words:

But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you

are free to compete with all the others,” and still justly believe that you have been completely fair.

This is the next and the more profound stage of the battle for civil rights. . . . We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

Using the term abstractly, as deployed in the rhetoric of civil rights discourse by both black and white, Johnson does briefly acknowledge that “the Negro . . . will have to rely mostly on his own efforts,” but once again he emphasizes that “he just cannot do it alone,” and the bulk of the speech is given to delineating the historic injustices blacks have endured and invoking the guilt and responsibility that whites must feel in general. All in all he enumerates so many needs that must be met by society that the space for the individual seems shrunken and shadowed.

“Men and women of all races are born with the same range of abilities,” LBJ confidently asserts, and although he acknowledges the differences that can arise from upbringing and culture, in the case of blacks he seems to see both as entirely negative. It doesn’t seem to occur to him either that there have been good aspects to black culture and family life that individual blacks could choose to build on while rejecting the bad (he’s speaking at a Howard University Commencement, after all, something he only very briefly acknowledges), or that the “centuries of oppression and persecution,” “long years of degradation and discrimination,” and “endless years of hatred and hopelessness” may be hard for government programs to undo at will. Yet he commends his own Great Society programs, already underway, which he plans to augment further in consultation with experts, both black and white, as the means to address these circumstances.

It’s not that LBJ doesn’t understand that some things exist besides government. He calls the family the “cornerstone of society”—“its influence radiating to every part of life.” It’s just that he always finds the remedy somewhere other than in individuals working to improve their lives. For the “breakdown of the Negro family structure,” he insists that “white America must accept responsibility,” having undermined the black man’s “dignity and assaulted his ability to produce for his family.” All right, there’s truth in that, but he gives only the briefest nod toward the possibility that welfare programs may be contributing to this state of affairs when he recommends *more* welfare programs, though, he insists, “better designed to hold families together.”

Were subsequent programs “better designed”? LBJ could lament in 1965 that “[o]nly a minority—less than half—of all Negro children reach the age of 18 having lived all their lives with both of their parents. At this moment, tonight,” he

continued, “little less than two-thirds are at home with both of their parents.” What would he say today, when a half century of those “better designed” welfare programs has brought us to the point where the percentage of black children living with both parents is less than one third?

Soon the work of Thomas Sowell would make more explicit what common sense no doubt had already grasped: if you are going to measure by group, you have to consider history and culture, how different groups have developed different cultural capacities and talents arising from the circumstances each faced which lead logically to certain outcomes in society, outcomes which cannot be ascribed to simple prejudice. Our laws must protect individuals from discrimination, allow individuals to flourish in their unique ways, not guarantee group outcomes. We are not at Ground Zero in the Garden of Eden, as if every person and every group starts with a blank slate and no belly button.

Thus did the 36th president of the United States lock us into the contradictions that plague us to this day, half a century later: that we could have our cake and eat it too, that we could secure both individual rights and collective remediation, that we could uphold equal rights for blacks while also seeing them as somehow incapable of exercising these rights without help.

And with all the uniqueness of the black experience in America on which LBJ based his analysis—“a feeling whose dark intensity is matched by no other prejudice in our society”—it wasn’t long before other groups defined by factors listed in the Civil Rights Acts ran with their own versions of victimhood and their own demands for preferences, despite not having the “devastating heritage of long years of slavery; and a century of oppression, hatred, and injustice.”

LBJ himself encouraged this development through an executive order that forbade discrimination based on race, color, religion, national origin, and sex in federal contracting and hiring, but also moved toward affirmative action in the second sense, calling for plans to increase the participation of minorities and women.

The Office of Federal Contract Compliance, under the auspices of Johnson’s Department of Labor, introduced a plan in several cities whereby companies seeking federal construction contracts had to show the numbers of minorities that would be hired. In 1967 it was introduced in Philadelphia where it met resistance from several quarters, including the Comptroller General of the United States, and was rescinded a year later.

The Democrats lost the White House in 1968, and Laurence H. Silberman, now a federal judge, became Solicitor and Undersecretary of Labor in the Nixon Administration. His own executive assistant advised against it, but Silberman decided that he would propose a “crucial shift in affirmative action” to push the

Philadelphia Plan through, as he relates in an extraordinary document, an apologia in more ways than one, outlining how he came to regret his actions in giving legal cover to racial/group preferences. The document, “The Origin of Affirmative Action as We Know It—The Philadelphia Plan Pivot by the Honorable Laurence H. Silberman,” began as a speech to the Federalist Society in 2001, and has been incorporated as an Appendix into a larger oral history project by the Historical Society of the District of Columbia Circuit. To read it today is disturbing, but eye-opening and worthwhile to consider in detail.

“I can recall exactly the moment when the core concept of what was to be the ‘Revised Philadelphia Plan’ was born,” Silberman relates dramatically. During a conversation with a congressional aide, “we came upon the notion of openly and boldly requiring all bidders to commit to meeting the percentage of minority hires in the construction trades that we would demand. To circumvent legal and political problems, the numbers would be expressed in terms of ranges, and contractors would be obliged only to use ‘good faith’ to reach the numerical targets which would be described as a goal. Timetables would be included to measure progress to the goal.”

The magical words “goals and timetables,” fashioned in “good faith,” would be used to obfuscate what were actually “quotas.” I was special assistant to Morris Abram, Vice Chairman of the Civil Rights Commission during part of the Reagan Administration, and I can recall his consternation that a mere juggling of verbiage could veil what he saw as a clear violation of the colorblind intentions of the Civil Rights Act.

Silberman, however, “thought that this approach would eventually pass muster because the anti-quota provision of the Civil Rights Act 703(j) [Title VII] applied only to the Act itself,” while Johnson’s executive order went further, “and, in any event, we were obliging contractors to aim for”—once again, the magic word—“goals” instead of rigid quotas.

Silberman won the approval of his boss, Secretary of Labor George Schultz. Then, through arguments he admits were “hokey” and a “stretch,” and meaningless directives such as “contractors would be forbidden to discriminate in reaching their goal” (something he admits was unrealistic), Silberman fought his way to approval from key people, including Assistant Attorney General William Rehnquist (a tough sell, apparently) and Attorney General John Mitchell. Armed with these endorsements, he also beat back objections from various quarters, including Congress, contractors, unions, courts, and, once again, the Comptroller General.

While some courts did oppose the imposition of the plans, other courts in other jurisdictions were already approving “numerical obligations for future black hiring as a remedy for past discrimination, even though the

future hires were not past discriminatees.” Silberman takes care to note that these courts “*were tacitly accepting the concept of group rights rather than individual rights.*” (Emphasis added) He saw his approach by contrast as “predicated . . . as an independent affirmative action obligation” under the executive order, but he admits that his plan benefited from “the remedial guise” that was developing in the courts, which did not demand any finding of wrongful discrimination.

And so affirmative action as we know it today was fully launched. “We went on to spread construction industry city plans around the country,” Silberman relates, “much like Johnny Appleseed.” The Nixon Labor Department further applied government-imposed goals and timetables to all government contractors, not just in construction. Silberman added “factors that should be used in calculating a goal so that it would not appear to be *per se* racial proportional representation.” In later testimony before Congress, “I was rather open in asserting a right to impose these requirements regardless of any showing of discrimination. I insisted that the executive order’s affirmative action obligation was a good deal broader than Title VII.”

But by this time Silberman was having second thoughts, via none other than the great Thomas Sowell. It was “Sowell’s criticism that caused me to begin to doubt the wisdom of our policy,” Silberman relates. As *AQ* readers know, Sowell understood the fallacies behind affirmative action from the first. He “*took issue with the critical assumption that underlay the whole premise: that in a perfectly non-discriminatory world jobs would be distributed roughly in proportion by race. He maintained that cultural factors lead different ethnic and racial groups into different occupational paths, and that our policy would balkanize the country.*” (Emphasis added)

Which is the first bit of sanity that surfaces in this lamentable history, and earns Sowell a place among the prophets of our time. Silberman had plans to walk back from the policy, but turmoil in the Nixon Administration made it impossible. He wrote a *mea culpa* in the *Wall Street Journal* in 1977, admitting “that the goal-quota distinction was an illusion and that any numbers led ineluctably to the concept of proportional representation.”

Higher education makes an entrance at this point in Silberman’s tale, for affirmative action in the second quota-disguised-as-goal sense was spreading, much like Johnny Appleseed, throughout the university. By the time of Silberman’s *WSJ* article, the Bakke case had denied remediation for past discrimination as a justification for affirmative action, but, of course, famously introduced the concept of “diversity.” This Silberman

saw as worse, in that “it could be justified indefinitely, whereas affirmative action suggested only a *temporary* remedial notion even if the remedy was national in scope.” That may be true, but of course, fatally, “diversity,” proportional representation by group, became the governing rubric of all aspects of higher education.

Silberman’s old Harvard Law Professor Derek Bok was now president of Harvard University, and along with William Bowen, President of Princeton, and John Dunlop, Dean of Harvard’s Faculty of Arts and Sciences, approached him to complain that Stanley Pottinger, civil rights chief of the Department of Housing, Education, and Welfare, was aggressively and unrealistically demanding that universities establish faculty minority hiring goals. They claimed that he was being “insensitive to standards.” Although the elite universities were using affirmative action in admissions, which necessitated lowering standards for minorities, these administrators balked at being told, regarding faculty, that they must not “apply hiring criteria that were more restrictive than that governing the least qualified tenured professor in any department,” in Silberman’s words.

For his part, hearing the complaints of these Ivy League administrators, Silberman decided “*that it was probably healthy for the academic elites to experience the same pressure that employers and unions felt because, insofar as we might be misguided, they would constitute a more politically respectable position.*” (Emphasis added)

“Boy was I wrong,” Silberman exclaims. An understatement, to say the least.

To see the manipulations that were used to fasten group preferences on the country is unedifying, but Silberman deserves credit for telling the whole story, in which a Republican Administration carried further what a Democratic Administration had begun. Silberman was evidently hoping that some other more local center of authority might intervene to stop the government directives, but not only did university authorities fail to insist on uniform standards, neither did the Supreme Court. Their various affirmative action decisions have so far allowed diversity to stand as a cover for group preferences.

Silberman emphasizes that those who approved his approach were doing it out of good intentions, and something of the same can be said for the universities as well, but diversity and identity politics now govern every aspect of academic life, not just regarding admissions and faculty hiring, but in administration, curriculum, and standards of comportment and behavior on campus.

America was no longer to be seen as a basically good country and a bastion of freedom that had to be expanded to ensure greater minority participation, but an evil country, victimizing oppressed groups whose claims to justice rest on their ongoing grievance against the oppressor, mainly white men. The “two roads” may have

seemed muddled for a while but now emerge as clearly separate, the one based on individual rights deriving from political equality; the other based on group rights deriving from victimization. Christopher Caldwell goes so far as to suggest that we are living under two constitutions in his new book, *The Age of Entitlement: America since the Sixties*.

All this may not seem a particularly apt introduction to this issue of *AQ*, but it is useful to trace how we got to where we are. Also, a massive new book on affirmative action by Melvin I. Urofsky references Silberman's "Johnny Appleseed" comment about the spread of affirmative action but not a word on his regrets. And it is ironic that not long after the U.S. had embarked on the tribalism of group rights, Francis Fukuyama emerged with his "end of history" thesis, which began as an essay in 1989 with the fall of the Berlin Wall, and was expanded into a book in 1991. He argued that liberal democracy was the only path forward for the world, Fascism and Communism having been defeated. In "Francis Fukuyama and the God That Failed," Mytheos Holt, a new contributor, exposes the weaknesses in Fukuyama's thesis in the first of a series of four "Verdicts" that comprise the feature for this issue, in which our authors evaluate the careers of important scholarly and intellectual figures.

Judith Butler is Maxine Elliot Professor of Comparative Literature and Critical Theory at Berkeley, where her postmodern theorizing strays into multiple confusions and impenetrable prose that has nevertheless had a large and deleterious influence on the study of literature and literary appreciation, as David Clemens explains in "Judith Butler's Deific Damage." In "'Racist and Proud': The Awful Legacy of Ta-Nehisi Coates," Mark Zunac argues that Coates's extreme racialist and anti-white views have destroyed what might have been a better approach to multiculturalism.

In many ways the scholarship of Carlos Eire, T. Lawrason Riggs Professor of History and Religious Studies at Yale University, on the Reformation and the Counter-Reformation, is the culmination of his life as a Cuban exile, a Catholic, and an American, writes fellow exile Mike Gonzalez in "The Metamorphosis of Carlos Eire," the last of the series of verdicts.

In articles, we have a lot of bracingly contrary wisdom. John Staddon and Peter Morcombe make "The Case for Carbon Dioxide," and cast doubt on the manmade global warming thesis; and Managing Editor Seth Forman points out that the 1619 Project of the *New York Times* could be advanced only because academia long ago detached itself from truth in favor of politics, "The 1619 Project: Believe Your Lying Eyes."

In "How to Respond to Obscure Writing," C.E. Larson offers some practical advice on judging the sometimes necessarily but often the gratuitously obscure

in academic writing. In the course of his explanations, Larson addresses the famously obscure prose of Judith Butler, the subject of David Clemens's essay in this issue.

Richard Phelps's careful examination of bibliographies and other research literature on education policy reveals that when experts claim some area of education policy hasn't been researched, it often has been, but is being ignored, in "Down the Memory Hole: Evidence on Educational Testing."

In his article, "In Humans, Sex is Binary and Immutable," Georgi K. Marinov argues that the notion that there are more than two sexes is actually gaining academic support but is undercut by all we know from science.

"Truth in Life . . . and in American Academe," Michael Platt considers the detrimental effects student evaluations have had on the true purpose of education. For Milton Ezrati, "Our Dangerous Obsession With STEM" also indicates loss of the wider purposes of education and is not beneficial for the STEM disciplines themselves.

Stanley K. Ridgley's review essay, "Goat-Killing in the Humanities," uses Steven Conn's slight book, *Nothing Succeeds like Failure: The Sad History of American Business Schools*, to highlight how those who hold progressive views cannot understand business, or business schools.

In reviews, Richard Vedder exposes the glaring inadequacies of Caitlin Zaloom's *Indebted: How Families Make College Work at Any Cost*. Other reviews of important new books are Matthew Stewart on Douglas Murray's *The Madness of Crowds: Gender, Race and Identity*; Glynn Custred on Rich Lowry's *The Case for Nationalism: How It Made Us Powerful, United, and Free*; Lauren Weiner's appreciation of Mary Grabar's exposé of Howard Zinn, whose slanted history of the United States has done untold harm, *Debunking Howard Zinn: Exposing the Fake History That Turned a Generation against America*; and David Randall's take on *Fraud in the Lab: The High Stakes of Scientific Research*, by Nicolas Chevassus-au-Louis.

Eva Moskowitz's enormously effective chain of New York City charter schools, Success Academy, has aroused admiration but also criticism. Robert Pondiscio spent a year doing in-depth, in-person research at one of her schools, and chronicles his findings in *How the Other Half Learns: Equality, Excellence, and the Battle Over School Choice*, reviewed by Anthony Hennen.

Longtime *AQ* advisor Gertrude Himmelfarb passed away earlier this year and Steve Balch remembers her significant and wide-ranging scholarship, as well as her importance, along with her husband Irving Kristol, in the founding of NAS, "Gertrude Himmelfarb (1922-2019)."