FROM BAKKE TO JOHNSON:
A Decade of Supreme Court Drift

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Exactly ten years ago, I incautiously anticipated the Supreme Court in the then pending case, *Alan Bakke v. University of California Board of Regents.* I wrote an essay entitled, "Court to Say No to Segregation," as I tried to predict the Court's reaction to racial preference policies at the U. C. Medical School, which led to better-qualified white students being denied admission while black students with lesser qualifications had seats reserved.

The Court did not see things exactly my way. In the first place, the Justices spoke with confusion, a babble of voices rather than a clear-cut decision. In the second place, out of that babble came a decision which, indeed, did admit Bakke to medical school but which nevertheless effectively affirmed that race-based admissions were constitutionally acceptable.

The only clear opinion in the ruling was that a majority of the Court believed universities could take race into account in school admissions, although they disagreed about how to do so. Justice Marshall rejected the idea of a color-blind Constitution most emphatically, arguing that it was too late in the day, after a history of blatant racial discrimination against blacks, to deny the use of race in favor of blacks.

Why was I so far wrong in foreseeing the course the Court would take? We can hardly guess at this any longer. For we now have a clear record before us. From its confusion in *Bakke*, the Court traveled to a more or less clear opinion in 1987, in the case, *Johnson v. Santa Clara County Transportation Agency.* There, a solid majority ruled that a lesser-qualified female could be preferred over a better-qualified white male in employment decisions, Justice O'Connor setting the main tone of the decision.

A color-blind, gender-blind Constitution? Out of the question, so long as the Court believes that the relative status of the civil rights of Americans is a matter of governmental choice rather than of natural laws.

Ten years ago it did not occur to me that the Supreme Court did not accept the principle of equality as expressed in the Declaration of Independence. The history of civil rights decisions since that time has proved that, indeed, the equality recognized by the Court is only a gift of government the result of human legislation rather than God-given rights. This is made clear in the Scalia dissent in the *Johnson* case perhaps the most important dissent since that by Justice Harlan in *Plessy v. Ferguson* almost a hundred years ago, the dissent which coined the expression, "color-blind Constitution."

I was wrong ten years ago, because I did not foresee that the Court might accept the argument that white males have no civil rights the Constitution is bound to respect. Had the Court done as I anticipated, they would have found it necessary to define an equality which

protected all alike rather than different persons differently. The opposite results of the past decade constitute a cause for alarm for Americans who cherish still the vision of a free society relying on the broad liberty of all to secure political prosperity.

Exactly one year ago a Gallup Poll reported that in some 19 of 20 categories (including "women"!) Americans disagreed with the Court's *Johnson* opinion. The only agreement, by a slight majority, came from American blacks. The divergence of views between the Court and the people has probably never been sharper.

In addition, the migration of the opinions of blacks away from the American standard is ominous. Because the Court said, "yes" to the segregation idea ten years ago, Americans today live uncomfortably under the shadow of that idea, and the segregation of history, more firmly than ever.