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From Affirmative Action to Reparations

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By preventing elite universities from making even the most limited use of race in admissions to help groups whose accumulation of wealth in US society was hampered by centuries of government sanctioned actions to isolate them, stigmatize them, and limit their opportunities, the US Supreme Court has given renewed energy to movements which seek Reparations for the damages suffered by such groups.

To those who have analyzed the Court's handling of affirmative action cases, from Bakke v University California Davis Medical School (1977) onward, the recent decision was no surprise. Since Bakke, the Court has steadily limited how government actors- which include state universities and universities receiving federal funds- may distinguish between individuals or groups on the basis of their race, even when the goal is to help people who have been the victims of historic discrimination which has had lasting consequences and contributes to persistent levels of inequality,

From Bakke on, Justice Lewis Powell's argument, in that historic case, that institutions giving racial preferences cannot use societal discrimination or integrating the professions as justification for racially preferential policies has been the bedrock of every important Supreme Court case limiting affirmative action- in employment and contracting as well as admissions- from Wygant (1986) to Croson (1989) to Adarand (1994), and it was the key argument that Justice Roberts drew upon in Students for Fair Admissions v Harvard.

Make no mistake about it. What Justice Powell did, as early as 1977, was remove the two single most important arguments in favor of affirmative action! When you take away compensation for past and current injustices as grounds for affirmative action, there is not much left

Justice Ketanji Jackson says as much in her powerful dissent in Student v Fair Admission v Harvard, echoing Justice Ruth Bader Ginsberg's dissent in the Adarand Case. After enumerating, with incredible eloquence, the history of policies which have produced profound and growing wealth inequality between Blacks and Whites, contributing to equally large health and education disparities, she excoriates the Court for removing compensatory justice as grounds for even limited racial preferences

"... apparently, on nothing more than Justice Powell’s initial say so—it drastically discounts the primary reason that the racial-diversity objectives it excoriates are needed, consigning race-related historical happenings to the Court’s own analytical dustbin."

That Justice Jackson, invoking a minority opinion in the Bakke case- one by Justice Thurgood Marshall- in calling for the Court to reconsider whether societal discrimination can be invoked as a legitimate grounds racial preference, show the uphill battle the current court minority is facing,

For nearly 50 years, the US Supreme Court has basically banned institutions from using historical disparities in treatment and outcome between racial groups as a justification for using Affirmative Action to redistribute wealth and opportunity to people who have suffered

systematic and often violent suppression of their rights and opportunities throughout US History.

But if the cry for justice remains powerful and the historic logic behind it unassailable, preventing Affirmative Action from serving that purpose doesn't mean the purpose itself will disappear.

What the court has done is given renewed power to another and perhaps more effective instrument of Compensatory Justice- Reparations.

If slavery, Jim Crow, land seizures, racial pogroms, and systematic exclusion from the country's most effective policies promoting wealth acquisition have left African Americans and indigenous people at a huge disadvantage in every statistical measure of well being, the logic of demanding compensation from governments and private institutions- including universities- which were complicit in such policies is increasingly compelling.

In Justice Sotomayor's dissent in Students for Fair Admission, she argues that the nation's march toward diversity cannot be stopped by a backward looking court. Justice Jackson's equally powerful dissent reminds us that the quest for Compensatory Justice will also not disappear.

Reparations will be the next frontier of this quest