

**Challenges to Affirmative Action Race Conscious College Admissions Policies
Affecting the Affordability of Higher Education for African
American Students**

Taj'ullah Sky Lark, PhD

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“Nothing is more freighted with meaning for our own destiny than the revolution of the Negro American...In far too many ways American Negroes have been another nation: deprived of freedom, crippled by hatred, the doors of opportunity closed to hope...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 freedom but opportunity. 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...To this end equal opportunity is essential, but not enough, not enough”. Lyndon B. Johnson (1965)

Abstract

The instability of the U.S. economy and its competitiveness in the global market has led to increase request for investment in Higher Education programs. There exists a rising awareness among scholars of how inextricably education is tied to the strength of the economy, the well being of its populace, as well as the importance of a diversified student body. However, there still remain complex financial barriers for African American students' ability in meeting the cost of rising tuition with the lack of race conscious financial aid. Race conscious financial aid has been attributed to minority academic success and ensuring equal access to college which is in keeping with Equal Protection Clause of the Fourteenth Amendment in the context of Higher Learning Institutions, the enforcement of Title VI of the Civil Rights Act of 1964 and Affirmative Action policies. Proponents argue its constitutionality.

Policy Identified:

Affirmative Action Race Conscious College Admissions Policies.

Policy Proposes:

Affirmative Action was established in the U.S. to address generations of persistent inequalities, discrimination, and marginalization of African Americans during the 60. In 1961 President John F. Kennedy Executive order 10925 mandated Affirmative Action for the equal opportunity employment and fair treatment of employee regardless of race color, or national origin. This mandate would eventually be extended to regulate the equal opportunity for education. Three decades of civil rights statutes which are:

- Title VI of the Civil Rights Act of 1964 (prohibiting race, color, and national origin discrimination)
- Title IX of the Education Amendments of 1972 (prohibiting sex discrimination)
- Section 504 of the Rehabilitation Act of 1973 (prohibiting disability discrimination)
- Title II of the Americans with Disabilities Act of 1990 (prohibiting disability discrimination by public entities)
- the Age Discrimination Act of 1975 (prohibiting age discrimination)

would command the removal of the many barriers that have prevented women and minorities from equal access to higher education.

Today, the Equal Protection Clause of the Fourteenth Amendment in the context of Higher Learning Institutions and the enforcement of Title VI of the Civil Rights Act of 1964 substantiated the necessity of the continuance of Affirmative Action Policies to enforce Race

Conscious Undergraduate Admissions for minorities at colleges & universities allowing institutions of higher education to tailor their undergraduate admission policies utilizing race as an important criteria.

Implementation of the Policy:

The department of Health Education and Welfare issued guidelines to higher education for the implementation of the Executive Order 11246. The intent of this and other legislation was to increase the representation of women and minorities in educational institutions.

Colleges and Universities would develop their own Affirmative Action Admission policy that would take into serious consideration a variety of variables other than standardized test scores when assessing minority applicants in particular historically underrepresented minorities which would include race, gender, ethnicity, native language, social class, geographical origin. Special attention would be given to historically underrepresented minorities. In addition, minorities can be awarded scholarships on the basis of the said criteria. The use of race as a significant component in financial aid programs is governed by the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.

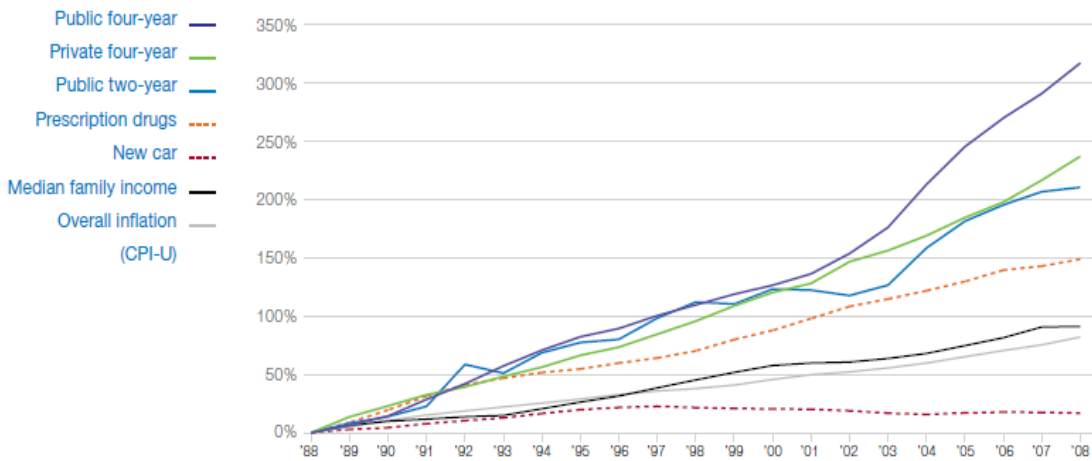
Analysis of the Policy Instrument

Affirmative Action Race Conscious Admissions Policies have successfully allowed numerous women, minorities, and African Americans in particular, the equal opportunity to education at historically tradition driven, predominately White institutions across America. There exists a plethora of Empirical research which supports not only the continued necessity but the individual, institutional, societal and global benefits of race conscious admissions policies. Research studies held by Bowen & Bok (1998); Zweigenhaft & Domhoff (1991); Bernal (2002);

Ambrose (2005); Gurin et al (2004); Milem & Hakuta (2000); and Orfield, G. (2001) are just a few of many studies that support the success, benefits, and the continued necessity of race conscious admissions. However, with sky rocketing tuition cost, is there equal consideration taking place as to necessity of race conscious financial aid packages and scholarships to ensure the continued diversity of college student bodies?

Every year students and parents fear what has become the expected yearly tuition increase at public and private university across the nation. Higher Education is big business. The growing online colleges and the supply and demand for skills in hopes for better paying jobs, have especially raised the bar in this competition as well. (Shaffer, 2011). Not only does competing for the brightest students and best athletes raise tuition cost but competing for faculty, state of the art facilities and rakings does as well (Lang, 2008). Meanwhile other institutions are capitalizing or low income students that need loan, students that require remedial coursework, and counseling as a means to create new administrative positions and generate revenue. Tuitions have continued to steadily climb since 1988 at a much faster rate than family incomes.

College tuitions continue to rise—at a rate faster than inflation and family incomes
 Cumulative change in the price of college, 1988–2008 (current dollar change)



Sources: College Board, *Trends in College Pricing*, 2009. Available at www.trends-collegeboard.com/college_pricing/ (Table 4a); U.S. Bureau of the Census, *Census Historical Income Tables, Families*. Available at www.census.gov/hhes/www/income/histinc/incfamdet.html (Table F-6, All Races); U.S. Bureau of Labor Statistics, *Consumer Price Index Databases*. Available at www.bls.gov/cpi/.

The current cost of the average undergraduate degree at its highest and continues to climb with each year.

The rising cost of college

Average estimated undergraduate budgets for full-time students, 2011-12

	PUBLIC TWO-YEAR	PUBLIC FOUR-YEAR IN-STATE	PRIVATE FOUR-YEAR
Tuition & fees	\$2,963	\$8,244	\$28,500
Room & board, books, etc	\$12,323	\$13,203	\$13,724
Total expenses	\$15,286	\$21,447	\$42,224

SOURCE: COLLEGE BOARD

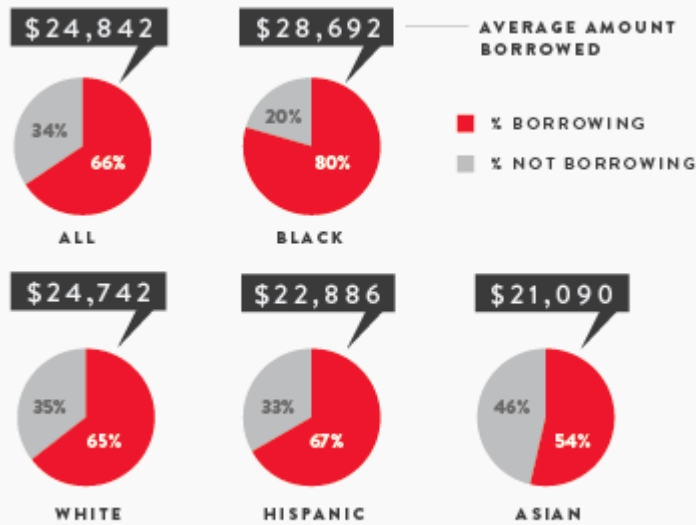
With no external guidelines to control tuition hikes at public institutions (Babolta, 2008) access to education can easily become out of reach for many and utilized as a tool to discriminate and potential corruption.

Christopher Newfield's (2011) critique of the crisis in Higher Education takes a close look at the "American Funding Model" (AFM) which is a partnership of private – public funding that which the private donors predominates shifting the ever rising expense of education cost to the young and the low income, which consist of predominately minority students. From the outside looking in, these universities appear prestigious with wealthy donors from the private sector picking up a large portion of tuition cost enabling many who could not afford admission to have access, when in actuality just the opposite has been happening.

The American Funding Model has been shifting university revenues to the private sector for the past 3 decades place the burden of the cost on the young, and is reliant upon high tuition to facilitate its agendas. In addition, the privatization of these revenues has damaged the attainment of a college degree in America as well as tarnished the financial solvency of quality higher education. Newfield (2011) sees this as a broken financial model that is directly responsible for the financing higher education crisis. The significance of this is that it not only keeps the low income drowning in debt and dangerously damages the “mutualization principle of social development” (2011), it also supports discriminatory practices for equal access and opportunity for academic success.

Due to a variety of factors including high tuition rates, budgetary cuts on the local and state levels, and the reduction of race conscious scholarships, African Americans undergraduate students are proportionality leading in student loan debt.

UNDERGRADUATE STUDENT LOAN DEBT BY RACE, 2008




source: Demos Analysis of CPS Outgoing Rotation Group. 1983-2010 data extracted from: Center for Economic and Policy Research. 2011. CPS ORG Uniform Extracts, Version 1.6. Washington, DC

Are the civil rights of minority students being violated due to financial barriers? Was the Equal Protection Clause of the Fourteenth Amendment in the context of Higher Learning Institutions and the enforcement of Title VI of the Civil Rights Act of 1964 only established to allow the admissions of African Americans and minorities with little to no regard as to how these students would finance their education? Negative, colleges and universities were cognizant upon the approval of the Equal Protection Clause of the Fourteenth Amendment in the context of Higher Learning Institutions and the enforcement of Title VI of the Civil Rights Act of 1964 that acknowledged the necessity of the continuance of Affirmative Action Policies to enforce Race Conscious Undergraduate Admissions for minorities at colleges & universities also acknowledged as the importance of restructuring financial aid policies by designating specific funds only for African Americans and minority students to receive noting that one of the main determinants of their enrollment is contingent upon receiving adequate financial aid in order that they would be able to matriculate (*Scott, supra note 15, at 653*).

Scholars, Ficklen, E., & Stone, J. E. (2002); Heller, D. E. (2004); Hoffman, K. & Llagas, C. (2003); St. John, E. P., Paulsen, M. B., & Carter, D. F. (2005); Paulsen, M.B., and St. John, E.P. (2002); Sherman, T.M., Giles, M.B. and Williams-Green, J. (1994); Turner, M.R. (2004) all agree to the necessity and importance of race conscious financial aid policies and how without these policies in place, the diversity and representation of minorities and African Americans in particular, will diminish tremendously once again with college education only for the privilege undoing more than 60 years of struggling for equal opportunity to education since *Swanson vs The Board of Rectors UVA*.

However, the Equal Protection Clause of the Fourteenth Amendment in the context of Higher Learning Institutions and the enforcement of Title VI of the Civil Rights Act of 1964 and Affirmative Action are being threatened in Higher Education by litigation against Affirmative Action, private pressures from independent legal nonprofits such as Center for Equal Opportunity (CEO) and the American Civil Rights Institute (ACRI), governmental pressures from ironically enough, the United States Department of Education's (DOE) Office of Civil Rights (OCR) to abandon race-conscious scholarships, tuition inflation, and the decrease in financial aid and race conscious scholarships. This crisis is in affect, rebuilding discriminatory barriers that were seemingly broken down.

While higher education has come a long way on the rough road to diversity and equality, controversy, debates, and lawsuits challenging the use of Race-Based Admissions Policies continue. Arizona has followed suit of California, Florida, Michigan, Nebraska, Texas, and Washington, by becoming the 17th state in America to place a ban on Affirmative Action

Admissions Policies in public colleges and universities, without legally substantiating the constitutionality of these bans. 

Opponent of race conscious admissions policies, Rothman et al (2003) and other opponents of Affirmative Action Admissions policies make similar claims reverse discrimination, stating affirmative action requires the very discrimination it is seeking to eliminate.

However, the charge of reverse discrimination ignores history. Many predominately White institutions claim their admission policies are race-neutral when in fact they are upholding traditions that extend back beyond the end of slavery in the U.S. and is the reasons why they remain predominately White in their student body, faculty and administration. In fact, most institutions and professions have yet to effectively break from their history of discrimination and exclusion as discussed in the 250 plus page Fact-Finding Report of the Federal Glass Ceiling Commission (1995). Meanwhile other opponents are questioning the constitutionality of race conscious financial aid and scholarships.

Brief Significant Historical Legal Cases to challenge Affirmative Action Policies in Higher

Education:

1978

Regents of the University of California v. Bakke - June 28, in the first case to successfully challenge Affirmative Action programs at a university, the U.S. Supreme Court strikes down a UC Davis Medical School Affirmative Action Race Based Admissions Policy that reserves a fixed quota of minority applicants, but does rules that race can be considered in college

admissions to improve racial diversity.

1996

Hopwood v. Texas - On March 19, the Fifth Circuit Court of appeals judges condemn the use of racial classifications to diversify student body.

Proposition 209 - November 5, California voters pass **Proposition 209**, banning affirmative action in government employment ending all race-based admissions practices at University of California schools.

2000

Gratz v. Bollinger - In 2000, the University of Michigan undergraduate affirmative action policies would be challenged in *Gratz v. Bollinger* with a federal judge ruling that the use of race as a factor in admission was constitutional.

2003

Grutter v. Bollinger - The 2003 case of *Grutter v. Bollinger* the University of Michigan's Law school's affirmative action policy was challenged with the judge ruling that the policies were unconstitutional only to be upheld in the U.S. Supreme Court with the U.S. Supreme Court emphatically affirmed the value of diversity, and argued that the state has a compelling interest to promote diversity on college campuses (Sullivan, 2006).

It would ultimately be the 1978 *Bakke* case that would set the parameters for higher education to uphold Affirmative Action Admissions Policies consciously utilizing race as a criteria for admissions. While *Grutter v. Bollinger* would established a withstanding case for the constitutionality of race-conscious admissions programs, the constitutionality of race based scholarships

as well as programs outside of the admissions context would be left open for debate leaving some institutions feeling governmental and private pressures to dismantle their minority scholarship opportunities. However, this may change in lieu of the U.S. Supreme Courts current decision in February 2012 to in which they agreed to consider whether the University of Texas at Austin has the right to consider race and ethnicity in admissions decisions (Jaschik, 2012).

Such race conscious scholarship programs for African Americans which have since been discontinued under the pressure since *Grutter v. Bollinger 2003* are:

- Washington University's John B. Ervin Scholars Program
- Saint Louis University's Ernest A. Calloway Jr. Scholarship
- The State University of New York Underrepresented Graduate Fellowship Program
- Empire State Minority Honors Scholarship Program
- Southern Illinois University's three fellowship programs: the Proactive Recruitment of Multicultural Professional for Tomorrow program, the Bridge to the Doctorate Fellowship program, and the Graduate Dean's Fellowship Program

These programs would total a sum of over \$78400.00 in scholarship funds once available to African American students lost to the pressures and fears of avoiding potential lawsuits and/or the loss of federal funding due to violations of Title VI of the Civil Right Act of 1964 (Title VI) by United States Department of Education's (DOE) Office of Civil Rights (OCR) (Clegg, 2005). In addition to the shut down of these race conscious scholarship programs, 50 colleges would extend their once African American focused financial assistance programs to all students, with an additional 14 colleges renaming their programs (Miksch, *supra* note 39, at 73).

The Civil Rights Project at Harvard University (2003) would emphasis the importance of race conscious financial aid diversifying the student bodies of universities and how it is vital to the recruitment, retaining, of minority students to ensure that these students are not enrolled but maintained and matriculate. While it may be argued that racial diversity alone is not necessarily

the only criterion for facilitating a broad mix of cultural experiences and varying perspectives that create diversity, empirical research has shown that race neutral admission does not racially diversify student bodies as effectively as race based admissions policies with far ranging significant benefits for all students and the diversifying the university as a whole and in preparing student in developing empathy, critical thinking, conscious learners with transferable knowledge that is critical for participating in a pluralistic society within a global community.

According to *The Higher Education in a Global Society Achieving Diversity, Equity and Excellence Advances in Education in Diverse Communities: Research Policies and Praxis*, 2006, Volume 5, the problem of diversity in the 21st century is rapidly expanding along side stubbornly persistent status quo and power inequalities by race, ethnicity, gender, sexual orientation, class, language, citizenship and region.

In *Grutter v. Bollinger* 2003, the U.S. Supreme Court emphatically affirmed the value of diversity, and argued that the state has a compelling interest to promote diversity on college campuses (Sullivan, 2006), but that diversity not only comes from diversifying its student body, faculty, and administration, but from diversifying its curriculum. Recent arguments to the Supreme Court about the importance of racial/ethnic diversity to the mission of higher education, faculty diversity-or the lack thereof- serves as a harbinger of the Academy continuing educational, academic, and social legitimacy. The use of “race” as a measure but not a dispositive feature of admissions within the constitutional bounds delineated by the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003) would ensure equal opportunity and diversify college student body and also support the constitutionality of race conscious financial aid.

Conclusion

When President Obama unveiled the Graduation Initiative in July 2009, he called for 5 million college graduates by 2020 in order to reach the goal of being the country with the highest graduation rate. According to President Obama, this “goal for America” can happen by ensuring that this country is adequately educating and preparing its populous for the “new jobs” of the 21st century providing them with competitive skills (Marcus, 2011). Who will be among the counted in this surge of college graduates? Will the graduates be reflective of the growing multicultural populous of this country? How will this initiative come to fruition with the inclusion of historically disenfranchised groups with soaring tuition cost and the demise of race conscious financial aid policies supported by Affirmative Action?

High tuition rates are being significantly subsidize by low income students through student loans in a vicious cycle reflective of a Neoliberal Social System that only benefits a few which directly creates a serious barrier for historically disadvantages people to an equal and equitable opportunities for academic success. While the prospect of “40 acres and a mule” is highly unattainable in the 21st century so many generations after 1865, reparations for crimes against a people without retribution, without restitution, has not made it to the dockets of the United States Supreme Court as a class action suit for accountability and justice served. Is it possible to propose a compromise and expand upon the original 40 Acres and a Mule Special Field Order by American Civil War General William Tecumseh Sherman (1865) for transitional justice for ills of Antebellum Slavery and explore the possibilities of “free tuition” for African Americans as a means of finally addressing reparations and eliminating the need for race conscious financial aid? What are the options?

With the inevitable transition into multicultural education and a global economy, it is imperative that predominately white colleges and universities expand their racial diversity

allowing the perspectives and experiences of minority students to be heard by the dominate culture, and that White educators learn about the histories of other cultures, the socio dynamics within the dominate culture, and their experiences, along with addressing their own biases in order to develop multicultural curriculum for multicultural education in our growing pluralistic society.

With predominately White faculty and a predominately White student body, a consciousness may not arise to develop a curriculum that is inclusive, or encourages students to view concepts, issues, themes, and problems from several ethnic perspectives and points of view with activities to strive for social change. If the department of Health Education and Welfare issued guidelines to higher education for the implementation of the Executive Order 11246 with the intent of this and other legislation to increase the representation of women and minorities in educational institutions via Colleges and Universities develop their own Affirmative Action Admission policy, it must provide the financial support necessary to ensure that African Americans and other minorities not only have access to higher education through admissions but sustainable financial support to retain these students. In addition, more empirical research needs to be conducted on the many disparities in America that continue to place African Americans at a disadvantage to quantify the continued need for race conscious financial aid and scholarships for African Americans in today's multicultural pluralistic society almost 50 years since the signing of the Title VI of the Civil Rights Act of 1964, and its inclusion of President John F. Kennedy's 1961 Executive order 10925 mandated Affirmative Action for the equal opportunity.

“There is a gift that ‘outsiders’ often bring to an institution. Women and minorities, precisely because they are outsiders, often bring a fresh point of view to the

institution, seeing it with different eyes and coming up with new ideas. If we do not have a supportive environment for them, we waste talent and ultimately the academy is the loser”
(Sandler & Hall, 1986).

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