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Educational Pluralism:

A Compelling State Interest

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Abstract

This paper describes the college admission process through the conceptual lens of Dickason's (2001) phases of affirmative action. The first phase, obligatory affirmative action, describes the history of affirmative action and the impact on college admission. The second phase, voluntary affirmative action, describes University of West Florida's (FL) efforts to increase its minority enrollment and retention. The final phase, tempered affirmative action, explores percentage plans that have been implemented in universities in California, Texas and Florida to eliminate race as a criterion for admission. The goal is to provide some insight into the future of race-based admission and the implication for institutional efforts to provide diverse learning opportunities for students.

Key Words: *Affirmative Action, College Admission, Bakke v. University of California, Hopwood v. State of Texas, Grutter v. Bollinger, Gratz v. Bollinger*

Dickason's Phases of Affirmative Action in College Admission

Affirmative action, Dickason (2001) posited, has gone through three phases as it relates to college admission. He refers to the first phase as "obligatory affirmative action," which started during the Civil Rights movements in the 1960s to the late 1970s. Affirmative action was the law of the land and during this period, college admission officers championed the idea of increasing the enrollment of minority students. The second phase, "voluntary affirmative action," occurred from 1980 to 1995. During this stage, institutions "vigorously implemented affirmative action and race conscious admission policies and practices (Dickason, 2001)." The third and current phase is "tempered affirmative action." Dickason describes this stage:

> "Tempered (having been toughened or hardened by the application of heat, or alternate heating and cooling) is an apt metaphor for the stresses placed on affirmative action in Phase III. Despite or because of these stresses there has been a toughening of the broad consensus of the need and desire to include a wide and deep representation of the students of our increasingly diverse nation. But the means to that end are now more complex for at least three reasons:
>
> - Increased awareness of the degree to which class structure debilitates educational opportunity and progress at educational levels
> - Greater complexities and more contradictions of legal rulings and precedents
> - More intrusiveness by agencies beyond the college and university dictating what measure shall be used to define the quality of the students, and which of these measures are mandated to be used to select students…"

Dickason, optimistic about the future of affirmative action even during the third phase, believes that "men and women of good will and sound intellect will continue to find ways to include opportunity for higher education for all the students of our society."

Obligatory Affirmative Action Phase

In 1961, President John F. Kennedy first used "affirmative action" in an executive order designed to racially integrate the workforce. Affirmative action was perceived as a proactive method of ensuring equality. In a speech at Howard University (DC), Lyndon Johnson stated that "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 say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."

Affirmative action efforts have been present in our colleges and universities for over 30 years (Moreno, 2003). Albeit controversial, affirmative action policies have been instrumental in increasing the participation of minorities in higher education. State governments, and colleges and universities have spent a lot of time, money and effort on campus diversity initiatives. Dungy (1996) stated that, "the threat of nearly homogeneous classrooms should push us to move campus diversity toward the ideals of affirmative action, the ideals of citizenship and toward the highest aspirations of a democratic society (53)."

Friedl (1999) suggested that more empirical data is needed to demonstrate how affirmative action enhances the educational experiences of all students. However, he describes several studies that, in fact, highlight the success of affirmative action in higher education. Friedl noted that William Bowen and Derek Bok, in their book, *The Shape of the River*, document the success of affirmative action in college admission over the past five decades, concluding that students of all races value diversity and

The Supreme Court ruled that the attainment of a diverse student body was a goal for an institution of higher learning. According to the court, the attainment of a diverse study body should not be acquired through a quota system based on race or ethnicity.

believe it contributes to their educational experience. He pointed out that the most comprehensive study was conducted by Alexander Astin, was of approximately 25,000 students at 217 colleges and universities. Astin found that an emphasis on diversity produces positive effects on students' cultural awareness and students' commitment to promoting racial understanding. This was extremely salient given the fact that many critics allege that emphasizing multiculturalism creates racial divisiveness. Patricia Gurin, in a study of 187 black and 1,134 white students at the University of Michigan, concluded that, "students in a more diverse environment showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills" (5).

A 1996, survey of alumni of University of Wisconsin system concluded that the majority of students' college educations contributed to their understanding of diverse cultures, which made them appreciate the need for racial equality.

Regents of University of California v. Bakke

The landmark decision in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), (*Bakke*), sought to undo past vestiges of discrimination and increase the number of underrepresented minorities in colleges and universities, thereby establishing diversity as a compelling state interest. The University of California Medical School at Davis reserved 16 of the 100 places in each year's class for minority students. These policies caused confusion over the legality of quotas and affirmative action. Allen Bakke, who was denied admission twice by the university, charged in state court that his civil rights had been violated under both the Fourteenth Amendment and Title IV of the 1964 Civil Rights Act (Sobel, Fickes and Hill, 1980). A California Superior Court ruled in Bakke's favor on both grounds. The California Supreme Court also supported Bakke's right to be admitted, but solely on the basis of the Fourteenth Amendment that guaranteed equal protection of the law to all citizens. Title IV held that no person can be discriminated against because of race, color or national origin under any federally-funded program or institution (Sobel, et. al., 1980). The United States Supreme Court declared that, "preferring members of one group for no reason other than race or ethnic origin is discrimination for its own sake" (145).

The Supreme Court ruled that the attainment of a diverse student body was a goal for an institution of higher learning. According to the court, the attainment of a diverse study body should not be acquired through a quota system based on race or ethnicity. Justice Powell asserted that colleges and universities can however, contribute to educational pluralism by considering, in addition to race, the perspective students' talents, service, maturity, and history or overcoming disadvantage (Sobel et al., p. 146, 1980). Justice Powell emphasized that:

> "The nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as a diverse nation, *Bakke*, at 313. It is not an interest in simple ethnic diversity, in which a specified percentage of student body is in effect guaranteed to be members of selected ethnic groups, that can justify using race. *Ibid* at 315. Rather, the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Ibid*. In the post-*Bakke* era, institutions' race-sensitive admission policies have been challenged and tested in several states.

The Voluntary Affirmative Action Phase

Recruiting Minority Students

The second phase, as identified by Dickason (2001), is voluntary affirmative action. This section describes the University of West Florida's efforts to implement race-consciousness in the admission process, programs and practices. In 1984, one of the researchers became the university's first African-American university admission officer. During this time, university officials made a commitment to increase the number of African-American students. Officials secured funding earmarked for minority scholarships.

In the 1991, a group of colleagues implemented Project ACT, primarily for, but not limited to, African-American students. They designed the project to give junior and senior high school students an introduction to college life by inviting them to spend four days on campus. This program provided students information on applying for admission, financial aid, scholarships, and preparing for the ACT at no cost.

The next year, Project ACT became the Summer Enrichment Program, providing students the opportunity to spend a part of their summer on campus getting a head start on college. The ACT preparation was an eight-day program that provided tips on improving students' test scores in mathematics, English and science, and the second part of the program, "Student Life Skills,"

helped students prepare for the future. The course's purpose was to help students develop skills necessary for the successful completion of college and attaining goals in life. Students learned about time management, study skills, college life, and career opportunities.

Students who completed the Summer Enrichment Program were given a place in the freshman class for the fall semester. Below are some comments from students who completed the Summer Enrichment Program:

- "Because I attended the program, I do not need to take remediation courses"
- "The Summer Enrichment Program helped me get a scholarship. I would not have gotten a scholarship if I had not attended the program"
- "Without the Summer Enrichment Program, I would not have been able to go to college. Everyone in the program was in the same situation, so we all related well to each other. We had a lot of group support."

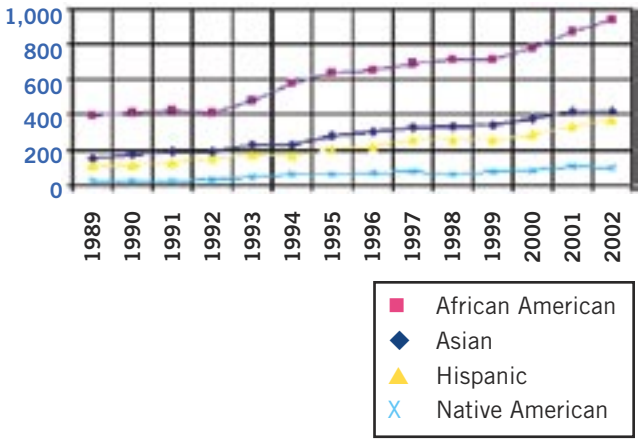
Establishing Support Programs

Many of the students who participated in the Summer Enrichment Program enrolled at the university the following fall semester. Unfortunately, at the end of the semester, many students were placed on academic probation, in part, because no other support system was in place. Gardner, Keller and Piotrowski (1996) conducted a study at the university of 60 undergraduate and graduate students to determine the perception and views of African-American students on retention efforts at the university. The majority of the respondents stated that the following strategies would improve African-American students' success in college:

- Maintaining "support systems" (minority affairs offices, minority groups and organizations, clubs and grievance resources)
- Training in "racial sensitivity" for faculty, staff, and students
- Increasing the number of black faculty and support staff
- Encouraging involvement of black faculty with enrolled students and prospective freshmen
- Providing "special counseling" opportunities via the university counseling center for black students
- Stressing expectations of course requirements, study skills and financial aid opportunities to all incoming students
- Involving more black students in organizational functions and planning activities on campus
- Encouraging formation and growth of black Greek organizations and minority groups
- Offering special advisement to black students who experience academic difficulties (21).

About the time that this study was conducted, the university was able to secure funding to establish an Office of Student Success Programs designed to address some of the above concerns and address the issues of recruitment and retention. The Student Success Program offered students tutorial assistance, mentoring, study skills, and critical thinking. A Multicultural Support Services was established to support initiatives in recruiting, retention and graduation of minorities. Programs were put in place to help low-income, first-generation students of parents who had not completed a bachelor's degree. The program prepared disadvantaged students for postsecondary education. Seniors have the opportunity to live on campus and can take six college credits.

Figure 1:
Minority Enrollment Trend at the University of West Florida



Unfortunately, many institutions have dropped summer enrichment programs designed to help minorities. (www.cnn.com/2003/EDUCATION/05/20minority.programs.ap/index.html). In addition, community colleges are dealing with challenges involving race-based scholarships. The University of West Florida eliminated race-based scholarship programs in favor of race-neutral scholarships (Lords, 2001). Race-based scholarship programs may be the subject of the next Supreme Court battle.

As indicated in Figure 1, the enrollment at the university has increased steadily since the implementation diversity initiatives.

Establishing a Multicultural Curriculum Requirement

In 2003, the university implemented a multicultural course requirement. According to the Faculty Senate Minutes:

> "The aim of the Multicultural course requirement is to re-affirm our commitment to a liberal education and appreciation of diversity for all university students. A minimal acquaintance with another culture requires some familiarity with its language, religion, arts, history, ideas and mores, and socio-economic structures, among other traits. This requirement is meant to introduce students to another culture, in the hope that this experience will whet their appetite for additional study."

Further, the multicultural course requirement fulfills the mantra that:

> "an important component of a liberal education is the study of cultures other than one's own. As such, multiculturalism encompasses the appreciation of the values, expressions and modes of organization of diverse cultural communities. To further such study, the university requires all students pursing a bachelor's degree to complete at least one course that explores one or more of the dimensions of another culture (language, religion, socio-economic structures, etc.)" (University of West Florida Catalog, 2003).

In the tempered affirmative action phase, Dickason posited that contradictions existing in legal rulings and precedents and agencies outside of the college and university may dictate what measures are mandated to select students.

Tempered Affirmative Action Phase

The Impact of Percent Plans on College Admission in Three States

Percent plans seek to achieve diversity, "in a non-racial manner through the guarantee of automatic admission to a fixed percentage of the high school graduates of all of a state's high schools" (Horn and Flores, 2003). Horn and Flores note further that, "like almost all simple solutions to complex problems, however, understanding the actual impact of the percent plan proves far more complex on examination" (59).

In the tempered affirmative action phase, Dickason posited that contradictions existing in legal rulings and precedents and agencies outside of the college and university may dictate what measures are mandated to select students. Indeed, we are in the tempered affirmative action stage, as officials in three of the largest states, Texas, California and Florida, have recently eliminated race-based admission plans and instituted percent plans.

Texas Percent Plan

In 1992, four white students, Cheryl Hopwood, Douglas Carvell, Kenneth Elliot, and David Rogers, applied for admission to the University of Texas Law School and were denied admission. The applicants argued that the law school's affirmative action admission policy violated equal protection. The United States District Court for the Western District of Texas, 861 F. Supp 551 (year) ruled in favor of the applicants. The Court of Appeals held that the state university law school's admission policy discriminated in favor of minority applicants by giving substantial racial preferences in its admission policy in violation of equal protection (*Hopwood v. Texas*, 78 F, 3rd 932) (1996). The state of Texas's appeal to the United States Supreme Court was denied and the judgment of the United States Court of Appeals decision was that the admission policy did in fact discriminate in favor of minority applicants.

The students argued that the admission policies violated their Fourteenth Amendment right to equal protection (*Hopwood v. Texas*). The admission policy allowed African-American and Mexican-American students to be admitted with lower GPA and LSAT scores (Hardtke, 1997). The Fifth Circuit Court of Appeals in 1996 prohibited race-conscious admission policies at the law school. The Court of Appeals wrote:

> "Within the general principles of the Fourteenth Amendment, the use of race in admission for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility. The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants" (*Hopwood v. Texas*).

The Court of Appeals' decision ended the university's race-conscious affirmative action plan and created a concern about enrollment and graduation rates of African-American and Mexican-American student admission at the University of Texas. A task force made up of faculty members associated with the Center for Mexican American Studies at the University of Texas, others from the University of Houston and the Mexican American Legal Defense and Educational Fund was established in response to a request from Senator Gonzalo Barrientos. The charge of the task force was to analyze the implications of the *Hopwood* decision and to generate alternatives that could become legislation (Montejano, 1998).

The recommendation of the task force was to draft a bill that included the automatic admission of each student in the top 10 percent of accredited public or private high schools as first-time freshman to public institutions. Universities had the option to extend the automatic admission threshold to the top 25 percent. In addition, universities had a list of 18 other factors that could be considered in admission (House Bill 588).

California Percent Plan

California was beginning plans to end the consideration of race/

Two-thirds of the participants believe that institutions should take steps to ensure diversity in the student body, 75 percent believe that steps should be taken to ensure a diverse faculty, 69 percent agreed that courses and campus activities that focus on diversity have a beneficial effort on college students.

ethnicity in admission decisions around the time of the Hopwood ruling (Horn and Flores, 2003). In 1995, the University of California Board of Regents voted to ban the use of race/ethnicity in the admission process (University of California Office of the President, 2001). The California Civil Rights Initiative (Proposition 209), in 1996, banned affirmative action. Governor Gray Davis proposed that public and private high school graduates in California in the top four percent of his/her class receive admission to the University of California system. Conservatives argued that the plan would impact the quality and reputation of University of California schools, especially UC Berkley and UCLA. There was concern that more qualified students would lose their places to less qualified students. Also, there was concern that students that were automatically admitted from lower-quality schools would be set up for failure in the University of California system (Gorman, 1999).

Florida Percent Plan

In November 1999, Governor Jeb Bush implemented "One Florida" (Executive Order 99-281) (1999) which eliminated the use of race- or gender-conscious decision in college and university admission (Horn and Flores, 2003). Bush implemented the Talented 20 policy in the Florida State University System. Under this policy, public high school graduates that finished in the top 20 percent of their class were guaranteed only system admission beginning in the fall 2000.

The NAACP filed an administrative challenge to One Florida, arguing that the plan involved inappropriate decision-making process that changed university admission policies. Even so, officials in the State University System were ordered to stop using race, national origin and gender as considerations for admission (Florida Board of Regents, 2000). Administrative Law Judge Charles Adams struck down the NAACP's administrative challenge and the Talented 20 policy went into effect. Race consciousness was, however, allowed in awarding scholarships, conducting outreach, or developing pre-college summer programs (Executive Order 99-281).

Horn and Flores (2003) note that the percent plans in Texas, California and Florida have important differences. The eligibility of students differs in each state. In Florida, only public school students are eligible. Texas and California offer the plans to public and private high schools students. California and Texas offer the access to the state university system. Texas also offers access to premier institutions. Horn and Flores (2003) argue that the percent plans have little impact on the most competitive universities. Students in Florida and California are not guaranteed automatic admission into the most selective universities. Studies suggest that eligible students would have been admitted to the institutions without a percent plan. They contend further that percent plans, when they work, "…serve as a kind of shorthand for what university officials know are actually systems of openly- or loosely-veiled race-attentive outreach, recruitment, support programs, and financial aid that enhance the likelihood of application, admission, and enrollment for some students" (59). They also argue that while the world is debating the future of affirmative action, there are serious problems with non-racial alternatives. They note that affirmative action is an effective tool that universities need to keep campuses diverse and contend that percent plans alone are not a solution.

Students of different races do not have the same opportunities for a college education, according to Horn and Flores. They point out that the proportion of minority students is increasing, the achievement gap between racial groups has been growing since the 1990s, dropout rates are rising, public school are becoming more segregated along the lines of race and income and these schools are inferior. Opponents of affirmative action should consider the above statements and the fact that many Americans believe that colleges and university should have diverse student bodies, diverse faculty and courses that focus on diversity (Chenoweth, 1998). A poll released by the Ford Foundation's Campus Diversity Initiative found that 71 percent of people think that diversity brings society together and 91 percent agree that the more we know about each other the better we all will get along. Two-thirds of the participants believe that institutions should take steps to ensure diversity in the student body, 75 percent believe that steps should be taken to ensure a diverse faculty, 69 percent agreed that courses and campus activities that focus on diversity have a beneficial effort on college students.

The U.S. Supreme Court issued an opinion rejecting the argument that diversity cannot constitute a compelling state interest. However, the court found that the university's current policy, which automatically distributed 20 points, or one-fifth of the points needed to guarantee admission, to every single underrepresented minority applicant solely because of race, was not narrowly tailored to achieve educational diversity.

***Grutter v. Bollinger*: The University of Michigan Law School Decision**

By the end of the 20th century, the time was ripe for the Supreme Court to hear the challenge to the race-sensitive admission policies of the Law School. University of Michigan's Law School is ranked among the nation's top law schools and it receives more than 3,500 applications each year for a class of approximately 350 students. The law school seeks, "a mix of students with varying backgrounds and experiences who will respect and learn from each other" *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003).

In 1992, the dean of the Law School charged a faculty committee with crafting a written admission policy that would achieve student body diversity and comply with the Court's most recent ruling in the *Bakke* case on the use of race in university admission. Upon the unanimous adoption of the faculty committee's report by the Law School faculty, the policy became the Law School's official admission policy (*Grutter v. Bollinger*, 123 S.Ct. 2325, 2332 (2003)). The hallmark of that policy was its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." *Ibid*. The policy made clear that even the highest possible score does not guarantee admission to the Law School. The policy aspired to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of diversity eligible for "substantial weight" in the admission process, but instead recognizes many possible bases for diversity. The policy does reaffirm the law school's longstanding commitment to one particular type of diversity, that is, racial and ethnic diversity with special reference to the inclusion of students from groups, which have been historically discriminated against, like African Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body. By enrolling a critical mass of [underrepresented] minority students, the law school seeks to ensure character of the law school. *Ibid*.

The court endorsed Justice Powell's view (*Bakke*) that student body diversity is a compelling state interest that can justify the consideration of race in university admission *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003). The court addressed the question of whether the law school's use of race is justified by a compelling state interest, held that the law school has a compelling interest in attaining a diverse student body. The court also held that, to be narrowly tailored, a race-conscious admission policy cannot use a quota system. Specifically "it cannot insulate each category of applicants with certain desired qualifications from competition with all other applicants." Instead a university may consider race or ethnicity only as a "plus in a particular applicant's file." In other words, an admission program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Ibid*.

***Gratz v. Bollinger*: The University of Michigan's Point System Declared Unconstitutional**

The University of Michigan's admission policy used written guidelines that changed a number of times during the period relevant to *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003). The admission office considers a number of factors in making admission decisions, including high school grades, standardized tests scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race. The admission office considered African Americans, Hispanics, and Native Americans to

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be underrepresented minorities. The guidelines used a selection method under which every applicant from an underrepresented racial or ethnic minority group was automatically awarded 20 points of the 100 needed to guarantee admission. Jennifer Gratz and Patrick Hamacher, both of whom were residents of Michigan and Caucasian, applied for admission to the University of Michigan's College of Literature, Science, and the Arts in 1995 and 1997 respectively. Although Gratz was considered well qualified and Hamacher was within the qualified range, both were denied admission to the university. Gratz and Hamacher filed a class action alleging that the University's use of racial preferences in the undergraduate admission violated the Equal Protection Clause of the Fourteenth Amendment, Title IV of the Civil Rights Act of 1964, and 42 U.S.C. §1981.

On, June 23, 2003, the U.S. Supreme Court issued an opinion rejecting the argument that diversity cannot constitute a compelling state interest. However, the court found that the university's policy, which automatically distributed 20 points, or one-fifth of the points needed to guarantee admission, to every single underrepresented minority applicant solely because of race, was not narrowly tailored to achieve educational diversity. *Ibid*.

Conclusion

Those who have worked on college campuses for more than 20 years see everyday the benefits of efforts to recruit and retain minority students. Since 1961, institutions have progressed from identifying affirmative action as goal, to voluntarily implementing diversity initiatives in our colleges and university. Unfortunately, despite increases in minority enrollments and support programs, affirmative action in the college admission process is still being questioned, as made evident by the University of Michigan Supreme Court decision and percent plans.

When looking at Texas, Florida and California's percent plans, it appears that the decision of the U.S. Supreme Court in *Gratz v. Bollinger* was a perfect fit. However, after meticulous examination, it becomes clear that percent plans do not meet the object of the court's decision to diversify college campuses. The problem with the University of Michigan's undergraduate admission policy was not its effort to create a diverse student body, but the use of a point system to meet that objective. Texas, Florida and California have methods that not only limit opportunities, but also set hidden quotas.

In *Grutter v. Bollinger*, the U.S. Supreme Court embraced the University of Michigan Law School's admission policy with the goal of creating a diverse student body population that is reflective of the United States. It is difficult to determine the outcome of the Texas, Florida and California percent plans. The top percentage of high school graduates will not reflect the population. Texas, Florida and California must revisit their plans allowing public colleges and universities to accomplish the goal of a diverse student body that will be beneficial to all Americans and contribute to an educated society where we all able to live in unity, despite differences.

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