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Current Issues Involving Affirmative Action and Higher Education

Abstract

This article examines current issues regarding affirmative action in today's institutions of higher learning. It addresses the two recent cases decided before the U.S. Supreme Court concerning the University of Michigan's policy. Two other recent and related issues, the *Hopwood* case and California's Proposition 209 approach, are also examined. Then, an examination of related policies, such as state budget issues and faculty hiring, are examined in light of recent developments. While much has indeed been written on the history, politics and practices of affirmative action, this paper seeks to provide and illuminate a survey of current issues regarding affirmative action in today's institutions of higher learning.

"It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today (O'Connor, opinion, *Grutter v. Bollinger*, No. 539 U.S. 02-241, 2003)."

"The University of Michigan Law School's mystical "critical mass" justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions. Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation (Scalia, dissent, *Grutter v. Bollinger*, No. 539 U.S. 02-241, 2003)."

A State of Prolonged Controversy?

As Justice Antonin Scalia noted in his passionate dissent, despite the recent United States Supreme Court decisions regarding the use of race-conscious admission criteria, the issue of affirmative action in institutions of higher education has not been laid to rest. Indeed, today's colleges and institutions face a unique challenge in striving for greater diversity. Intense disagreements exist over the most fair and effective means to realize Jefferson's goal of education in a democratic society—to prepare its citizens "for their role as participants in that society" (Lindsay and Justiz, 2001, 5). In the 21st century, the United States will become a "mosaic of minorities" as population dynamics continue to change the demographic landscape (Ward, 2004, 1). As definitions of race and goals for higher education are debated, today's colleges and universities must engage in the debate and strive to access and opportunity for all students.

Governance and management issues are at the forefront of the debate; a tension exists concerning these governance issues between the public institutions and the state, particularly regarding the issue of autonomy. Nordin (1998) describes the importance and relevance of this tug-of-war:

"Of course, the core reason for maintaining academic autonomy has remained consistent for centuries: free thought is necessary to the expansion of knowledge. When minorities and women first began to ask for fairer treatment on campus, the publicly stated resistance was not to the idea of equal treatment, but to the idea of governmental interference in the business of the university. Over the years, higher education's position on *autonomy* has remained the same, but its position on affirmative action has changed considerably. Whereas universities once objected to affirmative action on the grounds that forced compliance was an unwarranted interference with university life, they *now argue that removing* affirmative action is an unwarranted interference with academically sound university goals and values (226, emphasis added)."

In light of institutional governance, this argument, as Justice Scalia noted, is surely not going to disappear. In light of cultural relevance, as Justice O'Connor recognized, the affirmative action conversation will, at least "for the next 25" years, be alive and well. Issues such as governance, autonomy, the law, and cultural relevance must be examined in light of the current debate. Indeed, the immediate, pressing issue of "what to do now" is facing today's colleges and universities. Thus, a closer look at affirmative action is warranted for those involved in higher education.

The Michigan Cases: *Grutter* and *Gratz*

In July of 2003, the United States Supreme Court was involved, for the first time in a quarter of a century, in the issue of affirmative action and higher education. The question of whether or not institutions of higher education could continue to use race-conscious admission had been gathering steam for more than 20 years, since the *University of California Regents v. Bakke* decision in 1978, where the Court held quota systems to be unconstitutional (Brooks, 2003). The practice of affirmative action was then waged in the lower federal appellate courts in following decades. Lower federal circuit courts of appeals had previously struck down such policies in universities in Texas and Georgia; a recent *Hopwood v. Texas* (1996) decision by the Fifth Circuit Court of Appeals had declared race-based aid as illegal and the U.S. Supreme Court allowed it to stand, thus affecting all states in that circuit (Texas, Mississippi and Louisiana) (St. John and Hossler, 1998, 147).

Meanwhile, other circuits allowed race-conscious policies to stand in decisions involving institutions in Michigan and the state of Washington. Thus, these various "circuit splits" had presented colleges and universities with "complex and obscure questions" regarding affirmative action. (Nordin, 1998, 233). Finally, the U.S. Supreme Court took a role in the debate. The two cases that the 2003 U.S. Supreme Court granted certiorari to were *Grutter v. Bollinger*, which involved the admission policy of Michigan's law school, as well as *Gratz v. Bollinger*, which involved the admission policy of the undergraduate college.

These two "Michigan cases," as they soon became known, had arisen through the federal courts, where the Sixth Circuit Court of Appeals

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(covering Michigan, Ohio, Tennessee, and Kentucky) had allowed the two University of Michigan policies to continue to employ the race-conscious admission procedure in an attempt to enroll more minority applicants. In settling these two cases, the U.S. Supreme Court, some argue, did not "settle" much at all. As Schmidt (2003) notes, the "Court hardly ended the debate over race-conscious college admission policies in its two landmark rulings" while it did answer some important questions regarding the constitutionality of the practice (SI). As Brooks (2003) notes, the rulings centered on the means more than the desired ends of affirmative action as described here:

> "The divided Court upheld the affirmative action admissions program of the University of Michigan Law School in *Grutter v. Bollinger*, but overturned the race-conscious admissions policy of the University of Michigan undergraduate school in *Gratz v. Bollinger*. Both schools sought diversity in their student bodies; the difference in the two programs was the means by which they tried to obtain it (79)."

In the *Gratz* case, the Court decided that the undergraduate admission office, which awarded minorities "a 20-point bonus on its 150-point scale" did "not provide enough individual consideration of applicants" and ruled against it by a court ruling of 6–3 (Schmidt, 2003, S5-S6). Joining Chief Justice William Rehnquist were Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Stephen Breyer, who considered the undergraduate approach to be unconstitutional as follows:

> "The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *Bakke*, 438 U.S., at 317, the LSA's automatic distribution of 20 points has the effect of making "the factor of race… decisive" for virtually every minimally qualified underrepresented minority applicant. *Ibid* (Rehnquist, *Gratz v. Bollinger*, No. 539 U.S. 02-516, 2003)."

Dissenting in *Gratz* were Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg, who argued "that the majority opinion ignored the societal forces that had made admission system necessary" (Schmidt, 2003, S6). Many legal experts, including those who represented colleges said that the days of "race-normed grids, separate admission tracks, and bonus point systems" were over for colleges and universities and that more admission officers and staff would have to be hired to consider applicants (*Ibid*).

In *Grutter*, the Court ruled that since the law school had taken great lengths to ensure that their admission office had taken a "narrowly tailored" approach in evaluating each of the applicants on an individual basis and to merely "subjectively consider race along with other factors," they had acted in a constitutional manner to achieve a compelling governmental interest (Brooks, 2003, 79). The majority argued that this compelling governmental interest best served a society seeking talented individuals across a diverse spectrum:

> "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." See *Sweatt v. Painter*, *supra*, at 634. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America (O'Connor, opinion, *Grutter v. Bollinger*, No. 539 U.S. 02-241, 2003)."

This 5–4 ruling, written by Justice O'Connor and joined by Justices Stevens, Souter, Breyer, and Ginsburg, favored a more subjective and flexible process. The four dissenting justices disagreed; Justice Thomas authored the following dissent, labeling the majority view as "discrimination":

> "Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School. The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny" (Thomas, dissent, *Grutter v. Bollinger*, No. 539 U.S. 02-241, 2003)."

Therefore, the debate is far from over, but affirmative action has been given approval for "at least 25 years" though intense wrangling, as Justice Scalia noted, will surely continue. In light of *Gratz and Grutter*, however, it is important to note the effects of affirmative action, particularly when they are negated or altered as in two recent cases in the states of Texas and California.

Hopwood **and Its Effects**

In 1996, the Fifth Circuit Court of Appeals, in *Hopwood v. Texas*, held that the admission office of the University of Texas Law School violated white students' constitutional and statutory rights by setting up a "separate minority admission committee to pass on applications from African

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Americans and Mexican Americans and grant them admission until the desired numbers were reached" (Graglia, 1998, 188). The U.S. Supreme Court declined to hear the appeal on the grounds "that the University of Texas Law School had already changed its admission procedure to evaluate white and minority applicants in the same pool" (Hurtado and Cade, 2001, 102). The Texas attorney general, Dan Morales interpreted the decision to apply to all state-supported universities, programs and college scholarships, and he also specified that recruitment and retention policies geared toward attracting and retaining minorities were also unconstitutional (*Ibid*). Hurtado and Cade (2001) note that these actions "had a chilling effect on Hispanic and African American enrollments" in and 1996 thereafter (103).

The Texas legislature acted immediately to soften the effects of *Hopwood*, passing HB 588, known as the "10-Percent Plan" (Tienda and Niu, 2004, B10). Torres and Hair (2002) noted the effects of *Hopwood* and the legislative response and its effects:

> "For example, from 1996 to 1998, the number of black freshmen fell from 266 to 199, and the number of Hispanic freshmen dropped from 932 to 891. To rectify the problem, the Texas Legislature, guided by the Mexican-American and African-American leadership, guaranteed admission to state universities for all high-school graduates who finish in the top 10 percent of their class. As the "10 percent plan" concludes its fourth year, its benefits continue to emerge. The number of black freshmen at the Austin campus climbed to 296 in 2000, while the number of Hispanic freshmen rose to 1,011, surpassing those enrolled under affirmative-action policies (B20)."

Therefore, as a result of then-Governor George W. Bush working with minority leaders in the legislature, minority representation in the public institutions rose above the pre-Hopwood days. The important fact to note here, however, is that the George W. Bush 10-percent plan emphasized minority enrollments in flagship universities rather than merely just "public colleges or universities." Bush's brother, Governor Jeb Bush of Florida, implemented a similar plan with one critical omission: he did not work with minority leaders in the same way to include the "flagship" institutions. Guiner (2001) notes the difference in approaches and their dramatic effects:

> "The Texas Legislature adopted the plan with the support of several conservative white lawmakers. They realized that changes were necessary to give their own constituents access to a valuable public resource—taxpayer-subsidized higher education. Governor George W. Bush signed the plan, which has now been in effect for almost three years. The result? The grade-point average of freshman students admitted under the 10-percent plan is higher, for every racial group, than it was when SAT scores dominated admissions criteria. By contrast, when Governor Jeb Bush of Florida adopted his own version of the 10-percent plan, he failed to include the relevant stakeholders in the decision-making process. As a result, many black and Latino community leaders and legislators found fault with the One Florida plan, under which those graduating in the top 20 percent of the state's high-school classes gain admission to "a" public college but not necessarily to one of "the" flagship universities, as in Texas. Animus against the plan is credited with motivating the higher-than-usual black turnout in the 2000 election. Because Jeb Bush neglected black and Latino lawmakers, professors, and community advocates in developing the new admissions protocols, he was much less successful in fulfilling the state's higher-education mission of serving the diverse larger community (B10)."

Therefore, though the intentions were perhaps the same, the cooperation and focus on minority access to flagship universities allowed Governor George W. Bush to realize greater success. Hurtado and Cade (2001) note the crucial need to work with more minority groups, stating that "addressing such issues will be essential for attracting underrepresented groups, serving an increasingly diverse state population, and preparing students for participation in a diverse workforce" (116).

A Look at California's Proposition 209 and its Effects

An examination of the Golden State is also warranted, where this time

the voters acted to curb race-based admission. California voters passed Proposition 209 in 1996; 54 percent voted to "prohibit granting of preferential treatment to any individual on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting" (Pusser, 2001, 121). The immediate effects to this voter initiative on University of California admission became apparent in the fall of 1997 when the first group of applicants to the university's graduate and professional schools was admitted without consideration of race and gender. Schmidt (2001) notes the following impact:

> "The number of in-state black and Hispanic freshmen dropped sharply in 1998, the first year that an incoming class was affected by a ban on racial preferences in admissions. The decline was especially steep at Berkeley, the most selective campus. Black and Hispanic enrollments have stabilized or risen slightly in the past two years, and are expected to increase again in 2001–02, but generally remain below pre-1998 levels (A23)."

Schmidt (2001) further outlines the comparative effects of the decline in the California system, with an emphasis on the Berkeley campus, in Table 1, Retrieved on March 27, 2004, from http://chronicle.com/prm/weekly/v47/i37/37a02301.htm.

As the table on page 26 indicates, particularly on the Berkeley campus, incoming minority students had dropped, with the exception of Asian Americans, whose numbers had continued to rise. Pusser (2001) notes that this action was a political windfall for the Democratic Party, which, soon after the initiative, swept into most of the statewide offices on campaign promises to battle the effects of the initiative.

Related Issues to Affirmative Action in Higher Education

Michigan, Texas and California are not alone in striving to find the appropriate role for affirmative action in today's colleges and institutions. Indeed this issue, directly or indirectly, faces many institutions of higher learning. Evelyn (2003) notes that the real "silent killer" of minority enrollments is not judicial or legislative impacts on affirmative action policy but rather another "player"—state budget cuts. This has been particularly true at the community college level; as "nearly half of the nation's 2.95 million black and Hispanic college students attend community colleges" (A17). In states such as Florida, where two-year colleges serve 75 percent of minority college students and Washington, where tuition is set to rise 35 percent over the next few years, these cuts will be particularly painful (A17). By cutting monies directed toward community colleges, government leaders risk hurting those who can ill-afford additional costs.

Another issue involves the role of affirmative action in faculty hiring; Cole and Barber (2003) recognize that "with increasing diversification of the undergraduate student body has come the expectation that the faculty teaching this student body will become similarly diverse" (2). Others, as with other aspects of this issue, debate that faculty hiring practices often discriminate against non-minority applicants. Clegg (2002) describes the process:

> "While such examples may appear especially blatant, discrimination in faculty hiring, promotion, and pay is increasingly common. And, whether they want to acknowledge that discrimination or not, colleges that use such preferences are asking for big legal trouble. That's not to say that all affirmative action in faculty hiring is necessarily illegal. But it depends on how you define "affirmative action," a term that often means different things to different people. Originally, it meant simply taking positive steps—literally, affirmative action—to ensure that discrimination didn't occur. Nothing is illegal about that—or about colleges' casting the widest possible nets, recruiting extensively and eschewing old-boy networks and irrational qualifications. But, unfortunately, most colleges go beyond that. They seek candidates of a particular skin color and ancestry, pay them more, and give them greater— not just equal—consideration (B20)."

Cole and Barber (2003) note that there is indeed a delicate balance, pointing out that "although many agree that the achievement of racial and ethnic diversity in both student bodies and faculties is a desirable goal, there is no agreement on the means that should be used to attain this goal" (3). This "delicate balance" will continue to be argued in the years to come.

Continued Disagreement

Some, such as former University of California regent Ward Connerly, argue that affirmative action is an insult to minorities and that "African American students might achieve more if they did not have the 'crutch' of affirmative action" (Nordin, 1998, 231). Others take a more cynical view of the politics involved in the debate. Graglia (1998) notes, "most academics and the academic bureaucracy are strongly committed to 'affirmative action' for purely political reasons" (189).

Others argue that regardless of political mandates by the government, colleges and universities will continue to seek diversity. As Arredondo (2002) observes, institutions will find a way in which to achieve diversity:

> "It is likely that colleges will continue to deny using quotas and separate admissions practices, but the reality is that many continue to use them. A study by the Center for Equal Opportunity released on February 16, 2001 shows that dual admissions practices, with distinct criteria and outcomes, prevail at most universities, whether selective or not, from coast to coast. This study demonstrates that race is not just a "plus fact," but in many cases, the *only* factor to explain the disparities in admission for blacks and whites (22)."

Paulsen (2001) notes that a number of economists have argued on both theoretical and empirical grounds that demand-side factors, such as government intervention, have helped reduce discrimination and the "earnings gap" between women and minorities and white males in the

Table 1
University of California: Enrollment by Race

Systemwide	1997	1998	1999	2000
African American	917	739	756	832
American Indian	183	168	140	161
Asian American	6,909	6,979	7,788	8,064
Chicano	2,325	2,211	2,429	2,631
East Indian/Pakistani	680	702	746	744
Filipino American	1,201	1,266	1,346	1,372
Latino	806	737	804	848
Other	436	377	503	510
Unknown	774	3,441	1,745	1,884
White	9,451	8,257	9,713	9,780
Total	23,682	24,877	25,970	26,826
Berkeley	1997	1998	1999	2000
African American	252	122	122	143
American Indian	18	13	21	19
Asian American	1,155	1,217	1,203	1,231
Chicano	385	190	219	228
East Indian/Pakistani	121	148	116	148
Filipino American	84	101	125	131
Latino	84	76	102	92
Other	60	42	57	56
Unknown	147	485	271	308
White	909	939	982	987
Total	3,215	3,333	3,218	3,343
SOURCE: University of California				

20th century 83). Some, such as Skrentny (2001) point out that the "mosaic of minorities" that America is fast becoming a danger to affirmative action's future:

> "The greatest threats to affirmative action, however, come not only from political or legal scheming by activists but also from the fact that justifications for the policy are becoming incongruous with the changing population of the United States. Those who wish to save affirmative action, therefore, should focus not just on the justice of preferences in the abstract, but also on ways to redefine the policy to fit a new demographic reality. The recognition that, more and more, members of non-black minority groups—notably Latinos and Asian-Americans—benefit from racial preferences is strikingly absent from the national conversation on affirmative action. Yet already Latinos and Asian-Americans together compose 16 percent of the population, while blacks make up only 12 percent. And, in just a few years, Latinos alone—those already living here as well as the thousands who will continue to arrive daily from abroad—will outnumber blacks. Thus, even while most Americans believe that affirmative action is designed to compensate black people for years of slavery and segregation, it is increasingly becoming a policy for immigrants and the children of immigrants (B7)."

Walter Benn Michaels (2004) argues that universities employ affirmative action to seek a diverse group that benefits many, not just those "affirmed;" in fact, affirmative action should perhaps include a conversation that involves more than just race:

> "But the real value of diversity is not primarily in the contribution it makes to students' self-esteem. Its real value is in the contribution it makes to the collective fantasy that institutions ranging from University of Illinois-Chicago to Harvard are meritocracies that reward individuals for their own efforts and abilities—as opposed to rewarding them for the advantages of their birth. For if we find that the students at an elite university like Harvard or Yale are almost as diverse as the students at U.I.C., then we know that no student is being kept from a Harvard because of his or her culture. And white students can understand themselves to be there on merit because they didn't get there at the expense of black people. We are often reminded of how white our classrooms would look if we did away with affirmative action. But imagine what Harvard would look like if instead we replaced race-based affirmative action with a strong dose of class-based affirmative action. Ninety percent of the undergraduates come from families earning more than $42,000 a year (the median household income in the U.S.)— and some 77 percent

come from families with incomes of more than $80,000, although only about 20 percent of American households have incomes that high. If the income distribution at Harvard were made to look like the income distribution of the United States, some 57 percent of the displaced students would be rich, and most of them would be white. It's no wonder that many rich white kids and their parents seem to like diversity. Race-based affirmative action, from this standpoint, is a kind of collective bribe rich people pay themselves for ignoring economic inequality. The fact (and it is a fact) that it doesn't help to be white to get into Harvard replaces the much more fundamental fact that it does help to be rich and that it's virtually essential not to be poor (1)."

Whatever the case, the debate over affirmative action will continue as institutions continue in their quest to achieve diversity and access. Pusser (2001) notes that "over the last quarter-century, research on higher education policymaking has been dominated by an open-systems, organization-environmental perspective" in which "top-level administrators within the university mediate and negotiate demands into policy, which is voted on by a board of trustees" (123). Negotiation between university leadership and external members such as business leaders, community leaders, the state government, and interest groups are then seen as an open and expected means to reach consensus. Schmidt (2004) notes that some groups are seeking to better understand how schools are utilizing affirmative action by using open-records laws to examine their admission practices.

Perhaps, with continued debate and a willingness to honestly discuss the issue, we can continue to strive toward better access and opportunity for all students. Greater minds have differed before; even the United States Supreme Court realizes that this debate has "no quick fix." Rather than prolonged controversy, citizens and institutions should be willing to engage in a sincere, open dialogue about issues such as access, affordability, opportunity, growth, and priorities to ensure that future generations also enjoy the American Dream.

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