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A Constitutional and Efficacious Analysis of Affirmative Action Policies

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Cover Page Footnote

Wilcher, Shirley J. History of Affirmative action. 2003. Americans for Fair Chance. 5 April 2006. "The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission." National Archives and Records Administration, Web. 10 Nov. 2015. Lofgren, Charles A. The Plessy Case: A Legal-historical Interpretation.: Ebsco, 2014. Print. "History - Brown v. Board of Education Re-enactment." United States Courts. Federal Judiciary, Web. 15 Nov. 2015 Chávez, Lydia. The Color Bind: California's Battle to End Affirmative Action. Berkeley: U of California, 1998. Print. "Regents of the University of Cal. v. Bakke." LII / Legal Information Institute. Cornell University School of Law, Web. 15 Nov. 2015. Gratz v. Bollinger: Motion for Summary Judgment." Eastern District Court of Michigan. University of Michigan, Web. 30 Nov. 2015. Ibid "GRATZ V. BOLLINGER." LII / Legal Information Institute. Cornell University School of Law, 01 Apr. 2003. Web. 15 Nov. 2015. Potter, Halley. "What Can We Learn from States That Ban Affirmative Action?" The Century Foundation. 26 June 2014. Web. 15 Nov. 2015. Schuette v. Coalition to Defend Affirmative Action. No. 12-682. Supreme Court of the United States. 22 Apr. 2014. Supremecourt.gov. Web. 8 Nov. 2015. "Certiorari Granted: Affirmative Action Revisited." Audio podcast. Supreme Court Review. Supreme Reporter, 2015. Web. 15 Nov. 2015. Sander, Rick, Gail Heriot, Randall Kennedy, and Ted Shaw. "Affirmative Action on Campus Do More Harm than Good." Harvard University. 27 Feb. 2014. Intelligence Squared U.S. Web. "Affirmative Action." Civil Rights 101. The Leadership Conference on Civil and Human Rights, 2015. Web. 15 Nov. 2015. Sander, Rick, Gail Heriot, Randall Kennedy, and Ted Shaw. "Affirmative Action on Campus Do More Harm than Good." Harvard University. 27 Feb. 2014. Intelligence Squared U.S. Web. "Affirmative Action." Civil Rights 101. The Leadership Conference on Civil and Human Rights, 2015. Web. 15 Nov. 2015. Sander, Rick, Gail Heriot, Randall Kennedy, and Ted Shaw. "Affirmative Action on Campus Do More Harm than Good." Harvard University. 27 Feb. 2014. Intelligence Squared U.S. Web. Choper, Jesse H. Constitutional Law: Cases, Comments, Questions. St. Paul, MN: Thomson/West, 2011. Print. Fischer v. University of Texas at Austin. No. 11-345. Supreme Court of the United States. Print. Cahn, Steven M. The Affirmative Action Ebate. New York: Routledge, 1995. Print. Knowles, Robert. "The Intertwined Fates of Affirmative Action and the Military." Loyola University in Chicago 45.4: 1027-031. Web. 15 Nov. 2015. Knowles, Robert. "The Intertwined Fates of Affirmative Action and the Military." Loyola University in Chicago 45.4: 1027-031. Web. 15 Nov. 2015. Sander, Rick, Gail Heriot, Randall Kennedy, and Ted Shaw. "Affirmative Action on Campus Do More Harm than Good." Harvard University. 27 Feb. 2014. Intelligence Squared U.S. Web. Jackson. "Affirmative Action History." New York University, Web. 15 Nov. 2015. Knowles, Robert. "The Intertwined Fates of Affirmative Action and the Military." Loyola University in Chicago 45.4: 1027-031. Web. 15 Nov. 2015. Cole, Stephen, and Elinor G. Barber. Increasing Faculty Diversity: The Occupational Choices of High-achieving Minority Students. Cambridge, MA: Harvard UP, 2003. Print. Arcidiacono, Peter, Esteban M. Aucejo, and Ken Spenner. What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice. Economics Department. Duke University, 9 Aug. 2012. Web. 15 Nov. 2015. "Affirmative Action: Court Decision." National Conference of State Legislatures, 2015. Web. 15 Nov. 2015. "Affirmative Action." Civil Rights 101. The Leadership Conference on Civil and Human Rights, 2015. Web. 15 Nov. 2015. Bernardo, Richie. "2015's Most & Least Ethno-Racially Diverse Cities."WalletHub. Evolution Finance, Inc, 2015. Web. 15 Nov. 2015. Knowles, Robert. "The Intertwined Fates of Affirmative Action and the Military." Loyola University in Chicago 45.4: 1027-031. Web. 15 Nov. 2015. Potter, Halley. "What Can We Learn from States That Ban Affirmative Action?" The Century Potter, Halley. "What Can We Learn from States That Ban Affirmative Action?" The Century Foundation. 26 June 2014. Web. 15 Nov. 2015. Quinlan, Casey. "Why We Still Need Affirmative Action Policies in College Admissions." Think Progress. Center for American Progress Action Fund, 01 July 2015. Web. 15 Nov. 2015. "Campus Ethnic Diversity." U.S. News and World Report, 2014. Web. 15 Nov. 2015. "Affirmative Action in South Carolina" Ballotpedia. Web. 15 Nov. 2015.

Affirmative Action on College Campuses:
Arguments on Constitutionality, Efficaciousness, and Equitability

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Jeff Longust

Affirmative Action on College Campuses:
Arguments on Constitutionality, Efficaciousness, and Equitability

*“Affirmative action is a little like the professional football draft.
The NFL awards its No. 1 draft choices to the lowest-ranked team in the league.
It doesn't do this out of compassion or guilt. It's done for mutual survival.
They understand that a league can only be as strong as its weakest team.”*
-J. C. Watts

Purpose

Affirmative action programs have a history of being divisive and confusing, this paper seeks to briefly explore the history of these types of policies, the Constitutional considerations that have been made towards them, and the arguments in favor and against. These programs have important effects on college campuses and to the rest of the United States; this paper aims at addressing some of the factors surrounding the policies. Additionally, a few of the studies and cases mentioned in this paper reference race and ethnicity in stark terms but in this they seek only to draw correlations between variables, not draw conclusive causality.

History and Background

The term “affirmative action” was minted in Executive Order 10925 in 1961 when President John F. Kennedy instructed federal contractors to take “‘affirmative action’ to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin.”¹ Kennedy's Executive Order was the precursor to the transcending Civil Rights Act of 1964, which extended to all employers and cemented a pivotal milestone to the *de jure* discrimination prevalent in the United States. The 1964 Act outlawed race-based refusals from many businesses, encouraged public school integration, and fortified the Civil Rights Commission

¹ Wilcher, Shirley J. History of Affirmative action. 2003. *Americans for Fair Chance*. 5 April 2006.

charged with investigating key civil rights violations.² Without delving intently into the impacts of it, the Act marks a historical rectification of the Equal Protections Clause ratified almost a century prior.

In 1965, President Lyndon B. Johnson issued Executive Order 11246, which extended the reach of former President Kennedy's Order to prohibiting all employer discrimination based on the aforementioned factors. The Department of Labor monitored this Order, but had insufficient resources to uniformly regulate all employment discrimination.

In order to fully interpret both the rationality and argued remedial effects of affirmative action, one must consider the historically meandering precedent set forth by the Court and their resulting systemic impacts. *Plessy v. Ferguson* may be condemned as one of the most monumental misinterpretations made by the Court, but the precedent set forth by Justice Henry Billings Brown's writing lasted about five decades. Even though Plessy argued that he was seven-eighths white and was still forbidden to sit in the same train cars as whites, this was in direct conflict with the Fourteenth Amendment. Louisiana's statute prohibiting different races from traveling on trains together was just one example of the widespread Jim Crow laws. When this was upheld by the Supreme Court, it validated segregationist sentiments that exuded from the Reconstruction South.

Plessy v. Ferguson allowed for “the complex of beliefs that led many white Americans to see blacks as inferior yet threatening beings, perhaps not quite human”³ to become constitutionally extended to law. Public restrooms, drinking fountains, means of transportation, and public schools were now justifiably “separate but equal.” In practicality, the latter of this

² "The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission." National Archives and Records Administration, Web.

³ Lofgren, Charles A. *The Plessy Case: A Legal-historical Interpretation.*: Ebsco, 2014. Print.

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quote was far from fulfilled.

After nearly fifty years of Jim Crow affirmation, the Court granted certiorari to the following five cases: *Brown v. Board of Education of Topeka*, *Briggs v. Elliot*, *Davis v. Board of Education of Prince Edward County*, *Boiling v. Sharpe*, and *Beghart v. Ethel*. Combined, these cases embody the overruling of the “separate but equal” principle specified under *Plessy v. Ferguson*;⁴ particulars aside, these cases sought school integration. The NAACP Legal Defense and Education Fund and its lead attorney, Thurgood Marshall did exhaustive work on the side of anti-segregation. The Court combined these cases, heard arguments, deliberated, then rendered a decision that overruled the precedent set forth by *Plessy v. Ferguson*, and led to racial integration of most schools.

The proceeding milestone in the history of affirmative action is Proposition 209 in California. California was highly polarized over the issue of race-based preferences and it became a central issue in state politics. Pete Wilson won the gubernatorial race of 1991 and, despite being a Republican, was once known for his positive views toward affirmative action. Wilson's positive opinions toward it eventually wavered as public opinion shifted. This, coupled with President Clinton's inclination toward opposition, led Californians to incrementally abandon their support for traditional processes over the next decade.⁵ By voter referendum in 2006, citizens passed the California Civil Rights Initiative amendment to California's Constitution, which effectively eliminated preferential treatment based on race, sex, or ethnicity in public universities. However, affirmative action programs in all of the United States will likely

⁴ "History - Brown v. Board of Education Re-enactment." United States Courts. Federal Judiciary, Web.

⁵ Chávez, Lydia. *The Color Bind: California's Battle to End Affirmative Action*. Berkeley: U of California, 1998. Print.

continue until either Congress or all states approve similar restrictions, or until the Court considers them no longer constitutional under the Equal Protections Clause.

In light of its history, affirmative action programs are still commonly employed by universities and they vary in procedure, weight, and by state law. One method that was used at the University of Michigan's School of Law, and addressed in *Grutter v. Bollinger*, is a point-based system in which race is factored in as single component combined with other "soft factors" and awarded in a scale – this will be discussed further below. Another program used by some colleges is a simple "plus factor." This is similar to the point system, but rather than a combined pool of points up to 12 out of 100 for example, the "plus factor" is simply added to the application of a minority student. This addition can either be a small boost, in some cases equivalent to 50 SAT points, or it could be a substantial gain comparable to 300 SAT points depending on the university.

Relevant Supreme Court Cases

The year of 1978 marked one of the first⁶ salient backlashes toward affirmative action. In *Regents of the University of California v. Bakke*, the Court ruled that a quota system based on race, reserving certain admissions slots for students with specific racial backgrounds, was unconstitutional on the grounds that it violated the Equal Protections Clause. Allen Bakke, a white male, applied to the University of California, Davis' School of Medicine and was rejected even though his scores and grades were sufficiently above many other applicants who were admitted. The Court ultimately ruled in favor of the Petitioner, because the medical school had

⁶ *DeFunis v. Odendaard* (1974) was technically the first challenge, but it was dismissed due to mootness and the Court essentially dodged the pressing issue.

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reserved 16 out of 100 admission slots for only minority students (not accessible by white applicants) thus violating the Fourteenth Amendment.⁷ This was the first time an affirmative action program was curtailed and the ruling restricted the use of racially-based quota systems.

Gratz v. Bollinger was granted certiorari⁸ in 2003 and challenged a point-based system utilized by the undergraduate school at University of Michigan; Lee Bollinger was the President of the University and served as respondent in the case. The petitioners were both white and considered to be well-qualified candidates for admission. The admissions office created a scale that took into account test scores, grades, alumni relationships, hometown, and other categories including race as one of the substantially weighted factors. In order to gain admission, a student needed to earn 100 out of 150 points on the admissions' scale. Certain point values were awarded for different achievements, for example, up to 12 points were awarded to a high ACT/SAT score and 5 points for "personal achievement or leadership on the national level."⁹ A minority student was automatically awarded 20 points (or one-fifth of the 100 points needed) to his or her application. Further, "in 1995, minority Guidelines called for *admission* or delay decisions for students with combinations of adjusted grade point averages at or above 2.6 and ACT/SAT scores at or above 18 and 820, respectively. For non-minority in-state students that year, the Guidelines generally called for *rejection* of applicants with adjusted grade point averages below 3.2 and ACT/SAT scores below 23 and 950, respectively."¹⁰

⁷ "Regents of the University of Cal. v. Bakke." *LII / Legal Information Institute*. Cornell University School of Law, Web. 15 Nov. 2015.

⁸ After a petitioner files for their case to be heard in the Supreme Court, their case can be granted certiorari if the Court decides to hear it.

⁹ *Gratz v. Bollinger: Motion for Summary Judgment.* *Eastern District Court of Michigan*. University of Michigan, Web.

¹⁰ *Gratz v. Bollinger*.

Chief Justice Rehnquist wrote the Court's opinion and concluded that this practice is a *de facto* quota system and not narrowly tailored to promoting diversity, deeming it unconstitutional similar to *Regents of the University of California v. Bakke*. This decision again asserts a limitation on affirmative action programs but stopped short of outlawing it altogether.

In a similar case, *Grutter v. Bollinger*, University of Michigan's School of Law had an admission process that allowed for "soft variables" such as recommenders' fervor, the quality of the undergraduate institution and the applicant's essay, and the areas and difficulty of undergraduate course selection. The policy does not define diversity solely in terms of racial and ethnic status and does not restrict the types of diversity contributions eligible for 'substantial weight.'"¹¹

Justice O'Connor delivered the opinion of the Court holding that this practice is constitutional since it does not give a minority student an egregious "plus factor" and is narrowly tailored to promote diversity. Also, the decision shifts the burden of proof to the university to illustrate how the programs are narrowly tailored to encourage diversity rather than essentially forcing it with a weighty award for underrepresented minorities. By making race one factor within a larger category instead of its own important category, this program differentiates itself from the precedent set in *Gratz v. Bollinger* and its restrictions on other forms of affirmative action programs.

After this case was decided, several petitions were drafted to change the Michigan Constitution in order to prohibit race-based factors in state-funded Law School admission processes; Proposal 2, or the Michigan Civil Rights Initiative, was passed in 2006. Shortly after,

¹¹ "GRATZ V. BOLLINGER." LII / Legal Information Institute. Cornell University School of Law, 01 Apr. 2003. Web.

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this Initiative was challenged on constitutional grounds in conjunction with both California's Proposition 209 and Washington's Initiative 200 which aimed to eliminate race and gender-based preferences in the state. This led to another landmark Supreme Court case challenging the constitutional grounds for these state prohibitions and several others on the use of race-based preferences in university admissions.

In 2014, Michigan's then Attorney General, Bill Schuette, argued on behalf of Washington, California, Arizona, Nebraska, Oklahoma, Michigan, Florida, and New Hampshire, at the time, they are the seven states that had outlawed race-based affirmative action in all public universities via legislation, executive order, or voter referendum.¹² In *Schuette v. Coalition to Defend Affirmative Action*, the Court, in a 6-2 decision, upheld that voters have the right to choose whether the state uses affirmative action policies.¹³

In 2012, *Fischer v. University of Texas Austin*, the Petitioner, Abigail Fischer, after being denied admission to the University of Texas at Austin, argued that the distinguishing reason for her denial was based on the color of her skin. Fischer had three ways to gain admittance to the University of Texas: first, Texas law mandates that state-funded universities must automatically accept the top ten percent of the graduating classes of all high schools in Texas; second, she could be considered using a holistic methodology which includes race as a factor to fill the remaining spots; or third, she could potentially transfer in from another University of Texas campus where she would be accepted. Fischer was offered the latter, but opted out and instead filed suit against the University.

¹² Potter, Halley. "What Can We Learn from States That Ban Affirmative Action?" The Century Foundation. 26 June 2014. Web.

¹³ *Schuette v. Coalition to Defend Affirmative Action*. No. 12-682. Supreme Court of the United States. 22 Apr. 2014. *Supremecourt.gov*. Web.

The Top Ten Percent Plan was believed to promote racial diversity based on the assumption that all high schools in Texas are comprised of varying concentrations of most, if not all, races and ethnicities, then accepting some students from all schools would represent a diverse population. Programs such as this raise several questions regarding whether or not it produces a diverse admissions class, or if diversity is really an attainable and helpful ideal, or if this plan is equitable for elite schools with a higher-degree of overall performance, or if it encourages less qualified students into more rigorous and competitive environment where they would likely underperform. These are questions that also pertain to all affirmative action programs.

Fischer's class ranking was outside the top ten percent of her class therefore disqualifying her from admittance under the Texas law. In 2008, the University of Texas, Austin filled 92% of its spots under the Top Ten Percent Plan leaving only 1,216 vacancies for 17,131 submitted applications. Fischer's application was then considered under the holistic method but her grades and test scores were insufficient to gain her admittance in this stage either.¹⁴ During this stage, Fischer's race was considered as a singular factor among many others. Her claim that her denial was solely determined on the basis of her race was evaluated by a third-party to the case, it found that out of the 840 students who were admitted using the holistic method that denied Fischer, the University denied 168 minority students who had the same or better grades and test scores than Fischer.¹⁵ Once the case was remanded to the lower courts for judgement errors, the Court heard the case and determined that the affirmative action programs at the University of Texas, Austin were both not sufficiently impeding non-minority students and narrowly-tailored to increase diversity.

¹⁴ "Certiorari Granted: Affirmative Action Revisited." Audio podcast. *Supreme Court Review*. Supreme Reporter, 2015. Web.

¹⁵ "Certiorari Granted: Affirmative Action Revisited"

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There are many communities and institutions that are largely devoid of diversity. For example, University of Nebraska-Lincoln, when evaluated on a 0 to 1 scale (closer to 1 being more racially diverse) scored a 0.27 compared to University of Texas-Austin which scored 0.68.¹⁶ University of Nebraska-Lincoln does not use racial preferences in admission consideration.¹⁷ *Fischer v. Texas* decided that race-based admission calculi must be limited and aimed specifically toward a compelling purpose, in many cases, for the sake of diversity. Many argue that instituting a race-based preference in the admissions process could be used in order to diversify institutions such as these types of schools with low rates of minority representation. In this case, Nebraska prioritized other factors rather than incentivizing toward a diverse campus and this could be a reason why they are scored so low on the scale.

Multifaceted Debate

In a debate over the effectiveness and equitability of affirmative action in higher education, the intellectual debate forum, ‘Intelligence Squared U.S.’, proposed an assertion to the four distinguished scholars who have extensively studied the subject: “Affirmative Action on campus does more harm than good.” The experts were able to argue this tension rather than whether or not it is fully good or bad. Ted Shaw, a law professor at the University of North Carolina School of Law and the President of the NAACP Legal Defense and Education Fund, began his argument by outlining “nine out of ten days of African-American presence in what's now the United States, have been spent in either Jim Crow, segregation, or slavery. These are

¹⁶ "Campus Ethnic Diversity." *U.S. News and World Report*, 2014. Web.

¹⁷ Potter, Halley. “What Can We Learn from States that Ban Affirmative Action?” *The Century Foundation*. 26 June 2014. Web.

still differences that we are struggling to overcome.”¹⁸ His argument in favor of programs that encourage equitability is largely a sociological one – disadvantageous societal factors have plagued minorities for generations, and it is our responsibility today to promote measures to remedy the factors, namely through affirmative action. Similarly, in 1965, President Lyndon B. Johnson said, "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 just believe that you have been completely fair."¹⁹

Proponents of this justification, such as Ted Shaw, believe that education is the most effective way to combat these problems, however, since minorities have long been subject to these systemic problems, they should have the opportunities to move past them. This narrative argues that affirmative action promotes their ability to overcome societal impediments, both implicit and explicit, that put them at a disadvantage. To them, affirmative action is not necessarily a handout, but rather equalizing their position disenfranchised by past impediments. In other words, affirmative action seeks to create an equitable solution to access higher education promoting a lifeline out of this cyclical state.²⁰

Shaw continues with, “The emphasis is on opportunity: affirmative action programs are meant to break down barriers, both visible and invisible, to level the playing field, and to make sure everyone is given an equal break. They are not meant to guarantee equal results -- but instead proceed on the common-sense notion that if equality of opportunity were a reality, African Americans, women, people with disabilities and other groups facing discrimination

¹⁸ Sander, Rick, Gail Heriot, Randall Kennedy, and Ted Shaw. "Affirmative Action on Campus Do More Harm than Good." Harvard University. 27 Feb. 2014. *Intelligence Squared U.S.* Web.

¹⁹ "Affirmative Action." *Civil Rights 101*. The Leadership Conference on Civil and Human Rights, 2015. Web.

²⁰ *Intelligence Squared U.S.*

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would be fairly represented in the nation's work force and educational institutions.”²¹ From this perspective, affirmative action is simply living out the Fourteenth Amendment and mitigating the innate hurdles inhibiting it to be extended to minority students.

Sandra Day O'Conner writes for the Court in *Grutter v. Billinger*, “the Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”²² She believed that the “plus factor” described in the admission process of the University of Michigan would eventually become unnecessary but for efficacious in the short-term. In an amicus curiae brief to the Supreme Court during the *Fisher v. Texas* case, several universities including Brown, Columbia, Cornell, Duke and Harvard collectively wrote, “although Amici differ in many ways, they speak with one voice to the profound importance of a diverse student body—including racial diversity—for their educational missions. Amici seek to provide their students with the most rigorous, stimulating, and enriching educational environment, in which ideas are tested and debated from every perspective.”²³ These universities believe that under the current social conditions, the population of their student bodies would have far less minority students than suitable for the ideal ethnically-diverse campus.

Some experts believe that eliminating programs that disproportionately benefit old-money families is a reductive approach toward promoting diversity while maintaining the caliber of academic rigor. For example, legacy benefits for children of alumni tend to benefit rich, white students far more frequently than minority students due to historical advantages for wealthy

²¹ "Affirmative Action." *Civil Rights 101*.

²² Choper, Jesse H. *Constitutional Law: Cases, Comments, Questions*. St. Paul, MN: Thomson/West, 2011. Print.

²³ *Fischer v. University of Texas at Austin*. No. 11-345. Supreme Court of the United States. Print.

families.²⁴ Minority students have only increased enrollment in higher education in recent decades; therefore, white students have unequal access to advantageous programs such as these. Many call for these programs to be abandoned in order to assuage the ultimate problems affirmative action is attempting to mitigate.

Affirmative action enables universities to promote minority groups who, without preferences measures, would be less likely to attend and thus, be underrepresented on campus; universities grant these desired students a “plus factor” in their applications. Many proponents of affirmative action programs justify the preferences on the grounds that diversity is important in order for students to think critically among other ethnicities and races, especially since the world is increasingly globalized. Even if these minority students are more likely to be admitted to “reach schools” rather than schools at their proper level of competitiveness, diversity is seen as a more desirable goal.

Among the largely concordant promotion of diversity from universities, one of the most outspoken proponents of diversity is the United States military. Being a user of race-conscious policies in admissions, the United States Military advocates for a diverse force on the battlefield as well as in ROTC (Reserve Officers' Training Corps) programs and other military education institutions.²⁵ Diversity at all levels is favorable in the military because citizens from all backgrounds comprise the force. To take this idea to its logical extreme, if all of the ranking-officers were white and the incoming class has no white enlistees, this might not be the most conducive environment for a program based on similarity and conformity.

²⁴ Potter, Halley. "What Can We Learn from States That Ban Affirmative Action?" *The Century Foundation*. 26 June 2014. Web.

²⁵ Knowles, Robert. "The Intertwined Fates of Affirmative Action and the Military." *Loyola University in Chicago* 45.4: 1027-031. Web.

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In *Grutter v. Bollinger*, this perspective was represented in a joint amicus brief filed by several Congressmen, officers, and Cabinet members with military backgrounds; they advocated in favor of race-conscious admission techniques which eventually became the majority opinion. “The majority [in *Grutter*] agreed that, because the service academies and ROTC programs were important sources for filling the officer corps, 'limited race-conscious recruiting and admissions policies' were necessary in those contexts.”²⁶

Conversely, although opponents to affirmative action identify worth in diversity and benefits to some qualified minority students, they contend that the benefits are vastly outweighed by the problems derived from racial preferences. Affirmative action programs, according to one of the most outspoken critics of them – Dr. Richard Sander, unintentionally harm those they are trying to help. Sander is a UCLA law professor who has done extensive research in externalities associated with relaxed standards, and he concludes that negative results arise from allowing minority students to reach further than their academic proficiency.²⁷ Students who are granted admission into highly-competitive schools, who would not normally be accepted because of capability or motivation, are discouraged from attending universities within their intellectual range. Since class curves are generally rigid, students who are less qualified to compete with their peers are not as likely to earn high grades. “Regardless, however, studies have attempted to qualify numerically the effect of affirmative action. In 2005, researchers at Princeton attempted to compare the effects in terms of college admissions advantages and disadvantages. The study found that African Americans had a 230-point (based on the 1600-point SAT scoring system)

²⁶ Knowles, Robert.

²⁷ Intelligence Squared U.S.

advantage while Hispanics had a 185-point advantage.”²⁸

Gail Heriot, a member of the United States Commission on Civil Rights and a law professor at the University of California, San Diego, advances this point by saying lower marks received in high school are often comparable to the grades earned throughout college. Furthermore, these lower grades decrease these students' likelihood of graduate school aspirations. She adds that these practices produce fewer black lawyers, doctors, and engineers.²⁹ Although counterintuitive, affirmative action encourages minority students to attend schools and compete with students who tend to be more likely to succeed, at least in terms of grades. Instead, minority students could attend a more appropriate school at their competitive level and have a higher chance at success.

Moreover, several other studies have examined graduate school admissions and the resulting performance, and found that affirmative action benefits have propelled minority students into a trend of underperformance. Universities are hiring very few minority staff members, not because of an unwillingness to hire, but rather, because the pool of minority Ph.D. candidates is decidedly minuscule.³⁰ This is not to say minority students do not belong in more difficult schools, but rather that all students should enter a university that is consistent to the caliber of their academic potential.

In practice, are policies and rulings toward advancing affirmative action reverse discrimination? When the Equal Protections Clause and Civil Rights Act of 1964 practically prohibited discrimination based on an “individual's race, color, religion, sex, or national origin,”

²⁸ Jackson. "Affirmative Action History." *New York University*, Web.

²⁹ Knowles, Robert.

³⁰ Cole, Stephen, and Elinor G. Barber. *Increasing Faculty Diversity: The Occupational Choices of High-achieving Minority Students*. Cambridge, MA: Harvard UP, 2003. Print.

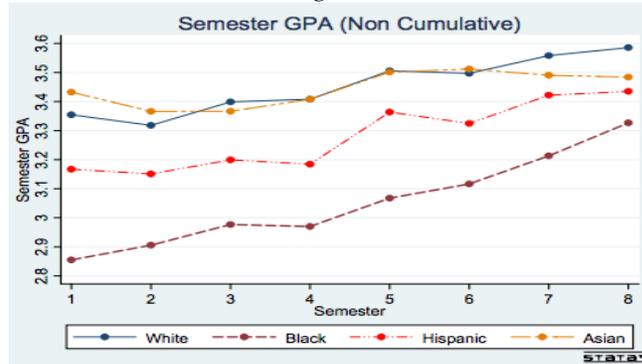
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did it exclude white people who are being excluded from race-based benefits? One must consider the “victims” of race-based preferences such as Allen Bakke and the other denied admission candidates with SAT scores 300 points higher than those of minority candidates admitted to the University of Michigan. In 2015, “a coalition of over 60 Asian American groups alleged that Harvard University committed civil rights violations against Asian students in its admissions process and said [socio-economic] class should be the only factor in college admissions.”³¹

Another potential symptom of this overreach is a tendency to abandon more difficult majors. It is generally accepted that the natural sciences, engineering, and economics degrees tend to embody the highest degree of academic vigor; comparatively, the social sciences and humanities tend to be less challenging. That is the assumption in a study in which three professors from Duke University, two economists and a sociologist, conducted research on racial differences in GPA and choice of major. Duke uses race-conscious admissions when accepting new students. The first study they conducted was tracing GPA to race and found that African-American GPAs begin almost three-quarters of a letter grade below their Asian and white counterparts. Although at the end of their college career, all four categories are more comparable, the trend still shows that African-American and Hispanic students are outperformed at either end of the spectrum in the case of this particular cohort at Duke. To be clear, neither this paper nor the study argue a causality between race and collegiate performance, it simply describes the data as it relates to a particular subsection of students.

³¹ Quinlan, Casey. "Why We Still Need Affirmative Action Policies in College Admissions." *Think Progress*. Center for American Progress Action Fund, 01 July 2015. Web.

Figure 1:



Source: Duke University Study, Arcidiacono

They found, on average, that 38.3% of African-American students entered college studying the “more challenging” majors compared to 39.2% of white students. When these white students graduate, about 50.5% stick to the more difficult major leaving about 10% who change majors. Contrastingly, upon graduation, only 29.6% of African-American students maintain the “more challenging” majors leaving about 32% who change major.

Table 1:

	White	Black	White Male	Black Male	White Female	Black Female
<i>Final Major (%)</i>						
Humanities/Social Science	49.5	70.4	36.4	65.0	65.6	72.3
Natural Sci/Engineering/Economics	50.5	29.6	63.6	35.0	34.4	27.7
<i>Expected Major (%)</i>						
Humanities/Social Science	39.2	38.3	31.3	23.3	49	44
Natural Sci/Engineering/Economics	60.8	61.7	68.7	76.7	51	56

Source: Duke University Study, Arcidiacono

The Duke professors acknowledged that the changes in majors could be caused by some external factor other than race, but it is a notable conclusion. According to the study, African-

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American students at Duke are 20% more likely to drop to an “easier” major.³² They do not attribute the changes in majors directly to affirmative action decisions, but they argue there is a notable correlation. Again, this describes simply a correlation of the two variables, not causation.

Lastly, some critics of affirmative action argue that these programs ultimately marginalize poor minority students further; this could be due to the preferential treatment that is largely applied to minority students who already have families, schools, and social circles urging them to attend better colleges. The Hoover Institution conducted a research study and found that affirmative action programs tend to benefit middle or upper-class minority students. It found that low-income minority students are far less likely to attend college and even be considered in race-conscious selective programs.³³ For example, a poor Hispanic student growing up in Compton and attending a poor performing school, such as Jefferson High School, is less likely to strive for admission to Harvard. However, an upper-class black student in Palos Verdes, California might have stronger support at home and a better funded high school urging them to apply to Yale. In this example, the problem is less about access to the best university possible and instead, concerns more about factors that precede college.

Conclusion

Policies toward diversity advancement or strict meritocracy advocates can be both controversial and inflammatory. As previously mentioned, states and institutions have been

³² Arcidiacono, Peter, Esteban M. Aucejo, and Ken Spenner. “What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice.” *Economics Department of Duke University*, 9 Aug. 2012. Web.

³³ "Affirmative Action: Court Decision." National Conference of State Legislatures, 2015. Web.

subject to strict parameters in which to create policies. Proponents for this argue that, “the continuing need for affirmative action is demonstrated by the data. For example, the National Asian and Pacific American Legal Consortium reports that although white men make up only 48% of the college-educated workforce, they hold over 90% of the top jobs in the news media, 96% of CEO positions, 86% of law firm partnerships, and 85% of tenured college faculty positions.”³⁴ But opponents such as Gail Heriot argue that affirmative action exacerbates these discrepancies rather than remedies them.

Dr. Richard Sander offers an addition that he believes would solve the problems explored in the Duke study. His plan keeps the affirmative action plans already in place with one addition: a predictive statement outlining a student's potential to succeed given his or her grades and expected major.³⁵ Dr. Sander contends that if a prospective student knew past students' success rate, with the same test scores and high school grades, they would be less likely to make the same college decisions insofar as to attend a “reach school” or not. His point is that affirmative action programs are more detrimental than beneficial to students in the long run since universities place a higher premium on a diverse campus than on minority students' potential to perform well. If students are elevated to a reach school, in turn, there is likely to be a student who was then denied. If race-based benefits were the cause of this elevation, and the reactionary denial would have otherwise been admitted, does that dilute the potency of the institution? Is a more racially diverse campus worth the cost of a less competitive university? Policymakers and voters need to engage this inflammatory topic and evaluate the trade-offs because affirmative action programs effect every student on a campus whether they receive racial preferences or not.

³⁴ "Affirmative Action." *Civil Rights 101*.

³⁵ Knowles, Robert.

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